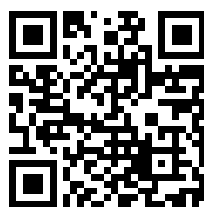


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# ADDENDUM TO WILLSON'S TEXAS CRIMINAL STATUTES,

SHOWING WHAT ARTICLES ARE AFFECTED BY THE  
GENERAL LAWS OF THE

SPECIAL SESSION OF 1888,

GENERAL SESSIONS OF 1889-1891.

## PENAL CODE.

**Art. 186a. Selling Goods on Sunday.** Act excepts certain merchandise and occupations from action of the law. Chap. 110, 1891.

**Art. 256a. Officer Failing to Report Statistics.** Act makes a misdemeanor; penalty. Chap. 31, 1889.

**Art. 256b. Officer Failing to Report as to School Affairs.** Act makes a misdemeanor; penalty. Chap. 18, 1889.

**Art. 258a. Treasurer of County or City Failing to Report Disbursements of School Fund.** Act makes misdemeanor; penalty. S. S. 1888, p. 6.

**Art. 259. Commissioner's Court.** Act amends concerning reports and publication thereof. Chap. 78, 1891.

**Art. 269a. Surveyor Failing to Survey Mining Claim.** Act makes a misdemeanor; penalty. Chap. 100, 1889.

**Art. 270a. Road Commissioner.** Failure to report; penalty. Chap. 54, 1891.

**Art. 270b. School Teacher or Trustee.** Penalty for violating provisions of Act. Chap. 95, 1891.

**Art. 318a. Unlawfully Carrying Arms.** The act amends as to penalty. Chap. 37, 1889.

**Arts. 339, 341-341b. Disorderly House.** The Act extends the definition thereof; penalty for keeping; enforcement. Chap. 38, 1889.

**Arts. 383a-386d. Illuminating Oils.** Act of April 5, 1889, is repealed by Chap. 7, 1891.

**Art. 388g. Railway Car Designated for Others.** Acts make riding in or attempting to ride in a misdemeanor; penalty. Chap. 108, 1889; Chap. 41, 1891.

**Art. 388h. Railway Conductor; Failure of Duty.** The Act makes it a misde-

meanor for conductor to fail to remove passenger riding in car not belonging to his race. Chap. 41, 1891.

**Arts. 399a-399d. Unlawful Practice of Pharmacy.** Act makes a misdemeanor; penalty. Chap. 104, 1889.

**Art. 399e. Practice of Dentistry.** Act makes the practice of dentistry without license misdemeanor; penalty. Chap. 80, 1889.

**Art. 405a. Driving on a Bridge.** Act provides penalty for riding or driving over any bridge faster than a walk. Chap. 88, 1891.

**Art. 405. Injury to Bridge, &c.** Act amends; penalty. Chap. 97, 1891.

**Arts. 409, 411. Failure of Duty as Overseer or Worker.** Act amends; penalty. Chap. 27, 1889; Chaps. 97 and 111, 1891.

**Art. 410a. Failure of Duty of Road Commissioner.** Act amends; penalty. Chap. 111, 1889.

**Art. 414. Injury to Irrigating Canals.** Act provides penalty. Chap. 88, 1889.

**Art. 417. Injuring Public Building.** Act provides penalty. S. S. 1888, p. 5.

**Art. 422cc. Too Many Stock on Leasehold Land.** Act provides penalty. Chap. 56, 1889.

**Art. 429a. Killing Certain Birds.** Act provides penalty for. Chap. 71, 1891.

**Art. 430. Exempt From Game Law.** Act exempts certain counties. Chap. 39, 1889.

**Art. 430a. Oysters for Planting.** Persons may take. Chap. 39, 1889.

**Art. 430e, Secs. 1-10. Oyster Beds.** Act provides for preservation of oyster beds, protection of individual rights, &c. Chap. 98, 1891.

**Art. 483a. Trusts; Conspiracies Against Trade.** Penalties against. Chap. 117, 1889.

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## CRIMINAL CODE.—Continued.

### TITLE 15.—OFFENSES AGAINST THE PERSON.

**Art. 528. Rape; Age of Consent.** Act raises the age of consent from ten to twelve years. Chap. 79, 1891.

**Art. 683. Destroying Personal Property.** Act provides penalty. Chap. 40, 1889.

**Art. 683b. Throwing Missile at Railway Trains.** Act provides penalty. Chap. 40, 1889.

**Art. 684c. Removal of Fence.** Without consent or notice, an offense; penalty. Chap. 50, 1889.

**Art. 684d. Withdrawal of Fence.** Notice of; failure to, an offense. Chap. 50, 1889.

**Art. 694, Secs. 12, 13. Inspector or Owner of Sheep.** Penalty for failure to comply with Act. Chap. 94, 1891.

**Art. 753a, et seq. Regulation of Slaughter of Cattle.** Act provides for at length. Chap. 75, 1889. Certain counties exempt. Chap. 80, 1891.

**Art. 772a. Inspectors of Hides.** Act provides penalty for failure to do duty. Chap. 41, 1889.

### TITLE 17.—CHAPTER 19 (New).—USURY.

**Art. 799a, Secs. 1-2. Usury.** Usury defined; penalty. Chap. 18, 1891.

### CHAPTER 20 (NEW).—GIVING FALSE PEDIGREE.

**Art. 799b.** Act provides penalty for giving false pedigree or certificate of sale. Chap. 64, 1891.

### CHAPTER 21 (NEW).—OFFENSES BY CARRIERS AND OTHER CORPORATIONS.

**Art. 799c. Express Company.** Overcharge is extortion; penalty. Chap. 45, 1891.

**Art. 799d. Railway Company.** Overcharge; refusal to render reports, &c. Chap. 51, 1891.

**Art. 799e. Guaranty and Fidelity Companies.** Failure of companies and agents to comply with law; penalty. Chap. 112, 1891.

### TITLE 18.—CHAPTER 7.—PRIZE FIGHTING.

**Art. 817f. Secs. 1-4.** Act prohibits prize fighting and pugilism; penalty. Chap. 50, 1891.

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### ADDENDA TO CODE OF CRIMINAL PROCEDURE.

**Arts. 216a, 216b. Venue in Criminal Actions.** Act provides for in certain cases. Chap. 42, 1889.

**Art. 403a. Duplication of Process.** Unlawful; penalty. Chap. 121, 1889.

**Art. 535a. Plea of Guilty.** Act provides for speedy disposition of certain criminal cases. Chap. 53, 1891.

**Art. 730. Seduction Cases.** Act amends excepting 3, permitting female alleged to have been seduced to testify. Chap. 33, 1891.

**Art. 730. Testimony of Defendant.** Act repeals excepting 4, and adds clause. Chap. 43, 1889.

**Art. 791a. Judgment in Case of Certain Minors.** Chap. 85, 1889.

**Art. 981a. Executive Clemency.** Act authorizes Governor to restore criminals to citizenship in certain cases. Chap. 82, 1889.

**Art. 1054. Fees Allowed Sheriff.** Acts amend concerning such fees. Chap. 44, 1889; Chap. 93, 1891.

**Art. 1056. Fees of District Clerk.** Act amends. Chap. 45, 1889.

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REVISED  
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AND  
CODE OF CRIMINAL PROCEDURE,

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ERRATA.

WILLSON'S STATUTE, Penal Code, Art. 1292. In note "Act March, 1877," should be "1887."

STATE OF TEXAS.

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ANNOTATED BY  
SAM. A. WILLSON:

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PART I—PENAL CODE.

[Third Edition.]

INCLUDING ACTS OF TWENTY-SECOND LEGISLATURE, 1891.

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## INTRODUCTORY.

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Prior to the adoption of the Penal Code and the Code of Criminal Procedure, the common law, with a few penal statutes, constituted the criminal law of Texas. In pursuance of an act of the Legislature of February 11, 1854, Hons. John W. Harris, O. C. Hartley and James Willie were appointed commissioners to prepare a Code, amending, revising, digesting, supplying and arranging the laws, civil and criminal, of the State. They performed this work, and at the session of 1855-1856 of the Legislature, submitted such Code. The Code of civil laws submitted by them was not adopted, but the Penal Code and Code of Criminal Procedure, after being amended in many provisions, were adopted at the adjourned session of the sixth Legislature in 1856, and took effect February 1, 1857. At the next session of the Legislature, by Act of February 12, 1858, both Codes were largely amended, and from that time to the present, amendments and additions thereto, and new penal statutes have been enacted by each succeeding legislature. The following is the act adopting the Penal Code and Code of Criminal Procedure:

### AN ACT TO ADOPT AND ESTABLISH A PENAL CODE FOR THE STATE OF TEXAS.

Be it enacted by the Legislature of the State of Texas:—

SECTION 1. This Code is hereby adopted, and shall be known as the Penal Code.

SECTION 2. The following acts and parts of acts, to wit:

An act punishing crimes and misdemeanors, passed December 21, 1836.

An act supplementary to an act for the punishment of crimes and misdemeanors, passed December 21, 1836.

An act to suppress gambling, passed May 26, 1837.

An act amending the judiciary laws of the Republic, passed December 18, 1837.

The eighth and ninth sections of an act to legalize certain marriages, to provide for the celebration of marriages, and for other purposes, passed June 5, 1837.

An act to punish certain offenses therein named, passed January 15, 1839.

An act to prohibit the driving of cattle from that part of the country west of the Guadalupe, passed January 19, 1839.

An act to amend the judiciary laws of the Republic, passed January 23, 1839.

An act to provide for the punishment of horse thieves, passed January 26, 1839.

An act to suppress dueling, passed January 28, 1840.

An act to punish swindling and other offenses therein named, passed February 5, 1840.

An act to suppress gaming, passed February 5, 1840.

An act to punish persons concerned in making, selling and locating fraudulent land certificates, passed February 5, 1840.

An act concerning slaves, passed February 5, 1840.

An act to amend an act to suppress gaming, passed December 24, 1840.

The fifth section of an act regulating the sale of runaway slaves, passed February 5, 1841.

An act to make certain offenses therein named grand larceny, and to prescribe their punishment, passed February 4, 1841.

An act to amend the criminal laws of the Republic of Texas, passed January 16, 1844.

An act to prevent the obstruction of navigable rivers and streams, passed February 3, 1844.

An act to fix the currency in which fines and forfeitures shall be recoverable, passed January 17, 1844.

An act to protect religious meetings, passed April 23, 1848.

An act to exclude from office, serving on juries, and from the rights of suffrage all persons who may be hereafter convicted of bribery, perjury, subornation of perjury, forgery, counterfeiting, larceny or other felony or treason, against this State, or the United States, passed April 2, 1846.

An act regulating appeals to the Supreme Court in criminal cases, passed May 13, 1846.

An act requiring juries in certain criminal cases to assess the amount of fine to be imposed, or punishment to be inflicted, passed April 30, 1846.

The fourteenth, fifteenth, sixteenth, twenty-second, twenty-third, twenty-fourth and twenty-fifth sections of an act regulating juries, passed May 4, 1846.

An act to amend the seventeenth and nineteenth sections of an act regulating juries, passed March 16, 1848.

An act to prevent confusion in judicial proceedings arising from a repeal of laws under which they were had or occurred, passed May 13, 1846.

An act giving concurrent jurisdiction to the district and inferior courts, in certain cases, passed May 11, 1846.

An act to amend the forty-third section of an act punishing crimes and misdemeanors, approved December 21, 1836, passed March 15, 1848.

An act to amend the third section of an act entitled an act concerning slaves, approved February 5, 1840, passed February 14, 1848.

An act to prevent burning the woods and prairies, passed March 18, 1848.

An act prescribing the punishment for cutting down, carrying away, or destroying trees, or timber, upon any land, without the consent of the owner, passed March 20, 1848.

An act concerning crimes and punishments, passed March 20, 1848.

An act prescribing in what cases the Governor may remit fines and forfeitures, passed February 26, 1848.

An act appropriating certain fines and forfeitures, passed March 18, 1848.

Joint resolution for the punishment of vagrants, passed January 10, 1839.

The fourth section of an act defining the duties of district attorneys, passed March 13, 1846.

The fourth and fifth sections of an act defining the duties of the attorney general of the State of Texas, passed May 11, 1846.

The fifth, sixth and seventh sections of an act defining the office and duties of constables, passed May 12, 1846.

An act supplementary to an act concerning crimes and punishments, approved March 20, 1848, passed February 11, 1854.



An act concerning offenses against life or person, passed January 31, 1854.

An act to prohibit individuals from issuing bills, checks, promissory notes or other paper, to circulate as money, passed April 7, 1846.

An act to give the right of appeal in cases of habeas corpus, passed February 5, 1853.

An act to establish a State penitentiary, passed March 13, 1848, except the first, second, third and fourth sections of said act, and except also so much of the fifth section of said act as provides for the appointment of three directors of the penitentiary.

An act supplementary to an act to establish a State penitentiary, approved 13th March, 1848, passed February 16, 1852.

An act concerning free persons of color, passed February 5, 1840.

An act to provide for the punishment of crimes and misdemeanors, committed by slaves and free persons of color, passed December 14, 1837.

An act supplementary and amendatory of certain acts therein named, passed January 22, 1841.

An act to prevent slaves from hiring their own time, or their owners from hiring them to other slaves, free negroes, or mulattoes, passed May 11, 1846.

An act concerning offenses committed by negroes, passed February 3, 1853.

Together with all other laws and parts of laws relating to crimes and punishments, are hereby repealed.

SECTION 3. This act shall take effect on the first day of February, 1857. Approved 18th August, 1856.

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It is generally understood that the Hon. James Willie is the author of the Penal Code and Code of Criminal Procedure, that being the portion of the labors of the commission which was assigned to him in the distribution among each other of their work. At first the Codes met with pronounced and strong opposition by some of the ablest lawyers in the State, but a practical operation of over thirty years has proved that they comprise the most perfect system of criminal laws ever devised.

In 1876, the legislature passed the following act: —

**AN ACT TO PROVIDE FOR REVISING, DIGESTING AND PUBLISHING THE LAWS, CIVIL AND CRIMINAL, OF THE STATE OF TEXAS.**

SECTION 1. *Be it enacted by the legislature of the State of Texas,* That the governor shall, by and with the advice and consent of the senate, if in session, appoint a commission of five persons learned in the law, to make a complete revision and digest of the laws of the State of Texas, and embody the same in a bill, which shall be by the commission reported to the governor, and by him laid before the next session of the legislature, and said commission shall revise all the general statutes of the State in force up to the time they shall make their report, and report to the legislature which of said statutes in their

opinion ought, and which ought not to remain in force, and shall suggest such omissions and contradictions as they shall find in said statutes, and the mode in which they can be reconciled, supplied or amended; and they shall arrange under appropriate chapters and sections all the different acts and parts of acts relating to the same subject matter which they shall deem ought to be continued or adopted, with such marginal and foot notes and explanations as they may deem essential to a clear understanding of the same; and shall execute and complete the revision in all respects in such a manner as in their opinion will render the general statutes most concise, plain and intelligible; and shall embody the result of their labors in two bills, one containing the entire body of civil statutes, and the other the entire body of the statutes relating to criminal law, both properly indexed.

SEC. 2. And it shall be the duty of the governor, upon the receipt of said reports so made by said commission, to cause five hundred copies of the same to be printed at the expense of the State, in the same manner and under the same rules and regulations as prescribed by law for other public printing, which said copies shall be filed, when printed, in the office of the secretary of state for the use of the next legislature.

SEC. 3. The commissioners herein provided for shall receive as compensation the same salary as district judges, for the time they are necessarily engaged in the performance of their work, and the certificate of the governor shall authorize the comptroller, at stated times, to draw his warrant on the treasurer for their payment.

Approved July 28, 1876.

In pursuance of the foregoing act, Governor Richard Coke appointed the following named commissioners, viz.: Chas. S. West, of Austin; J. W. Ferris, of Waxahachie; George Clark, of Waco; B. H. Bassett, of Brenham; Sam. A. Willson, of Rusk.

On January 1, 1879, they reported their work to the governor, said report being as follows:—

TO THE HONORABLE R. B. HUBBARD, GOVERNOR, ETC.:

The undersigned commissioners, appointed by virtue of the act of July 28, 1876, providing for a revision of the laws of the State, in accordance with the duty enjoined by that act beg leave, through your excellency, to report to the legislature as follows:

That they entered upon the discharge of their duties in November, 1876, and as the result of their labors present with this report, and as constituting a part of it, the two accompanying bills: The one a bill to be entitled "An act to adopt and establish a Penal Code and a Code of Criminal Procedure for the State of Texas;" and the other bill to be entitled "An act to adopt and establish the Revised Civil Statutes of the State of Texas."

The act under which they were appointed enjoined upon them "to make a complete revision and digest of the laws of the State, to be embodied in two bills," and "to make their report of the same to the governor, to be by him laid before the legislature at its next session."

The commissioners were also required "to report to the legislature which of the statutes of the State, both civil and criminal, ought and which ought not to remain in force." It is further made their duty "to suggest such omissions and contradictions as they shall find in the statutes, and the mode in which these omissions and contradictions can be reconciled, supplied or amended."

They are also required "to arrange under appropriate chapters and sections all the different acts and parts of acts relating to the same subject matter which they shall deem ought to be continued or adopted, with such marginal and foot notes and explanations as they may deem essential to a clear understanding of the same."

They are also required "to execute and complete the revision in all respects and in such a manner as will in their opinion render the general statutes most concise, plain and intelligible, and to embody the result of their labors in two bills, one embracing the entire body of the civil statutes, and the other the entire body of the statutes relating to criminal laws, both bills to be properly indexed."

In accordance with this law the commissioners have proceeded to group together and arrange under appropriate titles, chapters and sections the different statutes of the State, both civil and criminal, believed by them now to be in force; and also under the different titles to suggest such omissions and contradictions as seem to exist, and to supply and reconcile, as far as they were able, such omissions and contradictions.

The work thus devolved upon them was exceedingly arduous, as will be seen by a glance at the requirements of the statute under which they acted.

The difficulty of it was farther enhanced by the fact that the body of the civil and criminal law of this State is to be found scattered through the different acts of the different congresses of the Republic of Texas and of the numerous volumes of the acts of the different legislatures that have assembled in the State from the annexation of Texas down to the present time. These acts embrace a period of over forty years, during which time the Republic, and State, have materially changed their organic law not less than six different times.

Still another difficulty arose from the fact that though every constitution adopted since that of the Republic (constitution of the Republic general provisions, section 7), down to and including the last, enjoined it as a duty upon the legislature "to revise, digest and arrange under different heads" all the civil and criminal laws of the State, yet that duty has never been fully performed; and with the exception of the digest of Messrs. Oldham & White, published nearly twenty years ago, there never has been any authorized digest or even compilation of the laws of the State of any kind.

As a consequence the commissioners were compelled to gather from the different chapters and sections of the General Laws of the State, both civil and criminal, what they regarded as the now existing statutes of the State. These they have arranged carefully under what seemed to them appropriate heads, together with such additions as they deemed important to supply omissions; the result is the substance of the two bills now presented.

As a general rule, both in the civil and criminal statutes, we have endeavored to avoid making any radical or material changes, especially in those laws which have long been on the statute book and which have received judicial interpretation, or which have long been followed by the executive and other departments of the government.

Owing to the great changes effected by the present constitution in the general distribution of judicial power, and in the parceling out of the different tribunals established by it, many changes in the existing laws were rendered necessary in order that they could be executed and administered by the new tribunals.

In both of the bills herewith submitted marginal references are generally made both to the date of the law and the place where it can be found. Where there is no side reference to the old laws in any article, as a general rule such

article will be found to be some addition to or alteration of the old law which experience has rendered necessary.

Keeping this guide in view, most of the changes and alterations made can at once be noted by comparing the old law with the new as reported.

It is deemed best, however, for the convenience of those whose duty it will be to pass finally upon these bills to note in this report in a general way the most material changes made. These will be submitted in the following order:

1. The Penal Code.
2. The Code of Criminal Procedure.
3. The Revised Civil Statutes.

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## I. THE PENAL CODE.\*

In their revision of the laws creating offenses and affixing penalties thereto, the commissioners were not unmindful of the fact that more than twenty years ago an admirable Penal Code had been prepared by gentlemen learned in the law and peculiarly fitted for the task, and that the same, with elaborate amendments added in 1858, had stood the test of experience and proved well adapted to the wants and necessities of the State. Proceeding upon the basis that any Code to which the profession and people had been thoroughly accustomed, in substance and arrangement, would prove more satisfactory than even a better work differently arranged, and feeling assured that the present Penal Code was in most respects an admirable compilation, our design has been to preserve, in so far as was practicable, the substance and arrangement of the old Code, and to interweave therein the subsequent penal legislation of the State, together with such suggestions by way of amendment and addition as seemed to us essential to the greater perfection of a system already deemed as near perfect as can usually be expected in such compilations. The Penal Code, as proposed by us, will be found upon examination to be a very slight departure from the present body of the criminal laws, and to some of the more important changes, omissions and additions we now respectfully call attention.

1. Art. 3 of the old Code required "that no person shall be punished for any act or omission as a penal offense, unless the same is *expressly defined* and the penalty affixed by the written law of this State." This provision has greatly confused the administration of the law, especially since the decision in *State v. Foster*, 31 Tex. 578, and *State v. Fennell*, 32 Tex. 378, and many new offenses created by successive legislatures are subjected to the severe test imposed by this provision before punishments are administered under them. Especially in the lower courts has the nuisance become intolerable, and the sensible decision in *State v. Randle*, 41 Tex., has failed to relieve the professional and judicial mind from natural doubts arising from a too technical view of the article. Many offenses are incapable of an express definition, save a simple declaration that a certain act, done in a certain manner, shall be punished in a certain way. Many of the offenses created by the original Code may be classed in this category. Believing that the true construction of the article was that no person should be punished for any act or omission unless the same was made a penal offense and a penalty was affixed thereto by the

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\* Judge Willson's notes are added in brackets.

written law of the State, we present Art. 3 of the revision as an embodiment of that idea.

2. Art. 79 of the Penal Code was omitted because it referred exclusively to Arts. 77 and 78, both of which were repealed in 1858. [These articles related to punishment in a "House of Correction" where the offender was not over seventeen years of age at the time of the commission of the offense.]

3. In Art. 226 of the Penal Code, instead of "slaves," in sub-division 4, we have suggested "domestic servants." See new Code, Art. 86. [Suggested change made. See Art. 87.]

4. Title III, part 2, of the Code, relating to the penitentiary and its management, was stricken out as not appropriate in the Penal Code, and transferred to the Revised Statutes, under the title "Penitentiaries and Convicts."

5. Art. 233, Penal Code, defining "misprision of treason" was repealed by the act of December 14, 1863, page 13, but as the repealing act was regarded as Confederate legislation, it was omitted by Mr. Paschal in his digest, and misprision left undefined. We have inserted the original article, repealed. See new Code, Art. 94. [Adopted.]

6. Owing to the confusion engendered by the use of the term "embezzlement," as applicable to both public and private funds, we suggest that "embezzlement or misapplication of public money" be changed to "misapplication of public money." See new Code, Title IV, Chap. III. [Our page 43.]

7. We suggest a new offense, in obedience to the requirements of the Constitution, Art. VIII, section 7, preventing the diversion of special funds in the treasury. See new Penal Code, Art. 102. [Adopted.]

We also suggest an extension of the statute relating to "misapplication" so as to include county and municipal officers. See Arts. 103 and 104. [Adopted.]

8. In our revision of the Penal Code we retained the statute of 1876, relating to the tax upon dogs (Art. 114); but subsequent reflection induces us to suggest its abrogation *in toto*, and we recommend that it be stricken from the list of Penal Statutes. In revising the Civil Statutes we have omitted the act of August 29, 1876, levying a tax on the harboring of dogs. [Stricken out as suggested.]

9. We have consolidated the law of "bribery" into one chapter (Title V, Chap. 1, page 18,) and have suggested an amendment to various articles of the chapter, making an *agreement* to accept a bribe by an officer, punishable in the same manner as an acceptance. [See Art. 121 as to agreement.]

10. We suggest that compounding a crime be made an offense against the penal laws. (See Art. 272.) Also "malicious prosecution." See Art. 273. [Both articles adopted.]

11. The "labor strikes" of 1877 penetrated as far as our capital, and found no provision upon our statute book for the protection of peaceful laborers from the domination of the idle and vicious. We have inserted provisions calculated to meet such emergencies in future. (See Arts. 289 and 304.) [Both articles adopted.] We also offer a suggestion, looking to the prevention of future *charivari* parties, which in times past have led to broils and bloodshed. See Arts. 291 and 305. [Both articles adopted.]

12. Art. 386 of Penal Code, relating to the intermarriage of whites and blacks, has been adapted to recent constitutional amendments and construction. (See Arts. 326 and 327.) The offenses of "Adultery and Fornication" have been accurately defined, and the statute upon those subjects relieved of some of its obscurities. See Arts. 333-8; see Richardson v. The State, 37 Tex. 346. [All these articles adopted.]

13. Selling liquor to minors is a palpable grievance in our State, and

should long since have been visited with appropriate penalties. The law has been hitherto silent upon the subject, and we suggest its remedy. See Art. 376. [Adopted.]

14. Under a recent decision, the act of February 11, 1860. page 97 (P. C. 399*d*), making it penal for any person to "do any other act or thing that would be deemed or held to be a nuisance at common law," was held to be repugnant to our system of penal law, and within the inhibition of Art. 3 of the Penal Code. Whatever effect the change proposed in the last named article might have upon future adjudications, it is palpable that such legislation is of too loose a character to justify its permanent retention, and we recommend its omission. We may add, in justice to ourselves, that the Penal Code revision was printed before this decision was rendered. [Adopted. The decision referred to is *Johnson v. S.* 4 App. 63. See Post §8.]

15. The act of April 6, 1874, page 63, relating to the protection of fish in certain seasons, indicates, in some measure, the necessity for some general provisions tending to the protection of game, and especially of harmless and insectivorous birds. The want of such a law has been long felt in many portions of the State; and, by way of experiment and suggestion, we have endeavored to supply the deficiency. Under the latitude of the Constitution (Art. iv, sec. 56, last proviso), particular sections of country, in which such a law is likely to be obnoxious to the people, may be excepted from its operation and benefits. (See Arts. 423 to 430.) In article 429 the words, "or other harmless bird," should be omitted, being inserted inadvertently. [The words referred to were omitted, and the articles adopted.]

16. We suggest the alternative penalty of death, or confinement in the penitentiary for life, as the punishment for murder in the first degree. See Art. 609. [Adopted.]

17. We suggest an enlargement of the statute relating to dueling so as to give proper effect to the constitutional prohibition. See Arts. 610, 611. [Adopted.]

18. We suggest certain new penal provisions looking to the protection of the reputation of our women from indiscriminate slander, in conformity with repeated suggestions from our supreme court. (13 Tex. 454; 27 Tex. 468.) See Arts. 645, 646. [Adopted.]

19. The different offenses and penalties, under the chapter "Arson," for burning "a house" a "dwelling house," "an outhouse," etc, have been abolished, and the offense is confined to the burning of a house, defined so as to embrace all classes of houses, and with a penalty sufficiently flexible to enable the courts and juries to affix a punishment according to the circumstances of each case. See Arts. 651, 663. [Adopted.]

20. The act of May 2, 1874, page 201-2, "to protect the inclosed lands of any person from trespass," etc., we deemed proper to substitute by the simpler act of November 6, 1866, page 90, and our suggestion will be found in Art. 688. [This suggested article was stricken out.]

21. The two statutes punishing an "attempt" to commit burglary (P. C. 737*a* and 737*b*), which were adopted by the act of February 11, 1860 (pages 100-1), seem to have been overlooked by Mr. Paschal in his digest, but as no act could be found repealing them, and as they seemed to us essential, we insert them in our revision. See Arts. 715, 716. [Adopted.]

22. We have added "railroad cars" to the chapter on offenses committed on board of vessels and steamboats. See Arts. 717-721. [Adopted.]

23. A change is suggested in the statute relating to the theft of animals. Our former statute having attempted to enumerate specifically the species of animals of the horse kind, much confusion has arisen, and still arises,

in the matter of variances in the evidence on the trial and in the statement of facts on appeal, and sometimes in the innate difficulty of determining whether the animal stolen was a horse or a gelding. Such a difficulty presented itself so late as the Austin term, 1878, of the court of appeals. Under repeated decisions, or rather intimations, of our highest courts (*Banks v. State*, 28 Texas, 644, and other cases), we suggest the use only of the generic terms "horse, ass or mule," and believe that thereby the difficulties heretofore encountered in this respect will be, in a great measure, obviated. See Art. 746. [Adopted.]

24. Although our court of appeals in *Monroe v. State* (3 Court of Appeals Rep., page 341), has held that the act of November 13, 1866, page 224, regulating the sale and slaughter of stock, was repealed by the local statutes of 1871, 1874 and 1876, we have deemed it proper to suggest its retention and re-enactment, because nearly one-half of the organized territory of the State is exempt from the protection afforded by the supposed repealing acts, and the regulations prescribed by the act of 1866, and applicable to the whole State, seemed to us to be of a wholesome and necessary character. This part of our work will be found in Art. 752 to 756. In *Senterfit v. the State* (41 Texas, page 187), our supreme court has held that the act of May 22, 1871, did not repeal the act of November 13, 1866. This case is not referred to in *Monroe v. The State*. [Adopted.]

25. We suggest a penalty for "conspiracy" entered into in another State to commit an offense in this, deeming such amendment imperatively demanded by recent developments in our State. See Art. 808. [Adopted.]

26. We also offer a suggestion making the sending of threatening letters punishable. See Art. 813. [Adopted.]

The following statutes have been purposely omitted from our compilation, and we respectfully suggest their repeal by the legislature and omission from the completed work:—

1. "An act to punish drunkenness," approved August 17, 1876 (page 160). The statute has proven a dead letter, so far as our observation extends, and the propriety of such an enactment is a matter of grave doubt. Simple drunkenness should be classed as a misfortune or affliction, rather than a crime, and some other method should be devised for its suppression. Sometimes it is accidental, at other times habitual. For the latter a well conducted inebriate asylum would be more in consonance with the spirit of the age than a sweeping penal enactment. [The legislature saw proper to retain the statute against drunkenness. See Art. 144a.]

2. Section 1 of the "act to regulate the conduct of public officers in certain cases," approved May 1, 1874 (page 182), because substantially embraced in the law of "bribery." [Adopted.]

3. Section 14 of the act of August 23, 1876, punishing any person for voting out of the election precinct of his residence (pages 307-8) has been omitted. Or possibly it might be retained and the words "knowingly" or "willfully" inserted. So long as the constitution remains as it is on this point (Art. iv., Sec. 2) there should be some check. [See Art. 165.]

4. The act of November 6, 1866 (page 93), punishing conductors for failing to stop their trains for five minutes at each station, has been omitted. [Adopted.]

5. The act of February 5, 1861 (page 9), making it penal for any person to stray an animal in the county where the mark and brand is of record, is left out. [Adopted. See Arts. 770, 771.]

Several articles have been omitted in the Penal Code on the ground that they pertain to criminal procedure, and without now enumerating them spec-

ially, we may say generally that all articles pertaining to procedure so omitted will be found in their appropriate place in the Code of Criminal Procedure.

Art. 330 of the old Penal Code is omitted, but it is believed that Art. 258 of the new Code of Criminal Procedure answers substantially the purpose of the old article. [Adopted. These articles relate to the re-arrest of an escaped prisoner.]

In view of the change suggested by us in the law of dueling, Art. 606 of the old Penal Code, becomes unimportant and has therefore been omitted. [Adopted. The article omitted made it the duty of magistrates to arrest persons about to engage in a duel, &c.]

The other changes and modifications of the Penal Code will be apparent upon an inspection of the printed bill, and are not deemed of sufficient importance to be more specially noted in this report.

In Title XIII of the Penal Code, in Chap. 2, Art. 412, there is a blank which should be filled with the following words: "4379 to article 4388 inclusive." [The blank does not appear in Art. 412.]

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*Part 2 of the above report will be found with the preface to the Code of Criminal Procedure (part II of this volume), and part 3 in Judge Sayles' preface to Vol. II of the Civil Statutes.*



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AN ACT to Adopt and Establish a PENAL CODE and a CODE OF  
CRIMINAL PROCEDURE for the State of Texas.

*Section 1.* BE IT ENACTED BY THE LEGISLATURE OF THE STATE  
OF TEXAS, That the following articles shall hereafter constitute the  
*PENAL CODE* of the State of Texas:

*WHEREAS, The fact that the session of this Legislature is restricted to a short period by the constitution, and the fact that there is a large amount of necessary legislation demanding attention, constitutes an imperative public necessity which justifies the suspension of the constitutional rule requiring this bill to be read on three several days, therefore the said rule is hereby suspended.*

Act to adopt  
and establish  
P. C. and C. of  
C. P., passed  
Feb. 21, 1879.

*WHEREAS, The Penal Code and Code of Criminal Procedure of the State of Texas has been printed and laid upon the desks of members, at the commencement of this session, which has afforded them ample time to read the same; and*

*WHEREAS, It is impossible to read the same through on three several days, as contemplated by the constitution; therefore*

*RESOLVED, An imperative public necessity exists that the constitutional rule, requiring bills to be read on three several days be suspended as to the reading, but the same shall be considered on three several days.*

*17.*

# THE PENAL CODE.

## TITLE 1—GENERAL PROVISIONS RELATING TO THE WHOLE CODE.

### CH. 1. GENERAL PROVISIONS. 2. DEFINITIONS.

### CH. 3. PERSONS PUNISHABLE.

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§1—ART. 1. Design of the Code.—The design of enacting this Code is to define in plain language every offense against the laws of this state, and affix to each offense its proper punishment. [O. C. 1.]

§2—ART. 2. Object of punishment.—The object of punishment is to suppress crime and reform the offender. [O. C. 2.]

Cited in Cockrum v. S., 24 Tex. 394.

§3—ART. 3. All penalties must be affixed by written law.—In order that the system of penal law in force in this state may be complete within itself, and that no system of foreign laws, written or unwritten, may be appealed to, it is declared that no person shall be punished for any act or omission,† unless the same is made a penal offense and a penalty is affixed thereto by the written law of this state. [O. C. 3, revised.]

See Post § 115. † Same as old article down to here.

§4—Article 3 of original Code.—In order that the system of penal law in force in this state may be complete within itself, and that no system of foreign laws, written or unwritten, may be appealed to, it is declared that no person shall be punished for any act or omission† as a penal offense, unless the same is expressly defined and the penalty affixed by the written law of this state.

† This is same as the new article down to here.

§5—Decisions under original Article 3.—Under the original article it was held that “fornication” not being *defined* in the code, could not be punished. *S. v. Foster*, 31 Tex. 578; *S. v. Smith*, 32 Tex. 167; *S. v. Rahl*, 33 Tex. 76; *Wolff v. S.*, 6 App. 195. Nor for the same reason could “sodomy.” *Fennell v. S.* 32 Tex. 378; *Frazier v. S.*, 39 Tex. 390. But the offense of “establishing a lottery” was held to be sufficiently defined. *S. v. Randle*, 41 Tex. 292.

§6—Decisions under Article 3 as revised.—It is not now necessary under Article 3 as revised, that an act or omission be *defined* as a penal offense by the code. If an act or omission *eo nomine*, is made a penal offense, and a penalty is affixed thereto, it becomes an offense punishable under this article. *Robinson v. S.*, 11 App. 309; *Ex parte Bergen*, 14 App. 52; *Cross v. S.*, 17 App. 476.

§7—Intention of Article 3.—This article was intended to prohibit the prevailing practice in this State before the adoption of the Code, of looking to the common-law, and outside of our penal statutes, for the prosecution of persons for what were designed as offenses at common law, but which were not made penal by our statutes. *S. v. Randle*, 41 Tex. 292; *Rogers v. S.*, 8 App. 401. Unless the written law of this State makes an act or omission an offense, and affixes thereto a penalty, such act or omission cannot be punished. *Rogers v. S.*, 8 App. 401; *Smith v. S.*, 7 App. 286.

§8—Same, illustration.—In *Johnson v. S.*, 4 App. 63 it was held that a statute which enacted that “to do any act or thing that would be deemed and held a nuisance at “common law,” should be a misdemeanor, etc., was not a valid enactment when considered with reference to Article 3, and the cases of *Allen v. S.*, 34 Tex. 280, and *S. v. Flynn*, 35 Tex. 354, which held a contrary doctrine were expressly overruled.

§9 — ART. 4.—Common-law the rule of construction, when. The principles of the common-law shall be the rule of construction, when not in conflict with the Penal Code, or Code of Criminal Procedure, or with some other written statute of the state. [O. C. 4, Feb. 12, 1858, p. 156.]

Cited in *Martin v. S.*, 40 Tex. 19; *S. v. Randle*, 41 Tex. 292.

§10—ART. 5.—Special provisions control general.—In the construction of this Code each general provision shall be controlled by a special provision on the same subject, if there be a conflict. [O. C. 5.]

Cited in *Cockrum v. S.*, 24 Tex. 394.

§11—ART. 6.—Unintelligible law not operative.—Whenever it appears that a provision of the penal law is so indefinitely framed, or of such doubtful construction that it can not be understood, either from the language in which it is expressed, or from some other written law of the state, such penal law shall be regarded as wholly inoperative. [O. C. 6.]

§12—Article 398 Penal Code held inoperative under preceding article.—Under the preceding article it has been held that Article 398, making it an offense to engage in the practice of medicine, etc., without having first filed for record a certificate or diploma, is inoperative, because wholly irreconcilable with Article 3635 of the Revised Statutes, and when compared therewith is of such doubtful construction that it cannot be understood. *French v. S.*, 14 App. 76. But Art. 398 is now operative; see note §668.

§13—ART. 7.—Judges to report defects in the law.—Whenever a court trying an offense is of opinion that the law is so defective as to have no operation, or when it appears that there has been a failure to provide for any offense, or class of offenses, which ought to be made punishable, the judge of such court shall report the same to the legislature at its next session, after such defect or omission shall have been discovered. [O. C. 7.]

§14—ART. 8.—Prosecuting officers to report defects in law.—It is also declared to be the duty of the attorney-general to call the attention of the

legislature, in his reports which are required by law to be made to the governor, to any defects or omissions in the penal law which he may observe, and in like manner the district and county attorneys shall communicate to the attorney-general such suggestions as they may deem important touching the same subject. [O. C. 8.]

§15 — ART. 9. — General rule of construction. — This Code, and every other law upon the subject of crime which may be enacted, shall be construed according to the plain import of the language in which it is written, without regard to the distinction usually made between the construction of penal laws and laws upon other subjects, and no person shall be punished for an offense which is not made penal by the plain import of the words of a law. [O. C. 9, Feb. 12, 1858, p. 156.]

See Rev. Stat., Art. 31, 38.

§16 — Preceding Article abrogates rule of common law. — At common law the rule is to construe a highly penal statute *strictly*. *Estes v. S.*, 10 Tex. 300; *Sennett v. S.*, 17 Tex. 308. But that rule is abrogated by the preceding Article of the Code, and there is now no distinction recognized in this State, between penal and other statutes, as to the rules of construction. *Murray v. S.*, 21 App. 620; *Ex parte Gregory*, 20 App. 210; *S. v. Forrest*, 30 Tex. 508.

§17 — Legislative intention must govern in construction of statute. — It is a fundamental principle that in the construction of a statute the legislative intent, if that intent can be ascertained, must govern. The design of all rules of construction of statutes is to furnish guides to assist in arriving at the intention of the legislature. When that intention is discovered, it will prevail even over the literal import of words. *Cain v. S.*, 20 Tex. 355; *Walker v. S.*, 7 App. 245; *Sartain v. S.*, 10 Tex. 651. And when a statute is capable of two constructions equally reasonable, that should be adopted which effects the intention of the law-making power, unless qualified or restricted by some patent provision of law rendering a contrary construction imperative. *Albright v. S.*, 8 App. 313.

§18 — Acts in *pari materia*. — Rules as to. — It is a well settled rule in the construction of statutes, and for the purpose of arriving at the legislative intentions, that all laws in *pari materia*, or on the same subject-matter, are to be taken together, examined and considered as if they were one law. *Cain v. S.*, 20 Tex. 355; *Napier v. Hodges*, 31 Tex. 287; *Taylor v. S.*, 3 App. 169; *Walker v. S.*, 7 App. 245; *Bryan v. Sunberg*, 5 Tex. 417; *Selman v. Wolfe*, 26 Tex. 68.

§19 — Acts of same session. Rule as to. — In the construction of acts of the same session, the whole must be taken and construed as one act. Thus, it would not be a reasonable mode of construing acts of the legislature, so to construe them as to make one act repeal another passed at the same session. It cannot be supposed that it was the legislative intention that acts thus passed should abrogate and repeal one another. *Neill v. Keese*, 5 Tex. 33; *Cain v. S.*, 20 Tex. 355; *Austin v. Ry. Co.*, 45 Tex. 234; *Walker v. S.*, 7 App. 245; *Lavitt v. Cisey*, 17 Tex. 594.

§20 — Rule where statutes in *pari materia* irreconcilably conflict. — Where there is an irreconcilable repugnancy between two statutes, or statutory provisions, the rule seems to be, that the statute or provision last enacted, controls the former enactment, and is to be regarded as the law. This rule, however, obtains only in cases where there is such absolute repugnancy, as that both statutes, or provisions cannot stand together, and the court is, of necessity, compelled to give effect to one as expressive of the legislative intention rather than the other. *Cain v. S.*, 20 Tex. 355; *Davis v. S.*, 2 App. 425; *Chiles v. S.*, 1 App. 27.

§21 — Proviso in a statute. Effect of in construing. — The proviso is generally intended to restrain the enacting clause, and to except some thing which would otherwise have been within it, or in some measure to modify the enacting clause. It is a limitation or exception to a grant made or authority conferred, the effect of which is to declare that the one shall not operate or the other be exercised, unless in the case provided. The office of a proviso, generally, is either to except some thing from the enacting clause, to restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview. In construing a statute containing a proviso, such proviso must of course be considered in arriving at the intention of the legislature in enacting the law. *Graves v. S.*, 6 App. 228.

§22 — Preamble. Effect of in construing. — In the interpretation of a statute, resort may be had to the preamble, but it cannot limit or control the express provisions of the statute. And the statement of legislative reasons in the preamble will not affect the validity of the statute. *Ex parte Gregory*, 20 App. 210.

§23 — Language of the statute. Rules as to. — For the purpose of ascertaining the intention of the legislature in enacting a statute, the language employed in the act is first to be resorted to. If the words employed are free from ambiguity and doubt, and express plainly, clearly and distinctly the intent, according to the most natural import of the language, there is no occasion to look elsewhere. *Murray v. S.*, 21 App. 620; *Smith v. S.*, 18 App. 454.

§24 — ART. 10. — Words specially defined. How understood. — Words which have their meaning specially defined, shall be understood in that sense, though it be contrary to their usual meaning; and all words used in this Code,

except where a word, term or phrase is specially defined, are to be taken and construed in the sense in which they are understood in common language, taking into consideration the context and subject-matter relative to which they are employed.

This is O. C. Arts. 10 and 28, revised and consolidated.

Cited in *Hardeman v. S.*, 16 App. 1; *Hall v. S.*, Id. 6; *Anderson v. S.*, 17 App. 305; *Bell v. S.*, 18 App. 53; *Loyd v. S.*, 19 App. 137; *Murray v. S.*, 21 App. 620. See Art. 26, C. C. P.

§25—**General words following specific ones.**—When a particular class is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters *ejusdem generis*, with such class. *Murray v. S.*, 21 App. 620; *R. v. Bynum, Dallam*, 376.

§26—**Grammatical errors not to be regarded.**—“Grammatical errors shall not vitiate a law, and a transposition of words and clauses may be resorted to when the sentence or clause is without meaning as it stands, and in no case shall the punctuation of a law control or affect the intention of the legislature in the enactment.” *R. S.*, Art. 3139. This rule, though declared in a civil statute, is applicable and binding in the construction of a penal statute. *Murray v. S.*, 21 App. 620.

§27—**Policy, &c., of a statute. Courts have no concern with.**—With the expediency, propriety, or wisdom of a legislative enactment the courts have nothing to do. The legislative, and not the judicial department of the government, determines the policy of statutes. *Davis v. S.*, 2 App. 425; *Stapp v. S.*, 3 App. 138; *Albricht v. S.*, 8 App. 216; *Smith v. S.*, 18 App. 454.

§28—**ART. 11. — Innocence presumed.**—Every person accused of an offense shall be presumed to be innocent until his guilt is established to the satisfaction of those whose province it is to try him. [O. C. 11.]

See Post § 110-111; also C. C. P., Art. 727.

§29—**Extent, &c., of the presumption of innocence.**—Every person accused of crime is presumed to be innocent until his guilt is established by legal evidence, to the exclusion of any reasonable doubt. This presumption of innocence is with the accused throughout the whole case, from its commencement to its final determination. Its effect is to place the burden of proving the guilt of the accused upon the prosecution. The fact of guilt having been established to the exclusion of any reasonable doubt, the prosecution has made out its case, and this case will overcome the presumption of innocence, and produce the conviction of the accused; but the presumption of innocence never ceases to exist until the conviction is finally determined. *Jones v. S.*, 13 App. 1; *Templeton v. S.*, 5 App. 398; *Brinkoeter v. S.*, 14 App. 67; *Gazley v. S.*, 17 App. 267; *Robertson v. S.*, 10 App. 602; *Moore v. S.*, 20 App. 233; *Strong v. S.*, 18 App. 19; *Fury v. S.*, 8 App. 471; *Ake v. S.*, 6 App. 398.

§30—**Distinction between presumption of innocence and burden of proof.**—The rule imposing the burden of proof on the party advancing a proposition is a very different thing from the presumption of innocence. A defendant has the presumption of innocence with him through the whole case. The advantage that he derives, however, from the fact that the burden is on the prosecution to make out the points it advances is only temporary. As soon as this is done to such an effect as to sustain a verdict of guilty, then, should the proof close at that point, the case goes to the jury free from any presumptions arising from the prior imposition of this burden. In other words, the rule requiring the *actor* to take on him the burden of proof is one merely of practice, adopted for the proper development of the case, and ceases to operate when the evidence is in. The rule requiring guilt to be made out beyond reasonable doubt is a fundamental sanction of the law, — applicable to all stages of a trial. The first rule concerns the order, the second the *weight* of testimony. *Jones v. S.*, 13 App. 1; *Ake v. S.*, 6 App. 398.

§31—**Court should charge presumption of innocence.**—In all cases of felony the court should give in charge to the jury the presumption of innocence in connection with the rule as to reasonable doubt. *Thomas v. S.*, 40 Tex. 45; *Carr v. S.*, 41 Tex. 545; *Stapp v. S.*, 1 App. 734; *Black v. S.*, Id. 368; *Lindsay v. S.*, Id. 327; *Priesmuth v. S.*, Id. 480; *Treadway v. S.*, Id. 668; *Coffee v. S.*, 5 App. 545; *McMullen v. S.*, Id. 577; *Hampton v. S.*, 1 App. 652.

§32—**Failure so to charge not error per se.**—The mere omission to charge the presumption of innocence is not such error of itself as will cause a conviction to be set aside. *Hutto v. S.*, 7 App. 44; *Frye v. S.*, Id. 94. But if such charge be requested and refused, this would be error for which the judgment would be reversed. *Hampton v. S.*, 1 App. 652; *Coffee v. S.*, 5 App. 545; *McMullen v. S.*, Id. 577; *Mace v. S.*, 6 App. 470; *Wilkins v. S.*, 15 App. 420. And so it would be, if such omission were excepted to at the time of the trial, and presented by bill of exception. *Leache v. S.*, 22 App. 279; *Jackson v. S.*, Id. 442; *Clanton v. S.*, 20 App. 615; *Niland v. S.*, 19 App. 166; *Buntam v. S.*, 15 App. 485; *White v. S.*, 17 App. 188; *Paulin v. S.*, 21 App. 436.

§33—**Form of such charge.**—The charge of the presumption of innocence should embrace not only Art. 11, P. C., but also Art. 727, C. C. P., and should be substantially in the language of these articles. The following is the proper form of such charge. “The defendant is presumed to be innocent until his guilt is established by legal evidence; and if from the evidence before you, you have a reasonable doubt as to the defendant’s guilt, you will acquit him.” The charge should follow the language of the statute without any attempt at amplification or explanation. *Massey v. S.*, 1 App. 563; *Chapman v. S.*, 3 App. 67; *Ham v. S.*, 4 App. 645; *Bland v. S.*, 4 App. 15; *Fury v. S.*, 8 App. 471; *Cohen v. S.*, 9 App. 173; *McPhall v. S.*, Id. 164; *Walker v. S.*, 13 App. 618; *Willson’s Cr. Forms*, 721.



**§34 — ART. 12. — No offense against a law not in force.** — No act or omission can be punished as an offense, unless the law making it penal was in force at the time when such act or omission took place. [O. C., 12.]

See also Bill of Rights, §§16-19; C. C. P., Art. 3.

**§35 — Decisions under preceding Article.** — A statute transferring the power of assessing punishments from the judge to the jury is not *ex post facto*. *Holt v. S.*, 2 Tex. 363; *Dawson v. S.*, 6 Tex. 347. Nor one authorizing the amendment of defendant's name in an indictment then pending. *S. v. Manning*, 14 Tex. 402. But the legislature cannot give a statute of limitation a restorative effect, so as to authorize a prosecution already barred. *S. v. Sneed*, 25 Tex. Supp. 66. Nor could the accused be deprived of the right to plead in abatement to the grand jury under an indictment found before Art. 377, C. C. P., took effect. *Martin v. S.*, 22 Tex. 214. Nor can a conviction be authorized on less or different testimony than was required at the date of the offense. *Callaway v. S.*, 7 App. 585; *Murray v. S.*, 1 App. 417; *Holt v. S.*, 2 Tex. 363; *Valesco v. S.*, 9 App. 76; *Johnson v. S.*, 16 App. 402. Nor can cumulative sentences not before authorized be imposed. *Hannahan v. S.*, 7 App. 664; *Baker v. S.*, 11 App. 262; *Prince v. S.*, 44 Tex. 480.

**§36 — Ex post facto law. — Meaning of.** — An *ex post facto* law is one. 1. That makes an action, done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2. A law that aggravates a crime, or makes it greater than it was when committed. 3. A law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. 4. A law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender. But a law which modifies the rigor of the criminal law is not *ex post facto*. *Murray v. S.*, 1 App. 417; *Holt v. S.*, 2 Tex. 363; *Dawson v. S.*, 6 Tex. 347. Thus it was held that the law which changed the punishment of murder in the first degree from death absolutely, to the alternative punishment of death or imprisonment in the penitentiary for life, such change having been made after the commission of the murder, was not an *ex post facto* law. *McInturf v. S.*, 20 App. 335.

**§37 — ART. 13. — When laws take effect.** — No law of the legislature defining an offense, or affixing a penalty thereto, shall take effect until after the expiration of ninety days from the day of the adjournment of the session at which such penal law was enacted, unless the legislature shall otherwise determine. [O. C., 13.]

See Sec. 39, Art. 3. Const.

**§38 — ART. 14. — Ignorance no excuse.** — After a law has taken effect, no person shall be excused for its violation upon the ground that he was ignorant of its provisions. [O. C. 13.]

See Post, § 99.

**§39 — Decisions under preceding article.** — In *Chaplin v. S.*, 7 App. 87, the defendant was charged with unlawfully carrying a pistol in Brown county. His defense was that at the time he carried the pistol he believed that said county was exempt from the operation of the law against carrying arms; that it had been exempted by proclamation of the governor under Art. 323, P. C. It was held that this was no defense; that it was a plea of ignorance of the law, and afforded no excuse — nor is it any excuse that in committing an offense, the accused was justified by a custom of the locality, and believed such custom to be the law, while it was contrary to the law. A law cannot be subverted by local custom. This decision overrules *Dibbs v. S.*, 43 Tex. 650, upon this point. *Lawrence v. S.*, 20 App. 536. In *Hailes v. S.*, 15 App. 93, it is held that ignorance of the time of holding a special election, is ignorance not of law but of fact, and therefore a valid defense against a prosecution for selling liquor on the day of such election.

**§40 — ART. 15. — Effect of modification by subsequent law.** — When the penalty for an offense is prescribed by one law, and altered by a subsequent law, the penalty of such second law shall not be inflicted for a breach of the law committed before the second shall have taken effect. In every such case the offender shall be tried under the law in force when the offense was committed, and if convicted, punished under that law; except that when by the provisions of the second law the punishment of the offense is ameliorated, the defendant shall be punished under such last enactment, unless he elect to receive the penalty prescribed by the law in force when the offense was committed. [O. C. 14.]

See Post, Art. 19.

**§41 — Election by defendant.** — When the punishment for an offense is ameliorated by statute, subsequent to its commission, the defendant, upon conviction, must be punished according to the latter enactment, unless he elect to receive the penalty affixed by the former law, and such elec-

tion must be made *before verdict*. The defendant cannot elect except in case of amelioration. If the later statute *increases* the punishment, he *must* be punished according to the former law. *Maul v. S.*, 25 Tex. 168; *Veal v. S.*, 8 App. 474; *Perez v. S.*, Id. 610; *McInturf v. S.*, 20 App. 335; *Allen v. S.*, 7 App. 298; *Doran v. S.*, Id. 385; *Noftsinger v. S.*, Id. 801. If it is doubtful whether the later statute ameliorates the penalty, the defendant should be accorded the right to elect. *Herber v. S.*, 7 Tex. 72; *Greer v. S.*, 22 Tex. 588. Where two offenses are included in the same indictment, and the penalty as to one or more of such offenses has been ameliorated, the defendant has the right to elect as to either or all so ameliorated. If the election be as to the highest offense only, which has been ameliorated, and there has been no amelioration as to the lower offenses, on conviction of one of such lower offenses, the punishment must be fixed according to former law. *Maul v. S.* 25 Tex. 166.

§42—**Amelioration. Decisions as to.**—In a case of theft of cattle, which offense at the time of its commission, was punishable by the infliction of thirty-nine lashes, but which punishment, before the trial had been changed to confinement in the penitentiary, not less than one, nor more than seven years, it was held that the latter ameliorated the former penalty, and that the defendant was entitled to elect. In that case it is said: "The exception was designed for the benefit and advantage of the accused, and if it was doubtful whether it was a mitigation or not, he should have been permitted to have decided for himself. It is not an inquiry which punishment produces the most physical suffering, but which is the most ignominious; and among all nations of civilized man, from the earliest ages, the infliction of stripes has been considered more degrading than death itself." *Herber v. S.*, 7 Tex. 69. In *Doran v. S.*, 7 App. 385, the conviction was for murder in the first degree. At the time of the commission of the offense the penalty was death absolutely. At the time of the trial the penalty had been changed to the alternative one of death or confinement for life in the penitentiary. Held, that the court should have submitted to the jury the alternative punishment. In *Noftsinger v. S.*, 7 App. 301, which was a prosecution for murder in the first degree, the defendant elected to be punished under the former law fixing the punishment at death absolutely, which punishment was assessed against him, and on appeal the conviction was affirmed. But had not the defendant elected to be punished under the former law, it would have been the imperative duty of the court to have given him the benefit of the ameliorated punishment. *McInturf v. S.*, 20 App. 335. The punishment for the offense of murder was not ameliorated by the Penal Code. *Wall v. S.*, 18 Tex. 682. Nor by the amendment made thereto in 1858. *Cockrum v. S.*, 24 Tex. 394. Nor by the constitution of 1870. *Hunt v. S.*, 7 App. 212; *Dawson v. S.*, 33 Tex. 491. Where a statute which ameliorates a penalty takes effect *after a trial has commenced*, it is not operative in that case. The law in force *when the trial commenced* is the law of the case until the trial is ended. *Sims v. S.*, 8 App. 280; *Myers v. S.*, Id. 321.

§43—**ART. 16.—Repeal. Effect of.**—The repeal of a penal law, where the repealing statute substitutes no other penalty, will exempt from punishment all persons who may have offended against the provisions of such repealed law, unless it be otherwise declared in the repealing statute. [O. C. 15.]

§44—**Preceding article applies to case in appellate court.**—The preceding article applies as well to proceedings in an appellate court, as to the court having original cognizance of the offense. *Wall v. S.*, 18 Tex. 682; *Sheppard v. S.*, 1 App. 522; *Hubbard v. S.*, 2 App. 506; *Tuxon v. S.*, 4 App. 472; *Halpin v. S.*, 5 App. 212; *Chaplin v. S.*, 7 App. 87; *Monroe v. S.*, 8 App. 348; *Fitze v. S.*, 18 App. 372; *Mulkey v. S.*, 16 App. 53; *Whisenant v. S.*, 18 App. 491; *Woodlief v. S.*, 21 App. 412; *Boone v. S.*, 12 App. 184; *Etter v. Ry. Co.*, 2 W. Con. Rep. p. 48.

§45—**Repeal of civil statute. Effect of upon penalty for violation of.**—The repeal of a civil statute for the enforcement of which a penalty has been enacted, operates as a repeal of the latter. *S. v. Robinson*, 19 Tex. 478.

§46—**Repeal by implication.**—Repeals by implication are not favored. *Thouvenin v. Rodrigues*, 24 Tex. 468; *Napier v. Hodges*, 31 Tex. 287; *Walker v. S.*, 7 App. 245; *Harrold v. S.*, 16 App. 157; *Fraser v. S.*, 8 App. 264; *Taylor v. S.*, Id. 169. To constitute a repeal by implication, the new statute must cover the whole subject-matter of the old one, and prescribe different penalties. There must be an irreconcilable repugnancy between the two acts, and the repugnancy must be plain and unavoidable. *Walker v. S.*, 7 App. 245; *Cain v. S.*, 20 Tex. 870. But, when a subsequent statute, revising the subject matter of a former one, is evidently intended as a substitute for it, although it contains no express words to such effect, it must be held to operate to repeal the former, to the extent to which its provisions are revised and supplied. *Harold v. S.*, 16 App. 157; *Holden v. S.*, 1 App. 226; *Sterman v. S.*, 21 Tex. 734; *Etter v. Ry. Co.*, 2 W. Con. Rep., p. 48; *Cain v. S.*, 20 Tex. 355; *Rogers v. Watrous*, 8 Tex. 62; *Ex parte Valasquez*, 26 Tex. 178. A new statute, which comprehends the entire subject-matter of previous ones, and enacts a new and independent system respecting it, repeals and supersedes all prior systems and laws upon the same subject-matter. *Stebbins v. S.*, 22 App. 32.

§47—**Law may be repealed without setting it out.**—It is within the power of the legislature to repeal a definite portion of a section or article in an act, without the re-enactment of the section or article, omitting the part repealed. Such mode of repealing does not conflict with sec. 36, art. 3 of the constitution. *Chambers v. S.*, 25 Tex. 307.

§48—**Repeal of an amended law, repeals amendment, when.**—Where a section of a statute is amended, and the amendment is made in such terms that it stands in the stead of such section, and by a subsequent act the said section is expressly repealed, the amendment is also repealed. *Greer v. S.*, 22 Tex. 588.

§49 — **Amendment of a repealed law is of no effect.**—An enactment which purports merely to amend a repealed act is of no effect. A repealed law is not the subject of amendment. *Robertson v. S.*, 12 App. 541.

§50 — **ART. 17. — When new penalty is substituted.**—When by the provisions of a repealing statute a new penalty is substituted for an offense punishable under the act repealed, such repealing statute shall not exempt from punishment a person who has offended against the repealed law while it was in force, but in such case the rule prescribed in article 15 shall govern. [O. C. 16.]

§51 — **Where penalty is increased.**—Where the penalty is simply increased by the new law, the prosecution under the old law is not abated. *Gill v. S.*, 30 Tex. 514; *Roberts v. S.*, 17 App. 148.

§52 — **ART. 18. — Change of definition. Effect of.**—If an offense be defined by one law, and by a subsequent law the definition of the offense is changed, no such change or modification shall take effect, as to offenses already committed; but all offenders against the first law shall be tried, and their guilt or innocence determined in accordance with the provisions thereof. [O. C. 17.]

§53 — **ART. 19. — Previous offense not affected by this Code.**—No offense committed, and no fine, forfeiture or penalty incurred under existing laws, previous to the time when this Code takes effect, shall be affected by the repeal herein of any such existing laws; but the punishment of such offenses, and the recovery of such fines and forfeitures shall take place as if the laws repealed had still remained in force; except that when any penalty, forfeiture, or punishment shall have been mitigated by the provisions of this Code, such provision shall apply to and control any judgment to be pronounced after this Code shall take effect, for any offense committed before that time, unless the defendant elect to be punished under the provisions of the repealed law. [O. C. 18.]

See Ante, art. 15, as to penalty.

§54 — **Decisions under preceding article.**—The repeals and changes enacted in this Code, do not affect offenses committed before said Code went into effect. Offenses under a repealed law may still be punished when such is the declared legislative intention, as is the case in the foregoing article. *Chaplin v. S.*, 7 App. 87; *Walker v. S.*, Id. 245. Rev. Stat., p. 718, § 6.

§55 — **ART. 20. — No cumulative penalties.**—No penalty affixed to an offense by one law shall be considered as cumulative of penalties prescribed under a former law, and in every case where a new penalty is prescribed for an offense, the penalty of the first law shall be considered as repealed, unless the contrary be expressly provided in the law last enacted. [O. C. 19.]

Cited in *Roberts v. S.*, 17 App. 148.

§56 — **Qui tam penalty. Decision as to.**—In *Bush v. R.*, 1 Tex. 455, it is held that if a statute prohibits an act, under a penalty to be enforced by indictment, and a subsequent statute gives a *qui tam* action for such penalty, the latter is merely cumulative of, and does not repeal, the remedy given by the former statute.

## CH. 2 — DEFINITIONS.

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§ 57 — ART. 21.—**Definition of terms.** — The general terms "*whoever*," "*any person*," "*any one*," and the relative pronouns "*he*" and "*they*," as referring to these terms, include females as well as males, unless there is some express declaration to the contrary. The word "*man*" is used to signify a male person of any age; and the word "*woman*" a female person of any age. [O. C. 20.]

§ 58 — ART. 22.—**Words expressive of relationship, state, condition, trust, etc., include what.** — The use of any word expressive of the *relationship, state condition, office or trust* of any person, as of "parent," "child," "ascendant," "descendant," "minor," "infant," "ward," "guardian," or the like; or of the relative pronouns "*he*" or "*they*," in reference thereto, includes both *males* and *females*. [O. C. 21.]

See Rev. Stat. Art. 3138, Sub. 3.

§ 59 — "Father," "mother," not equivalent to "parent." — An information charging the sale of intoxicating liquor to a minor, without the written consent of the "father" of said minor, was held bad, the statute being without the written consent of the "parent." The use of the word "father," or "mother" is not equivalent to the word "parent" which would include both. *Lantzner v. S.*, 19 App. 320.

§ 60 — ART. 23.—**Singular includes plural, and masculine feminine.** — The use of the singular number includes the plural, and the plural the singular; and words used in the masculine gender include the feminine also, unless, by reasonable construction, it appears that such was not the intention of the language. [O. C. 22.]

See Rev. Stat., Art. 3138, Sub. 3 and 4.

§ 61 — ART. 24.—**"Person" includes state or any corporation.** — Whenever any property or interest is intended to be protected by a provision of the penal law, and the general term "*person*," or any other general term, is used to designate the party whose property it is intended to protect, the provision of such penal law, and the protection thereby given, shall extend to the property of the State, and of all public or private corporations. [O. C. 23.]

See Rev. Stat., Art. 3140, Sub. 2.

§ 62 — ART. 25.—**"Accused" and defendant synonymous.** — The word "*accused*" is intended to refer to any person who, in a legal manner, is held to answer for any offense, at any stage of the proceeding, or against whom complaint, in a lawful manner, is made, charging the commission of an offense, including all proceedings from the order for arrest to the final execution of the law; and the word "*defendant*" is used in the same sense. [O. C. 24.]

See *Pierce v. S.*, 17 App. 232.

§ 63 — ART. 26.—**"Criminal action" defined.** — A "*criminal action*," as used in this Code, means the whole, and any part of the procedure which the law provides for bringing offenders to justice; and the terms "*prosecution*,"

“criminal prosecution,” “accusation,” and “criminal accusation,” are used in the same sense. [O. C. 25.]

§64 — ART. 27. — “**Convict**” defined. — An accused person is termed a “*convict*” after final condemnation by the highest court of resort, which, by law, has jurisdiction of his case, and to which he may have thought proper to appeal. [O. C. 26.]

§65 — ART. 28. — “**Criminal process**” defined. — The term “*criminal process*” is intended to signify any *capias*, *warrant*, *citation*, *attachment*, or other written order issued in a criminal proceeding, whether the same be to arrest, commit to jail, collect money, or for whatever other purpose used. [P. C. 28; O. C. 27, for O. C. 28, see art. 8.]

§66 — ART. 29. — “**Preceding**” and “**succeeding**” defined. — The word “*preceding*” means the next preceding, and the word “*succeeding*” the next succeeding, whenever used, to designate any particular article, chapter, or title of the Code. [O. C. 29.]

See Rev. Stat., Art. 3140, Sub. 8 and 9.

§67 — ART. 30. — “**Writing**” and “**oath**.” — The word “*writing*” includes *printing*, the word “*oath*” includes *affirmation*. [O. C. 30.]

See Rev. Stat., Art. 3140, Sub. 3 and 4.

§68 — ART. 31. — “**Signature**” defined. — The word “*signature*” includes the mark of a person unable to write his name. A mark shall have the same effect as a signature, when the name is written by some other person, and the mark made near thereto, by the person unable to write his name. [O. C. 31.]

See Rev. Stat., Art. 3140, Sub. 6.

### CH. 3.—THE PERSONS PUNISHABLE UNDER THIS CODE, AND THE CIRCUMSTANCES WHICH EXCUSE, EXTENUATE, OR AGGRAVATE AN OFFENSE.

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§69 — ART. 32. — **The persons punishable under this Code.** — All persons, whether inhabitants of this State or of the United States, or aliens, are amenable to punishment for offenses which are defined and made punishable under the provisions of this Code. The exceptions to the general rule here laid down, are given in the subsequent articles of this title. [O. C. 32, amended by Act Oct. 31, 1866, p. 70, O. C. 33-34 are repeated.]

§70 — ART. 33. — **Indians not punishable except, when.** — No act done within the uninhabited portion of the State, by individuals belonging to the several Indian tribes, in their intercourse with each other, or with other tribes, and affecting no other person, is considered as an offense against this Code, but in all other respects, such individuals are upon a footing with all other persons, both as to protection and liability to punishment. [O. C. 35, amended by Act Oct. 31, 1866, p. 70.]

§71 — ART. 34. — **Children not punishable.** — No person shall, in any case, be convicted of any offense committed before he was of the age of nine years; nor of any offense committed between the years of nine and thirteen, unless it shall appear by proof that he had discretion sufficient to understand the nature and illegality of the act constituting the offense. [O. C. 36.]

§72 — **“Discretion” what is.** — Proof that the defendant knew the difference between good and evil, or that he was possessed of the intelligence of ordinary boys of his age, does not fill the requirements of the statute. It must be shown that he understood the nature and illegality of the act. *Wusnig v. S.*, 33 Tex. 651; *Parker v. S.*, 20 App. 451.

§73 — **Burden of proof of discretion.** — When the evidence discloses that the defendant, when the offense was committed, was between the ages of nine and thirteen years, it then devolves upon the State to prove that he, at the time of the commission of the offense, had discretion to understand the nature and illegality of the particular act constituting the crime.

*Parker v. S.*, 20 App. 451; *Gardner v. S.*, 33 Tex. 692. But proof of discretion does not devolve upon the State until the fact of non-age is shown by the evidence. *McDaniel v. S.*, 5 App. 475; *Ake v. S.*, 6 App. 898. Post, § 76.

§74 — **Discretion may be proved, how.**—It is not required that proof of discretion should be made by direct and positive testimony. In most instances circumstances of education, habits of life, general character, moral and religious instructions, and oftentimes the circumstances connected with the offense charged, will be sufficient to satisfy the jury that the defendant had the discretion required by the statute. *Wusnig v. S.*, 33 Tex. 651.

§75 — **ART. 35. — Person under seventeen years not punishable capital-ly.**—A person, for an offense committed before he arrived at the age of seventeen years, shall in no case be punished with death; but may, according to the nature and degree of the offense, be punished by imprisonment for life, or receive any of the other punishments affixed in this Code to the offense of which he is guilty. [O. C. 37.]

See Post, § 163.

§76. — **Burden of proof of non-age.**—The burden of proving the non-age of the defendant rests upon the defendant, as this is a distinct substantive matter relied upon by him to exempt him from capital punishment, and is foreign to the issue made by the State in her charge against him. The maxim that the burden of proof never shifts from the State, means only that it never shifts in so far as it is necessary to make out the specific crime charged, by establishing the *corpus delicti*, and the constituent elements of the crime. *Ake v. S.*, 6 App. 898; *Jones v. S.*, 13 App. 1, ante, § 73; *Taylor v. S.*, 3 App. 169.

§77 — **ART. 36. — Married women, offenses by, etc.**—A married woman who commits an offense by the command or persuasion of her husband, shall not in any case be punished by death, but may be imprisoned for life, or a term of years, according to the nature and degree of the crime; and in cases not capital, she shall receive only one-half the punishment to which she would otherwise be liable. [O. C. 38.]

See Post, § 164.

§78 — **ART. 37. — Husband, etc., instigating offense, double punishment.**—When it shall appear that a minor was aided or instigated in the commission of an offense, by a relation in the ascending line, or by his guardian, or an apprentice under age by his master, or a wife by her husband, such relation, guardian, master or husband, shall, at the discretion of the jury, in capital cases, be punished by death, and in cases not capital, shall receive double the punishment imposed by law in ordinary cases, for the same offense. [O. C. 39; amended by Act, Oct. 31, 1886, p. 71.]

See Post, § 164.

§79 — **ART. 38. — "Minor" defined.**—The word "*minor*," as here and elsewhere used in this Code, signifies a person under the age of twenty-one years. [O. C. 40.]

Cited in *Schenault v. S.*, 10 App., 410.

§80. — **ART. 39. — Insanity a defense.**—No act done in a state of insanity can be punished as an offense. No person who becomes insane after he committed an offense shall be tried for the same while in such condition. No person who becomes insane after he is found guilty, shall be punished for the offense while in such condition. [O. C. 41.]

§81. — **Insanity, what is.**—The law does not require as the condition on which criminal responsibility shall follow the commission of crime, the possession of one's faculties in full vigor, or a mind unimpaired by disease or infirmity. The mind may be weakened by disease, or impaired, and yet the accused be criminally responsible for his acts. The accused can only discharge himself from responsibility by proving that his intellect was so disordered that he did not know the nature and quality of the act he was doing, and that it was an act which he ought not to do. If he had sufficient intelligence to know what he was doing, and to know that the act was wrong, and had the will and power to refrain from doing it, he is in contemplation of law, responsible for the act committed. *Leache v. S.*, 22 App. 279. The rule adopted in this State as to the character of insanity which will exempt from responsibility for crime, is, that at the time of committing the crime the accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature or quality of the act he was doing, or, if he did know it, that he did not know he was doing wrong. The inquiry should be directed to his knowledge of right and wrong, with respect to the very act with which he is charged. *Carter v. S.*, 12 Tex. 500; *Webb*

v. S., 5 App. 596; Williams v. S., 7 App. 163; Clark v. S., 8 App. 350; King v. S., 9 App. 515; Warren v. S., Id. 619; Johnson v. S., 10 App. 571; Pettigrew v. S., 12 App. 225; King v. S., 13 App. 277; Thomas v. S., 40 Tex. 60; Erwin v. S., 10 App. 700; Burkhard v. S., 18 App. 599; Powell v. S., 37 Tex. 348.

§82—“**Moral insanity.**”—“**Irresistible impulse.**”—For a discussion of the doctrines of “moral insanity” and “irresistible impulse” the case of Leache v. S., 22 App. 279, is referred to, from which it would seem that these doctrines are not recognized as law in this State, any farther than is conceded in that case, and in the case of King v. S., 9 App. 515.

§83—**Kleptomania is insanity.**—Kleptomania is an uncontrollable propensity to steal, and is a well recognized species of insanity, which if clearly established by the evidence constitutes a complete defense in a trial for theft. Looney v. S., 10 App. 520; Harris v. S., 18 App. 287.

§84—**ART. 40.—Proof of insanity according to common law.**—The rules of evidence known to the common law, in respect to the proof of insanity, shall be observed in all trials where that question is in issue. The manner of ascertaining whether the insanity is real or pretended, when it is alleged that the defendant became insane after the commission of offense, is prescribed in the Code of Criminal Procedure. [O. C. 42.]

§85—**Sanity presumed. Burden of proof of insanity.**—Every person is presumed to be of sane mind, until the contrary is shown. Webb v. S., 5 App. 596; Carter v. S., 12 Tex. 500; King v. S., 9 App. 515. When the defense of insanity is relied upon, the burden is upon the defendant to establish such defense by a preponderance of evidence. Webb v. S., 5 App. 596; Carter v. S., 12 Tex. 500; King v. S., 9 App. 515; Johnson v. S., 10 App. 571; King v. S., 13 App. 277; Mendiola v. S., 18 App. 462; Smith v. S., 19 App. 95; Leache v. S., 22 App. 279; Jones v. S., 13 App. 1.

§86—**Proof of insanity. Medical experts.**—The opinion of medical experts is admissible as to the mental state of a person whom they have examined. Pigg v. S., 43 Tex. 108; Thomas v. S., 40 Tex. 60. They may also state their opinion upon the whole evidence, if they have heard it all, or upon a hypothetical statement which is in conformity with the whole evidence. But it is inadmissible to permit an expert to give his opinion upon anything short of the whole evidence in the case, whether he has personally heard it, or it is stated to him hypothetically. Nor can he be asked as to an hypothesis having no foundation in the evidence in the case, or resting in statements made to him by persons out of court. The proper question to be propounded to an expert to elicit his opinion upon the evidence in the case, or upon a hypothetical statement of it, is, “If the symptoms and indications testified to by the other witnesses are proved, and if the jury are satisfied of the truth of them, was the defendant in your opinion insane?” Webb v. S., 9 App. 490; Thomas v. S., 40 Tex. 60. Where the expert has not heard the evidence, each side has the right to an opinion from the witness upon any hypothesis reasonably consistent with the evidence, and, if meagerly presented in the examination on one side, it may be fully presented on the other; the whole examination being within the control of the court, whose duty it is to see that it is fairly and reasonably conducted. He may be asked by either party as to the reasons upon which his opinion is based; or he may, with leave of the court, give such explanation on his own account. Beyond this he cannot go in such examination, though he may be examined in details in order to test his credibility and judgment. Leache v. S., 22 App. 279.

§87—**Same. Non-experts.**—Upon an issue of insanity, witnesses who are not experts, are permitted to state their opinions and conclusions upon the facts to which they testify. McClackey v. S., 5 App. 320; Webb v. S., Id. 596; Thomas v. S., 40 Tex. 60; Holcomb v. S., 41 Tex. 125. A contrary doctrine was held in Hickman v. S., 38 Tex. 190; but that decision is evidently no longer the rule in this State. In Gherke v. S., 13 Tex. 568, it was held that non-expert witnesses should not be permitted to testify that they were conversant with persons well-known to be insane, and that the conduct and appearance of the prisoner were like such as they had observed in said insane, and that the prisoner, in their opinion, looked and acted like one insane. In Thomas v. S., 40 Tex. 60, it is said that the holding in the Gherke case is not in conflict with the rule stated in the first sentence of this section. And in Webb v. S., 5 App. 596, the Gherke case is declared overruled upon this point.

§88—**Antecedent and subsequent condition of mind may be proved.**—Evidence of the state of mind of the accused, both before and after the criminal act charged to have been done, is admissible in determining the question of the sanity of the accused at the time of the commission of the offense. Webb v. S., 5 App. 596; Warren v. S., 9 App. 619.

§89—**Presumption of continuance of insanity.**—If insanity be proved to have existed at any particular period, it is ordinarily presumed to have continued. But this is the rule where the insanity proved is of a *permanent* character. Where the insanity is *temporary* or *recurrent* such presumption does not prevail, but on the contrary, in such case, the law presumes the offense of such persons to have been committed in a lucid interval, unless it appears to have been committed in the time of his distemper. Leache v. S., 22 App. 279; Webb v. S., 5 App. 596.

§90—**Charge upon insanity. Duty of court to give when.**—It is the duty of the court in felony cases, where insanity is interposed as a defense, and the evidence even slightly tends to establish such defense, to instruct the jury upon the law applicable thereto, whether asked or not to do so. Thomas v. S., 40 Tex. 60; Erwin v. S., 10 App. 700; Smith v. S., 19 App. 95. For approved charges upon this defense, see Clark v. S., 8 App. 350; King v. S., 9 App. 515;



*Williams v. S.*, 7 App. 163; *Willson's Cr. Forms*, 715-716. But where there is only evidence that the accused was of a lower order of intellect than other members of his family, it was held that the court was not required to charge upon the issue of insanity. *Powell v. S.*, 37 Tex. 348.

§91 — **Charge in kleptomania.**— When in a trial for theft, the defense is the insane propensity to steal known as kleptomania, and there is evidence tending to sustain that defense, the charge should distinctly present and specifically treat of the peculiar issue thus raised, and not stop with submitting the usual test of the defendant's ability in general to distinguish right from wrong. *Looney v. S.*, 10 App. 520.

§92 — **ART. 40a. — Intoxication as a defense. Statute regulating.** — § 1. Neither intoxication, nor temporary insanity of mind, produced by the voluntary recent use of ardent spirits, shall constitute any excuse in this State for the commission of crime, nor shall intoxication mitigate either the degree or the penalty of crime, but evidence of temporary insanity produced by such use of ardent spirits may be introduced by the defendant in any criminal prosecution in mitigation of the penalty attached to the offense for which he is being tried, and in cases of murder for the purpose of determining the degree of murder of which the defendant may be found guilty.

§ 2. It shall be the duty of the several district and county judges of this State, in any criminal prosecution pending before them, where temporary insanity is relied upon as a defense and the evidence tends to show that such insanity was brought about by the immoderate use of intoxicating liquors, to charge the jury in accordance with the provisions of section 1 of this act. [Genl. Laws 17 Leg., Reg. Sess., p. 9.]

§93 — **State of the law prior to the statute.**— Prior to the preceding enactment there was no statute relating to intoxication as a defense in criminal trials, but such defense was often interposed, and the courts passed upon it in the light of the common law. It was held that intoxication merely is not insanity, and where it was voluntary, could never afford an excuse, nor even a palliation for crime. *Carter v. S.*, 12 Tex. 500; *Zrembrod v. S.*, 25 Tex. 519; *Colbath v. S.*, 2 App. 391. But it was further held, that *mania a potu* or *delirium tremens* is a species of insanity, and excuses unlawful acts, although the intoxication which caused it may have been voluntary. *Carter v. S.*, 12 Tex. 500; *Zembrod v. S.*, 25 Tex. 519; *Erwin v. S.*, 12 App. 700. See, also, the following other decisions upon the subject: *Johnson v. S.*, 1 App. 146; *Wenz v. S.*, Id. 36; *Loza v. S.*, Id. 488; *Colbath v. S.*, 4 App. 76; *McCarty v. S.*, Id. 46; *Brown v. S.*, Id. 275; *Payne v. S.*, 5 App. 35; *Pugh v. S.*, 2 App. 536; *Walker v. S.*, 7 App. 627; *Thomas v. S.*, 40 Tex. 36; *Tarrer v. S.*, 42 Tex. 265; *Ferrell v. S.*, 43 Tex. 503; *Outlaw v. S.*, 34 Tex. 481; *Jeffries v. S.*, 9 App. 598; *Gaitan v. S.*, 11 App. 544; *Scott v. S.*, 12 App. 31.

§94 — **Decisions under the statute.** — In a murder case, the following charge upon the issue of intoxication was held to be in accordance with the statute, viz.: "You are charged that intoxication produced by the voluntary recent use of ardent spirits constitutes no excuse for the commission of crime; nor does intoxication mitigate either the degree or the penalty of crime. However, in a case where the defendant is accused of murder, as in the case before you, you may take into consideration the mental condition of the defendant for the purpose of determining the degree of murder, if you should find him guilty of murder." *Charles v. S.*, 13 App. 658. In *Burkhard v. S.*, 18 App. 699, which was a murder case, it is said: "There was evidence tending to prove that at the time the defendant committed the homicide he was temporarily insane from the use of ardent spirits. This evidence of itself demanded that the issue of murder in the second degree should be submitted to the jury, as it is provided by statute that such temporary insanity may be proved for the purpose of determining the degree of murder of which the defendant may be found guilty. See, also, *Ward v. S.*, 19 App. 664; *Bramlette v. S.*, 21 App. 611.

§95 — **ART. 41. — Officer justified when.**— A person in the lawful execution of a written process, or verbal order from a court or magistrate, is justified for any act done in obedience thereto. [O. C. 43.]

See Post, Arts. 227, and 557 et seq. C. C. P. Arts. 53, 54, 112, 114, 116, 117, and Chaps. 1 and 2 of Title 5.

§96 — **ART. 42. — Peace officer justified, when.**— A peace officer is in like manner justified for any act which he is bound by law to perform, without warrant or verbal order. [O. C. 44.]

See Ante, § 95, and citations thereunder.

§97 — **ART. 43. — Duress a defense, when.** — A person forced by threats or actual violence to do an act, is not liable to punishment for the same. Such threats, however, must be —

1. Loss of life or great personal injury.

2. They must be such as are calculated to intimidate a person of ordinary firmness.

3. The act must be done when the person threatening is actually present.

The violence intended by this article must be such actual force as restrains the person from escaping, or such ill-treatment as is calculated to render him incapable of resistance. [O. C. 45.]

See *Stanley v. S.*, 16 App. 392.

§98 — ART. 44. — **Accidents excused, when.** — No act done by accident is an offense, except in certain cases specially provided for, where there has been a degree of carelessness or negligence which the law regards as criminal. [O. C. 46.]

See *Clark v. S.*, 19 App. 495; *Pierce v. S.*, 21 App. 540; *McCoy v. S.*, 25 Tex. 33. See, also, Post §§ 104-105.

§99 — ART. 45. — **No mistake of law excuses.** — No mistake of law excuses one committing an offense; but if a person laboring under a mistake, as to a particular fact, shall do an act which would otherwise be criminal, he is guilty of no offense. [O. C. 47.]

See Ante §§ 38-39. Also, *Watson v. S.*, 13 App. 76; *Alonzo v. S.*, 15 App. 378; *Price v. S.*, 18 App. 474; *Pressler v. S.*, 13 App. 95; *Heskew v. S.*, 14 App. 606; *Tardiff v. S.*, 23 Tex. 169; *Chaplin v. S.*, 7 App. 87; *S. v. Sparks*, 27 Tex. 705; *Donahue v. S.*, 28 App. 457; *Shaw v. S.*, Id., 493.

§100 — ART. 46. — **Mistake of fact excuse, when.** — The mistake as to fact which will excuse, under the preceding article, must be such that the person so acting under a mistake, would have been excusable had his conjecture as to the fact been correct; and it must also be such mistake as does not arise from a want of proper care on the part of the person committing the offense. [O. C. 48.]

§101 — “**Proper care**” is an issue of fact. — Proper care in avoiding mistake of fact, is a question which is controlled by the particular facts of the case, and is an issue which is to be determined by the jury upon the evidence adduced. The court, in its charge upon this issue, should give the two preceding articles, without attempting to define the meaning of the words “proper care.” Those words are not technical, having a fixed legal meaning, but are plain, common, well understood words, and need no explanation. *Watson v. S.*, 13 App. 76; *Halles v. S.*, 15 App. 93.

§102 — **Mistake must be as to an existing fact.** — Information to the accused concerning a matter which, if true, would render it probable that the fact about which he claims to have been mistaken might therefore exist, is not an existing fact, supposed or real, concerning which he could be mistaken. A delusion as to facts, created under such circumstances is a “want of care” on his part. *Tardiff v. S.*, 23 Tex. 169.

§103 — **Preceding articles 45 and 46 not applicable, when.** — Articles 45 and 46 of this Code, refer to acts “otherwise criminal,” or acts in themselves criminal if unexcused, and not to acts which become criminal only when committed with a fraudulent or felonious intent. *Bray v. S.*, 41 Tex. 203; *Neely v. S.*, 8 App. 64. See, also, *Pressler v. S.*, 13 App. 95.

§104 — ART. 47. — **Act done by mistake a felony, when.** — If one intending to commit a felony, and in the act of preparing for or executing the same, shall, through mistake or accident, do another act, which, if voluntarily done, would be a felony, he shall receive the punishment affixed by law to the offense actually committed. [O. C. 49.]

See Post, § 162.

§105 — **Decisions under preceding Article.** — If A. shoots at B., with express malice, and by accident kills C., the offense is murder in the second degree. *McCoy v. S.*, 25 Tex. 33; *Bean v. Matthieu*, 33 Tex. 591; *Angell v. S.*, 36 Tex. 542; *Ferrell v. S.*, 43 Tex. 503; *Taylor v. S.*, 3 App. 387; *Halbert v. S.*, Id. 656; *McConnell v. S.*, 13 App. 390; *Clark v. S.*, 19 App. 495. But if the act committed is the unintentional homicide of a different person from the one intended, and is without malice, and done while the mind is under the immediate influence of sudden passion, arising from an adequate cause, rendering the mind incapable of cool reflection, the crime is manslaughter, because the crime intended was manslaughter. *Clark v. S.*, 19 App. 495. If a party in necessary self-defense accidentally kills a person, it is justifiable homicide. *Plummer v. S.*, 4 App. 310; *Clark v. S.*, 19 App. 495.

§105a — ART. 48. — **Same subject as to misdemeanor.** — If one intending to commit a felony, and in the act of preparing for or executing the same, shall, through mistake or accident, do another act, which if voluntarily done,

would be a misdemeanor, he shall receive the highest punishment affixed by law to the offense actually committed. [O. C. 50.]

See Post, § 162.

**§106—ART. 49.—Felony committed by mistake, &c.—Lowest punishment affixed.**—If one intending to commit a misdemeanor, and in the act of preparing for or executing the same, shall, through mistake, commit an offense which is by law a felony, he shall receive the lowest punishment affixed by law to the offense actually committed. [O. C. 51.]

See Post, § 162.

**§107—ART. 50.—Intention presumed.**—The intention to commit an offense is presumed, whenever the means used is such as would ordinarily result in the commission of the forbidden act. [O. C. 52.]

See Ante, § 28; also, Post, Art. 571-612.

**§108—Ultimate good intent no excuse.**—When a person does a prohibited act, with the intent the law forbids, it will not avail him that he also intended an ultimate good, and if he intended to do what the law forbade, there need not be any other intent. *Phillips v. S.*, 29 Tex. 226.

**§109—Consequences of act intended.**—A man is always presumed to intend that which is the necessary or even probable consequences of his acts, unless the contrary appears. *McCoy v. S.*, 25 Tex. 42; *Aiken v. S.*, 10 App. 610.

**§110—Article 50 should not be given in charge ordinarily.**—It has been held improper in a number of instances to give Article 50 in charge to the jury against the defendant, because the presumption of innocence is stronger than any presumption of guilt arising merely from the means used to accomplish the guilty purpose, and the burden rests upon the State, in a criminal trial, to overcome the presumption of innocence, by establishing the guilt of the accused by legal evidence beyond a reasonable doubt. *Black v. S.*, 18 App., 124; *Jones v. S.*, 13 App. 1; *Thomas v. S.*, 14 App. 200; *Brinkoeter v. S.*, Id. 67; *Luerals v. S.*, 12 App. 257; Post, §§ 111, 112; *Bell v. S.*, 17 App. 538.

**§111—ART. 51.—Burden of proof on defendant, when.**—On the trial of any criminal action, when the facts have been proved which constitute the offense, it devolves upon the accused to establish the facts or circumstances on which he relies to excuse or justify the prohibited act or omission. [O. C. 53].

See Ante, §§ 28, 29, 30.

**§112—Error to give preceding article in charge to jury, when.**—It is frequently an error to give the preceding article in charge to the jury, as it only devolves upon the defendant to show excuse or justification when it fails to appear in the evidence for the prosecution. *De-laney v. S.*, 41 Tex. 601; *Perry v. S.*, 44 Tex. 473; *Brown v. S.*, 4 App. 275; *Ake v. S.*, 6 App. 398; *Leonard v. S.*, 7 App. 567; *Ainsworth v. S.*, 8 App. 532; *Guffee v. S.*, Id. 187; *Jones v. S.*, 13 App. 1; *Brinkoeter v. S.*, 14 App. 67; *Thomas v. S.*, Id. 200; *Burney v. S.*, 21 App. 565.

**§113—When not error to give said article in charge.**—When the defendant relies upon any substantive, distinct, separate and independent matter, as a defense, which is outside of, and does not necessarily constitute a part of the act or transaction with which he is charged, such as insanity, non-age, license to do the act, relationship or the like, then it devolves upon him to establish such special and foreign matter, by a preponderance of evidence. It would not be error in such cases to instruct that the burden of proving such defenses devolved upon the accused. And when a defendant relies upon a defensive fact which is peculiarly within his knowledge, it is not error to instruct that the burden of proving such fact rests upon him. *Jones v. S.*, 13 App. 1; *Thomas v. S.*, 14 App. 206; *Donaldson v. S.*, 15 App. 25; *Leache v. S.*, 22 App. 279.

**§114—Instances in which burden of proof rests upon defendant.**—In the following instances it has been held that the burden of proof rests upon the defendant, viz.: Where the defense is insanity. Ante, § 85. Where the defense is non-age. Ante, § 76. Where the defense is former acquittal. *Hozier v. S.*, 6 App. 501. Where it is claimed by the defendant that the gun, with which the alleged assault was committed, was unloaded. *Caldwell v. S.*, 5 Tex. 18; *Crow v. S.*, 41 Tex. 468; *Forrest v. S.*, 3 App. 232; *Burton v. S.*, Id. 408. In case of theft where defendant claims that he was the *bona fide* owner of the alleged stolen property. *Stoneham v. S.*, 3 App. 595. Where the fact relied upon as a defense is peculiarly within the knowledge of the defendant. *Leonard v. S.*, 7 App. 417; *Lewis v. S.*, Id. 567; *Budges v. S.*, 8 App. 145. When the prosecution is under Art. 749, P. C., for willfully driving stock from its accustomed range, and the State has proved the act of driving, etc. *Owens v. S.*, 19 App. 242.

## TITLE 2—OF OFFENSES AND PUNISHMENTS.

CH. 1. DEFINITION AND DIVISION OF OFFENSES. | CH. 2. PUNISHMENTS IN GENERAL.

## CH. 1.—DEFINITION AND DIVISION OF OFFENSES.

ART.	SEC.	ART.	SEC.
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53. How divided.	116	56. Petty offenses.	120
54. Felonies and misdemeanors defined.	117	57. Subdivision and classification of offenses.	121
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§115 — ART. 52. — “**Offense**” defined. — An offense is an act or omission forbidden by positive law, and to which is annexed, on conviction, any punishment prescribed in this Code. [O. C. 54.]

See Ante, § 1, 3, 6, 7, 8.

§116 — ART. 53. — **How divided.** — Offenses are divided into felonies and misdemeanors. [O. C. 55.]

§117 — ART. 54. — **Felonies and misdemeanors defined.** — Every offense which is punishable by death or by imprisonment in the penitentiary, either absolutely or as an alternative, is a felony; every other offense is a misdemeanor. [O. C. 56.]

§118 — **Preceding article interpreted.** — It is the capacity of an offense to be punished by confinement in the penitentiary, and not that such punishment of necessity follows conviction, that distinguishes crime and separates felonies from misdemeanors; and hence the offenses created by statute, falling precisely within the definition of a felony given by statute — a public offense which *may* (*not must*) be punished by confinement in the penitentiary — are felonies, although under the statute persons convicted thereof may be fined or imprisoned in the county jail. If by the terms of the statute the jury is at liberty to inflict some milder punishment than death or imprisonment in the penitentiary, this discretion does not prevent the offense from being a felony. *Campbell v. S.*, 22 App. 262. The case of *Slak v. S.*, 9 App. 90, in which it was held that the distinction between a felony and a misdemeanor *after* conviction, was determinable by the punishment assessed by the jury, is expressly overruled in *Campbell v. S.*, *supra*.

§119 — ART. 55. — **Felonies subdivided.** — Felonies are either capital or not capital. An offense for which the highest penalty is death, is a capital felony. [O. C. 57.]

§120 — ART. 56. — **Petty offenses.** — An offense, which a justice of the peace, or the mayor, or other officer of a town or city, may try and punish, is called a petty offense. [O. C. 58.]

§121 — ART. 57. — **Subdivision and classification of offenses.** — Offenses are again subdivided, and classed as follows; they are —

1. Offenses against the State, its territory, property and revenue.
2. Offenses affecting the executive, legislative and judicial departments of the government.
3. Offenses affecting the right of suffrage.
4. Offenses which affect the free exercise of religious opinion.
5. Offenses against public justice.
6. Offenses against the public peace.
7. Offenses against public morals, decency and chastity.
8. Offenses against public policy and economy.
9. Offenses against public health.
10. Offenses affecting property held in common for the use of the public.
11. Offenses against trade and commerce, and the current coin.
12. Offenses against the persons of individuals.
13. Offenses against reputation.
14. Offenses against property.
15. Miscellaneous offenses. [O. C. 59.]

## CH. 2. — PUNISHMENTS IN GENERAL.

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§122 — ART. 58. — **Punishments.** — The punishments incurred for offenses under this Code, are —

1. Death.
2. Imprisonment in the penitentiary for life or for a period of time.
3. Imprisonment in the county jail.
4. Forfeiture of civil or political rights.
5. Pecuniary fines. [O. C. 60.]

§123 — ART. 59. — **Continuous offenses suppressed.** — When an offense of which a person is convicted, is in its nature continuous, there shall also be judgment for its suppression. [O. C. 61.]

§124 — ART. 60. — **No forfeiture in capital cases.** — In case of the execution of a convict under sentence of death, or where he is imprisoned for life, there shall be no forfeiture of any kind to the State, nor shall any cost of the prosecution be collected from his estate. [O. C. 62.]

§125 — **Judgment for costs does not vitiate conviction.** — Costs may be adjudged against a convict in a capital case, without vitiating the judgment of conviction, but it is better practice not to enter judgment for costs. *Lanham v. S.*, 7 App. 126.

§126 — ART. 61. — **No forfeiture in any criminal case.** — When a convict is imprisoned in the penitentiary, his property shall be controlled and managed in the manner directed by law; but there shall, in no criminal case, be a forfeiture of property of any kind to the State. [O. C. 63.]

§127 — **Forfeiture unconstitutional.** — By the Act of April 12, 1870, regulating the keeping and bearing of deadly weapons, it was provided that the weapon found on or about the convicted person should be forfeited to the county. This portion of the act was declared to be in violation of §25 of the Bill of Rights of this State. *Jennings v. S.*, 5 App. 298.

§128 — ART. 62. — **Political rights.** — When the penalty affixed to the commission of an offense is deprivation of political rights, such rights are intended to include the rights of holding office, of serving on juries, and of suffrage. [O. C. 64, amended by Act of Feb. 12, 1858, p. 156.]

§129 — ART. 63. — **Double punishment. How fixed.** — Whenever a minimum or maximum punishment is fixed by law, and by reason of any aggravation of the offense, or the existence of any circumstance on account of which the law directs that the punishment be doubled, this shall be construed to mean that the jury shall not inflict less than double the smallest punishment incurred by the law, nor more than double the greatest punishment so incurred. [O. C. 65.]

See Post, §§ 162-164.

§130 — ART. 64. — **Double punishment in misdemeanor.** — If fine and imprisonment are the punishments to be incurred for any offense, and it is provided that the punishment be doubled in any particular case, then the jury are to assess not less than double the smallest, and not more than double

the largest fine prescribed by law, and not more than double the longest period of imprisonment, nor less than double the shortest period of imprisonment so prescribed. [O. C. 66. See Post, §§ 163-164.]

§131 — ART. 65, **Same subject.** — When an offense is punishable by either fine or imprisonment, and as an alternative it is declared that the punishment shall be doubled in any particular case, the jury are to assess not less than double the amount of the smallest fine, nor more than double the amount of the largest fine, or as an alternative they shall not assess less than double the shortest period of imprisonment nor more than double the longest period. This rule applies where there may be more than two kinds of punishment prescribed as alternatives. [O. C. 67.]

§132 — ART. 66. — **Increase of punishment one-half.** — Where it is directed by law that in any particular case the punishment shall be increased one-half, it is to be construed to mean that the jury may, beside the punishment ordinarily prescribed by law, assess such additional punishment as shall not be less than one-half the penalty in ordinary cases, and all the rules before prescribed with respect to offenses which by law incur alternative punishments, are applicable to cases where the penalty is to be so increased. [O. C. 68.]

§133 — ART. 67. — **Decrease of punishment one-half.** — When it is provided that the punishment in any given case, on account of mitigating circumstances, shall be diminished one-half, the jury shall assess one-half of the penalty fixed by law for the offense under ordinary circumstances, and so with regard to any other proportion in which the penalty is directed to be diminished. [O. C. 69.]

§134 — ART. 68. — **Diminution of punishment. What rule.** — In the diminution of punishments, the same rule as to two or more penalties, or as to alternative penalties, shall apply which are prescribed with regard to the increase of punishment. [O. C. 70.]

§135 — ART. 69. — **Capital cases, &c., not included in foregoing rules.** — The foregoing rules, as to increase or diminution of punishments, have no application to cases where the highest penalty may be death, nor to any case where the penalty is total deprivation of civil or political rights. [O. C. 71.]

§136 — ART. 70. — **General verdict of guilty carries death penalty, when.** — Whenever by the provisions of the Penal Code, or other law of the State, it is declared that an offense may be punished by death, or by some other penalty as alternative, the jury may by their verdict find the defendant guilty, and if this be the form of the verdict sentence of death shall be pronounced thereon. But in the cases above mentioned, the jury may in their discretion assess the lighter penalty prescribed by law within the limits so prescribed, and this, when so intended, shall be specially set forth in the verdict. [O. C. 71a; Act Feb. 12, 1858, adding this article as 71a.]

§137 — **Preceding article is not now the rule.** — By the adoption of the Revised Penal Code the penalty for murder has been changed from death absolutely, to the alternative of death or confinement for life in the penitentiary, and the jury must not only find by their verdict that the defendant is guilty of murder in the first degree, but they must assess the punishment at either death or confinement in the penitentiary for life. A general verdict of guilty of murder in the first degree without assessing the punishment, will be insufficient to support a judgment. *Doran v. S.*, 7 App. 385; *Wooldridge v. S.*, 13 App. 443; *C. C. P.*, Art. 712. When under the law the punishment was death absolutely, a general verdict of guilty of the capital offense, without assessing the punishment was sufficient. *Murray v. S.*, 1 App. 418; *Boothe v. S.*, 4 App. 202; *Perry v. S.*, 44 Tex. 78.

§138 — ART. 71. — **Death — How inflicted.** — The punishment of death is inflicted by hanging, as prescribed in the Code of Criminal Procedure. [O. C. 72.]

See C. C. P., Art. 826, et seq. Also 22 App. 464.

§139 — ART. 72. — **Hard labor intended.** — Whenever the penalty, prescribed for an offense, is imprisonment for a term of years in the penitentiary, imprisonment to hard labor is intended. [O. C. 73.]

§140 — ART. 73. — **Officer to be removed, when.** — Whenever an offense is committed by an officer and the same appears to the jury to be a willful violation of duty, they shall so find, and such officer shall be removed from office. [O. C. 75.]

See Rev. Stat., Chap. 2, Title 66, p. 486. O. C. Arts. 74, 76, 79 were not incorporated in revision of 1879.

## TITLE 3—OF PRINCIPALS, ACCOMPLICES AND ACCESSORIES.

### CH. 1. PRINCIPALS. 2. ACCOMPLICES.

### CH. 3. ACCESSORIES. 4. TRIAL OF ACCOMPLICES AND ACCESSORIES.

#### CH. 1.—PRINCIPALS.

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§141 — ART. 74.— **Who are principals.**— All persons are principals who are guilty of acting together in the commission of an offense. [O. C. 214.]

§142 — **Acting together without actual presence.**— All persons are principals who *acted together* in the commission of an offense, although all may not have been *actually present* when the offense was committed. *Welsh v. S.*, 3 App. 412; *Wills v. S.*, 4 App. 20; *Berry v. S.*, Id. 492; *Scales v. S.*, 7 App. 361; *Templeton v. S.*, 5 App. 398; *Corn v. S.*, 41 Tex. 301; *Heard v. S.*, 9 App. 1; *Brown v. S.*, Id. 81; *Cohea v. S.*, Id. 173; *Cook v. S.*, 14 App. 96; *O'Neal v. S.*, Id. 582; *Bean v. S.*, 17 App. 60; *Smith v. S.*, 21 App. 107; *Watson v. S.*, Id. 598; *Wright v. S.*, 18 App. 358; *Truitt v. S.*, 8 App. 148.

§143 — ART. 75.— **Same subject.**— When an offense is actually committed by one or more persons, but others are present, and knowing the unlawful intent, aid by acts, or encourage by words or gestures, those actually engaged in the commission of the unlawful act; or who, not being actually present, keep watch so as to prevent the interruption of those engaged in committing the offense, such person so aiding, encouraging or keeping watch, are principal offenders, and may be prosecuted and convicted as such. [O. C. 215.]

§144 — ART. 76.— **Same subject.**— All persons who shall engage in procuring aid, arms, or means of any kind, to assist in the commission of an offense while others are executing the unlawful act, and all persons who endeavor, at the time of the commission of the offense, to secure the safety or concealment of the offenders, are principals, and may be convicted and punished as such. [O. C. 216.]

§145 — ART. 77.— **Same subject.**— If any one, by employing a child or other person, who cannot be punished, to commit an offense, or by any means, such as laying poison where it may be taken, and with intent that it shall be taken, or by preparing any other means by which a person may injure himself, and with intent that such person shall thereby be injured, or by any other indirect means, cause another to receive an injury to his person or property, the offender, by the use of such indirect means, becomes a principal. [O. C. 217.]

§146 — ART. 78.— **Same subject.**— Any person who advises or agrees to the commission of an offense, and who is present when the same is committed,



is a principal thereto, whether he aids or not in the illegal act. [O. C. 218.]

**§147 — Presence merely does not make party a principal.** — The mere presence of a party at the commission of an offense does not make him a principal. But such presence, in connection with his companionship and his conduct at, before, and after the commission of the act, are circumstances from which participancy may be inferred. *Burrill v. S.*, 18 Tex. 713; *Ring v. S.*, 42 Tex. 282; *Jackson v. S.*, 20 App. 190; *Golden v. S.*, 18 App. 637; *Truitt v. S.*, 8 App. 148.

**§148 — Mere knowledge does not make a principal.** — Mere knowledge that an offense is about to be committed will not make the party a principal. *Tullis v. S.*, 41 Tex. 598. Nor will his knowledge that an offense is being committed, or has been committed. Nor will his failure to give alarm, his silence, inaction, or supposed concealment of the offense. *Golden v. S.*, 18 App. 637; *Ring v. S.*, 42 Tex. 282; *Burrill v. S.*, 18 Tex. 713.

**§149 — Presence and participation.** — If the accused is shown to have been present, and to have acted with and encouraged others in the commission of a crime, he is deemed a principal in such crime, although the act constituting such crime was actually committed by another. *Sharp v. S.*, 6 App. 650; *Mills v. S.*, 13 App. 487; *Dunman v. S.*, 1 App. 593.

**§150 — Act and intent must combine.** — To constitute one a principal with others in the commission of a crime, there must be a combination of both *act* and *intent*. He must *act together* with the others in the commission of the offense, knowing their unlawful intent. *Roundtree v. S.*, 10 App. 110; *Welsh v. S.*, 3 App. 413. In some instances his liability as a principal is determined, not by the acts and intent of those with whom he is acting, but by his own act and intent. Thus, if one brother finds another in a conflict and rushes to his aid, his amenability to punishment depends upon his own act and intent, and not upon the act and intent of his brother. *Guffee v. S.*, 8 App. 187. So, if in a joint unlawful undertaking, one commits a felony beyond the purview or original enterprise, without the foreknowledge of his confederates, the others are not liable therefor, although the act was done to facilitate the escape of all. *Mercersmith v. S.*, 8 App. 211.

**§151 — Each liable for the act of the others, when.** — If several combine to commit an offense, all are amenable for whatever offense resulted from the acts of each done in accordance with their common plan. *Cox v. S.*, 8 App. 254; *Blum v. S.*, 20 App. 578; *Mills v. S.*, 13 App. 437; *Kirby v. S.*, 23 App. 13.

**§152 — Acts and declarations of each evidence against all.** — If two or more act together, with unlawful intent, in the perpetration of a crime, they are co-conspirators and principal offenders by reason of their common design and co-operation, and whether they be indicted and tried jointly or separately, the antecedent acts or declarations of each, pending and in pursuance of the common design, and tending to throw light upon its execution or upon the motive or intent of its perpetrators, are competent evidence against each and all of them. *Coş et al. v. S.*, 8 App. 254; *Avery v. S.*, 10 App. 199; *Cruitt v. S.*, 41 Tex. 476; *Blum v. S.*, 20 App. 578.

**§153 — Principals in manslaughter.** — The law of principals in crime applies as well to manslaughter as to any other offense. Though there can be no accomplice in manslaughter, several persons may so act together as to become principals in its commission. *Cartwright v. S.*, 16 App. 473; *Ogle v. S.*, Id. 361.

**§154 — Indictment against a principal.** — An indictment charging the accused as a principal offender, need not aver the particular acts or facts which inculpates him as a principal, rather than as an accomplice or accessory. *Tuller v. S.*, 8 App. 501; *Williams v. S.*, 42 Tex. 392; *Mills v. S.*, 13 App. 487; *Willson's Cr. Forms*, 532.

**§155 — When charged as principal cannot be convicted as an accomplice.** — Under an indictment charging the accused as a principal, he cannot be convicted upon evidence which shows that he was an accomplice or accessory and not a principal. *Bean v. S.*, 17 App. 60; *Golden v. S.*, 18 App. 637; *Trimble v. S.*, Id. 632; *Truitt v. S.*, 8 App. 148; *McKean v. S.*, 7 App. 631; *Sims v. S.*, 10 App. 131.

## CH. 2. — ACCOMPLICES.

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§156 — **ART. 79. — Accomplice — Who is.** — An accomplice is one who is not present at the commission of an offense, but who, before the act is done, advises, commands or encourages another to commit the offense; or,

Who agrees with the principal offender to aid him in committing the offense, though he may not have given such aid; or,

Who promises any reward, favor or other inducement; or threatens any injury in order to procure the commission of the offense; or,

Who prepares arms or aid of any kind, prior to the commission of an offense, for the purpose of assisting the principal in the execution of the same. [O. C. 219.]

“Accomplice Testimony” see C. C. P., Art. 741.

§157 — **Distinction between principal and accomplice.** — The distinction between a principal and an accomplice is stated as follows: The acts constituting an accomplice are auxiliary only, all of which may be, and are performed by him, anterior and as inducements to the crime about to be committed, whilst the principal offender not only may perform some antecedent act in furtherance of the commission of the crime, but, when it is actually committed, *is doing his part of the work* assigned him in connection with the plan and furtherance of the common purpose, whether he be present where the main fact is to be accomplished, or not. When the offense is committed by the perpetration of different parts which constitute one entire whole, it is not necessary that the offenders should be in fact together at the perpetration of the offense, to render them liable as principals. In other words an accomplice, under our statute, is one who has *completed his offense before the crime is actually committed*, and whose liability attaches after its commission by virtue of his previous acts in bringing it about through the agency of, or in connection with third parties. The principal offender acts his part individually, in furtherance of and *during the consummation* of the crime. The dividing line between the two is the commencement of the commission of the offense. If the parties *acted together* in the *commission* of the offense, they are principals. If they *agreed* to commit the offense together, but did not *act together* in its commission, the one who *actually* committed it, is the principal, while the other, who was not present at the commission, and who was not in any way aiding in its commission, as by keeping watch, or by securing the safety or concealment of the principal, would be an accomplice. To constitute a *principal*, the offender must either be present where the crime is committed, or he must do some act during the time when the offense is being committed which connects him with the act of commission in some of the ways named in the statute. Where the acts committed occur *prior* to the commission of the principal offense, or *subsequent* thereto, and are independent of, and disconnected with, the *actual commission* of the principal offense, and no act is done by the party during the commission of the principal offense in aid thereof, such party is not a principal offender, but is an accomplice or accessory according to the fact. *Bean v. S.*, 17 App. 60; *Phillips v. S.*, Id. 169; *Cook v. S.*, 14 Id. 96; *O’Neal v. S.*, 14 App. 582.

§158 — **Same as accessory before the fact.** — Under our Code an accomplice is the same substantially, as an accessory before the fact at common law. *McKeen v. S.*, 7 App. 631; *Vincent v. S.*, 9 App. 46; *Hancock v. S.*, 14 App. 392; *Ogle v. S.*, 16 App. 361.

§159 — **Concealment of knowledge of offense.** — The mere concealment of knowledge that an offense is about to be committed will not, of itself, render a party an accomplice. *Noftsinger v. S.*, 7 App. 801; *Rucker v. S.*, Id. 549.

§160 — **ART. 80. — Precise offense need not be committed.** — To render a person guilty as an accomplice, it is not necessary that the precise offense which he may have advised, or to the execution of which he may have given encouragement or promised assistance, should be committed; it is sufficient that the offense be of the same nature, though different in degree, as that which he so advised or encouraged. [O. C. 220.]

§161 — **ART. 81. — Punishment.** — Accomplices shall, in all cases not otherwise expressly provided for, be punished in the same manner as the principal offender. [O. C. 220a.]

§162 — **ART. 82. — Where one offense is attempted and another committed.** — If in the attempt to commit one offense, the principal shall by mistake or accident commit some other under the circumstances set forth in articles 47, 48 and 49, the accomplice to the offense originally intended shall, if both offenses are felonies by law, receive the punishment affixed to the lower of the two offenses; but if the offense designed be a misdemeanor, he shall receive the highest punishment affixed by law to the commission of such misdemeanor, whether the offense actually committed be a misdemeanor or a felony. [O. C. 221.]

§163 — ART. 83. — **If principal is under seventeen, punishment doubled.** — If the principal in an offense less than capital be under the age of seventeen years, the punishment of an accomplice shall be increased so as not to exceed, however, double the penalty affixed to the offense in ordinary cases. [O. C. 222.]

§164 — ART. 84. — **If accomplice is parent, master, guardian, or husband to principal, punishment increased.** — If the accomplice stands in the relationship of parent, master, guardian or husband to the principal offender, he shall, in all such cases, receive the highest punishment affixed to the offense, and the same may, in felonies less than capital, be increased by the jury to double the highest penalty which would be suffered in ordinary cases. [O. C. 223.]

§165 — ART. 85. — **No accomplice in manslaughter or negligent homicide.** — There may be accomplices to all offenses, except manslaughter and negligent homicide. [O. C. 224.]

Cited in *Ogle v. S.*, 16 App. 361; *Cartwright v. S.*, Id. 473.

§166 — **Accomplice must be indicted as such.** — An accomplice must be indicted *as such*. If charged as a principal, proof showing him to have been a principal, will not sustain the charge. *McKeen v. S.*, 7 App. 631; *Sims v. S.*, 10 App. 131; *Truitt v. S.*, 8 App. 148; *Willson's Cr. Forms*, 533-538.

### CH. 3. — ACCESSORIES.

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87. Who cannot be.	168	Domestic servant, defined.	170a
88. How punished.	169		

§167 — ART. 86. — **Who is an accessory.** — An accessory is one who, knowing that an offense has been committed, conceals the offender, or gives him any other aid in order that he may evade an arrest or trial, or the execution of his sentence. But no person who aids an offender in making or preparing his defense at law, or procures him to be bailed, though he afterwards escape, shall be considered an accessory. [O. C. 225.]

§168. — ART. 87. — **Who cannot be.** — The following persons cannot be accessories :—

1. The husband or wife of an offender.
2. His relations in the ascending or descending line, by consanguinity or affinity.
3. His brothers and sisters.
4. His domestic servants. [O. C. 226.]

§169 — ART. 88. — **How punished.** — Accessories to offenses shall be punished by the infliction of the lowest penalty to which the principal in the offense would be liable. [O. C. 227.]

§170 — **Indictment against.** — An indictment against one as accessory to another in the commission of an offense must charge the accessory *as such*, and must charge the principal with the offense committed. *Poston v. S.*, 12 App. 408. It need not negative the exceptions contained in Article 87. *S. v. Smith*, 24 Tex. 285; *Willson's Cr. Forms*, 539.

§170a — **"Domestic servant" defined.** — A "domestic servant;" is one who resides in the same house with the master — a servant or hired laborer residing with a family. It does not extend to workmen and laborers employed out of doors. *Wakefield v. S.*, 41 Tex. 556.

Also see 21 App. 663.

## CH. 4. — TRIAL OF ACCOMPLICES AND ACCESSORIES.

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**§171 — ART. 89. — Accomplice may be tried before principal.** — An accomplice may be arrested, tried, and punished, before the conviction of the principal offender, and the acquittal of the principal shall not bar a prosecution against the accomplice, but on the trial of an accomplice the evidence must be such as would have convicted the principal. [O. C. 228.]

See Arnold v. S., 9 App. 435.

**§171a — ART. 90. — Accessory also, unless principal is arrested.** — An accessory may in like manner be tried and punished before the principal, when the latter has escaped, but if the principal is arrested, he shall be first tried, and, if acquitted, the accessory shall be discharged. [O. C. 229.]

**§171b — Death of principal discharges.** — The death of the principal is not equivalent to an escape, and in such a contingency the accessory must be discharged. S. v. McDaniel, 41 Tex. 229.

**§171c — Conviction of principal of another offense does not discharge.** — A conviction of the principal for another offense and his confinement in the penitentiary does not entitle the accessory to a discharge. Hernandez v. S., 4 App. 425.

**§171d — Evidence must establish guilt of principal.** — To warrant the conviction of an accomplice or an accessory the evidence must establish the guilt of the principal, as though the principal himself were on trial. Arnold v. S., 9 App. 435; Poston v. S., 12 App. 408.

**§171e — ART. 91. — Cannot be witnesses for each other, but may sever.** — Persons charged as principals, accomplices, or accessories, whether in the same indictment or by different indictments, cannot be introduced as witnesses for one another, but they may claim a severance; and if any one or more be acquitted, they may testify in behalf of the others. [O. C. 230.]

See C. C. P., Arts. 731-741.

**§171f — When may be used as witnesses.** — The State can use a principal, accomplice or accessory as a witness pending indictment. Myers v. S., 3 App. 8. And such witnesses may be used by the defendant when they have been acquitted, or when the prosecution as to them has been dismissed. C. C. P., Art. 731; Warfield v. S., 35 Tex. 736. So when such a witness has been fined and has paid his fine. Ellige v. S., 24 Tex. 78; Tilley v. S., 21 Tex. 200. But pending an indictment for the same offense against the witness, his testimony cannot be used by the defendant. Rutter v. S., 4 App. 57; Booth v. S., 4 App. 202; Helm v. S., 20 App. 41. A co-defendant is not competent as a supporting witness on a motion for new trial, unless no evidence was developed against him. Delaney v. S., 41 Tex. 601. The rule of exclusion extends, in a case of theft, to a "receiver" of the stolen property. Crutchfield v. S., 7 App. 65.

**§171g — Acts and declarations of principal as evidence.** — The acts and declarations of the principal may be proved to establish his guilt, but if there be no proof *aliunde* of conspiracy between the defendant and the principal, the jury should be instructed not to consider such evidence as proof of any other issue than the guilt of the principal. Arnold v. S., 9 App. 435.

**§171h — Charge of court as to reasonable doubt.** — If there be a reasonable doubt as to the guilt of the principal the accessory cannot be held guilty. It is therefore the duty of the court to charge the law of reasonable doubt as to the guilt of the principal as well as to that of the accessory. Poston v. S., 12 App. 408.

## TITLE 4—OF OFFENSES AGAINST THE STATE, ITS TERRITORY, PROPERTY AND REVENUE.

- CH. 1. TREASON.  
 2. MISPRISION OF TREASON.  
 3. MISAPPLICATION OF PUBLIC MONEY.  
 4. OF ALLEGED CONTRACTS AFFECTING THE STATE.  
 5. COLLECTION OF TAXES AND OTHER PUBLIC MONEY.

- CH. 6. DEALING IN FRAUDULENT LAND CERTIFICATES.  
 7. DEALING IN PUBLIC LANDS BY OFFICERS.

### CH. 1.—TREASON.

ART.	SEC.	ART.	SEC.
92. "Treason" defined.	172	93. Punishment.	172a

§172 — ART. 92. — "Treason" defined.— Treason against the State shall consist only in levying war against it, or adhering to its enemies, giving them aid and comfort. [Cons., art. 1, sec. 22; O. C. 231.]

Indictment for, Willson's Cr. Forms, 10-11.

§172a — ART. 93. — Punishment. — If any citizen of this State be guilty of treason, he shall suffer death, or imprisonment in the penitentiary for life, at the discretion of the jury. [O. C. 232.]

### CH. 2. — MISPRISION OF TREASON.

ART.	SEC.	ART.	SEC.
94. Misprision of treason defined.	173	95. Punishment.	173a

§173 — ART. 94. — "Misprision of treason" defined.— Whoever shall know that another person has committed treason, or is intending so to do, and shall not, within five days from the time of his having come to such knowledge, give information of the same to the governor, or to some magistrate or peace officer of the State, shall be deemed guilty of misprision of treason. [O. C. 233.]

Indictment for, Willson's Cr. Forms, 12.

§173a — ART. 95. — Punishment — The punishment for misprision of treason is confinement in the penitentiary for a term not less than two nor more than seven years. [O. C. 233, amended by Act Feb. 12, 1858, pp. 157, 158.]

## CH. 3.— MISAPPLICATION OF PUBLIC MONEY.

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97. Using public funds.	175	103. Misapplication of county or city funds.	182
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§174 — ART. 96. — **Officer fraudulently taking or misapplying public money.** — If any officer of the government, who is by law a receiver or depositary of public money, or any clerk or other person employed about the office of such officer, shall fraudulently take, or misapply, or convert it to his own use, any part of such public money, or secrete the same with intent to take, misapply, or convert it to his own use, or shall pay or deliver the same to any person, knowing that he is not entitled to receive it, he shall be punished by confinement in the penitentiary for a term not less than two nor more than ten years. [O. C. 235; amended by Act Feb. 12, 1858, p. 158.]

Indictment, Willson's Cr. Forms, 13.

§175 — ART. 97. — **Using public funds.** — Within the term, "misapplication of public money," are included the following acts: —

First — The use of any public money, in the hands of any officer of the government, for any purpose whatsoever, save that of transmitting or transporting the same to the seat of government, and its payment into the treasury;

Second — The exchange, by any officer, of one character of public funds in his hands, for those of another character; the purchase of bank checks or post-office orders, in exchange, for transmission to the treasury, is not included in this class;

Third — The deposit, by an officer of the government, of public money in his hands, at any other place than the treasury of the State, when the treasury is accessible and open for business, or permitting the same to remain on deposit at such forbidden place, after the treasury is open;

Fourth — The purchase of State warrants or other evidence of State indebtedness, by any officer of the government, with public money in his hands;

Fifth — The retention in his hands, by any collector of taxes, of any funds belonging to the State for thirty days after receiving notice from the comptroller of public accounts, to pay the same over to the treasurer, as prescribed in article 4761 of the Revised Civil Statutes;

Sixth — The willful failure of any officer to pay into the State treasury, at the time prescribed by law, whatever funds he may have on hand;

Seventh — The special enumeration of cases of misapplication, above set forth, shall not be understood to exclude any case, which, by fair construction of language, comes within the meaning of the preceding language; *provided*, that this article shall not be construed to prevent collectors of taxes from paying warrants drawn by the comptroller in favor of officers living in their district or county, as may be provided by law.

The offenses defined in subdivisions five and six of this article, when committed in any county in this State may be prosecuted in the district court of

Travis county, or in the county where the money was received. [Act April 24, 1879, pp. 165, 166.]

Indictment, Willson's Cr. Forms, 16, 17, 18, 19, 20, 21.

§176 — ART. 98. — **What not included.** — Nothing in the two preceding articles contained shall apply to the sale or exchange of one kind of money for another by the financial officers of the State, when done in pursuance of law. [Act March 15, 1875, p. 180.]

§177 — ART. 99. — **Receiving or concealing misapplied public money.** — If any person shall knowingly and with fraudulent intention receive or conceal any public money which has been taken, converted or misapplied by any officer or employee as set forth in the two preceding articles, he shall be punished by confinement in the penitentiary for a term not less than two nor more than five years. [O. C. 236, amended by Act Feb. 5, 1875, p. 12.]

Indictment, Willson's Cr. Forms, 22.

§178 — ART. 100. — **"Officer of the government" defined.** — Under the term "officer of the government," as used in this chapter, are included the State treasurer and all other heads of departments who, by law, may receive or keep in their care public money of the State; tax collectors, and all other officers who, by law, are authorized to collect, receive or keep money due to the government. [O. C. 237.]

§179 — **Deputy sheriff is an officer, when.** — A deputy sheriff is an "officer of the government" within the meaning of the preceding article when he is authorized to collect taxes. S. v. Brooks, 42 Tex. 62.

§180 — ART. 101. — **State treasurer improperly receiving private funds.** — If the treasurer of this State shall, knowingly, keep or receive into the building, safes, or vaults of the treasury, any money, or the representative of money, belonging to any individual, except in cases expressly provided for by law, he shall be punished by confinement in the penitentiary for a term not less than two nor more than five years. [Act May 3, 1873, pp. 61, 62.]

Indictment, Willson's Cr. Forms, 23.

§181 — ART. 102. — **Diverting special funds.** — If any person shall, knowingly and willfully borrow, withhold, or in any manner divert from its purpose, any special fund, or any part thereof, belonging to or under the control of the State, which has been set apart by law for a specific use, he shall be punished by confinement in the penitentiary for a term not less than two nor more than ten years. [Const. Art. VIII., § 7.]

Indictment, Willson's Cr. Forms, 24.

§182 — ART. 103. — **Misapplication of county or city funds.** — If any officer of any county, city, or town in this State, or any clerk or other person employed by such officer, shall fraudulently take, misapply, or convert to his own use, any money, property, or other thing of value belonging to such county, city, or town, that may have come into his custody or possession, by virtue of his office or employment, or shall secrete the same with intent to take, misapply, or convert it to his own use, or shall pay or deliver the same to any person knowing that he is not entitled to receive it, he shall be punished by confinement in the penitentiary for a term not less than two nor more than ten years.

Indictments, Willson's Cr. Forms, 25-26; Crump v. S., 23 App. 615.

§183 — ART. 104. — **Fraudulently receiving misapplied county or city funds.** — If any person shall, knowingly, and with fraudulent intention, receive or conceal any money or property which has been taken, misapplied, or converted by any officer or employee, as set forth in the preceding article, he shall be punished by confinement in the penitentiary for a term not less than two nor more than five years.

Indictment, Willson's Cr. Forms, 27.

**§184 — ART. 104a. — Officer failing to pay over public money.**

§1. Every tax collector, or other officer or appointee authorized to receive public moneys, who shall willfully and negligently fail to comply with the direction and notification, as prescribed in sections 1 and 2 of the supplement to chapter 4, title xcv of the Revised Civil Statutes, shall be deemed guilty of a felony, and shall be punished by imprisonment in the penitentiary for not less three nor more than ten years.

Prosecutions, for failing to account for and pay over money belonging to the State, under the provisions of this section, shall be conducted in Travis county; and prosecutions for failing to account for, and pay over, moneys belonging to counties, cities and towns, shall be conducted in the county to which such money may belong, or in the county where such city or town is situated. [Supplement Acts 1879. Extra session.]

§2. The provisions of the foregoing section shall be cumulative to the provisions of the above chapter, except where the latter may be in conflict with said section, and the provisions of said chapter, when in conflict with said section, are hereby repealed [Ib.]

Indictment, Willson's Cr. Forms, 28.

**§185 — Civil statute referred to in preceding section.**

§1. All tax collectors, and other officers or appointees authorized to receive public moneys, shall account for all moneys in their hands belonging to the State, and pay the same over to the State treasurer whenever and as often as they may be directed so to do by the comptroller of public accounts; *provided*, that tax collectors shall have thirty days from the date of such direction within which to comply with the same. [Rev. Stat. p. 700.]

§2. All tax collectors, and other officers or appointees authorized to receive public moneys, shall account for all moneys in their hands belonging to their respective counties, cities or towns, and pay the same over to their respective county or city treasurers, whenever and as often as they may be directed so to do by their respective county judges, county commissioners' courts, or mayors, or boards of aldermen; *provided*, that tax collectors shall have ten days, from the date of such direction, within which to comply with the same.

§3. The notification and direction, provided for in the preceding sections, may be verbal, written or by telegram; and if written or by telegram, proof of the deposit in the post-office or telegraph office of such notification and direction, with postage or charges duly prepaid, and correctly addressed, shall be *prima facie* evidence of the fact of such notification and direction having been given, and of the time when the same was given.

§4. The provisions of the above three sections shall be cumulative to the provisions of the foregoing chapter, except where the latter are in conflict therewith; and any provisions of said chapter, in conflict with the provisions of said sections, are hereby repealed. And any one failing, willfully and negligently, to comply with the provisions of said sections, shall be punished as prescribed in supplement to chapter three, title iv of the Penal Code.

**§185a.—ART. 104b.—Collector failing to pay.**—The collectors of taxes shall, at the close of each month, pay over to the State treasurer all moneys collected by them during the month, for the State, excepting such amounts as they are allowed by law to pay in the counties, reserving only their commissions on the same; and to enable them to do so, they may, at their own risk, secure and send the same to the treasurer by express, or in post office orders, at not more than the usual rate of exchange, to be paid by the State; that the collectors of taxes shall pay over to the State treasurer all balances in their



hands belonging to the State, and finally adjust and settle their accounts with the comptroller on or before the first day of May of each year; that the treasurer, whenever he may receive from the collectors of taxes post-office orders, shall collect the same and pay the money so collected into the treasury on the deposit warrant of the comptroller, and the money when so deposited shall be a credit to the tax collector.

IT SHALL BE THE DUTY OF THE COMPTROLLER to enforce a strict observance of the provisions of this article, but no public moneys shall be paid to the comptroller except such as are made payable directly to him as collector of the same under existing statutes, and expressly provided by law to be paid to him as receiver of taxes; and in addition to the reports required by law to be made by tax collectors, they shall make a monthly statement under oath, on forms to be provided by the Comptroller, showing the amounts collected each month and the funds to which they belong.

ANY COLLECTOR OF TAXES FAILING TO COMPLY with the provisions of this article shall be fined in a sum not less than five hundred and not more than one thousand dollars, and each failure to make the required report shall constitute a separate offense; and it shall be the duty of the comptroller to notify the county attorney, or district attorney, of the county in which the collector resides, and the sureties on the bond of said collector, of any failure to comply with the provisions of this law. [Act March 30, 1887, p. 67.]

#### CH. 4.—OF ILLEGAL CONTRACTS AFFECTING THE STATE.

## ART.

## SEC.

105 Contract to charge the State without authority. 186

§186 — ART. 105. — Contract to charge the State without authority.—If any person or officer in this State shall contract with any other person for his service or labor, or for any property of any kind, with intent to charge the State of Texas with the same, and to do which, such person or officer has no authority by law, he shall be fined in any sum not less than one hundred dollars, and not more than two thousand dollars. [Act May 4, 1874, pp. 221, 222.]

Indictment, Willson's Cr. Forms, 29.

## CH. 5—COLLECTION OF TAXES AND OTHER PUBLIC MONEY.

ART.	SEC.	ART.	SEC.
106	Collector extorting excessive taxes, etc.	187	
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§ 187 — ART. 106. — **Collector extorting excessive taxes, etc.** — If any person authorized to collect or receive taxes or other money due the State, shall extort, or attempt to extort from any one, a larger sum than is due, or shall receive any sum of money or other reward as a consideration for granting any delay in the collection of such dues, or for doing any illegal act, or omitting to do any legal act in relation to the collection of such money, he shall be punished by fine not exceeding five hundred dollars. [O. C. 238.]

Indictments, Willson's Cr. Forms, 30-31.

§ 188 — ART. 107. — **Tax officer exacting usury.** — If any assessor or collector of taxes shall advance for a person owing taxes to the government the amount of money so due, and shall charge therefor a rate of interest greater than twelve per centum per annum, he shall be punished in the manner provided in the preceding article. [O. C. 239.]

Indictments Wilson's Cr. Forms 32.

§ 189 — ART. 108. — **Tax officer assuming taxes for reward.** — Within the meaning of the preceding article is included the case of any assessor or collector who fails to collect taxes due, and assumes to be responsible to the government therefor, and receives for such act any compensation or reward. [O. C. 240.]

§ 190 — ART. 108a. — **Collectors failing to forward transcript.**

That the collector of taxes shall keep a book of such size and character as may be necessary, in which shall be entered quarterly, at the following dates, to wit: January 1, April 1, July 1 and October 1, or within ten days thereafter, commencing on July 1, 1879, in which to require the returns to be made under the provisions of this act, the several amounts as shown by such returns for which and upon which any person, firm or association of persons is, or may be liable to a tax upon occupation, under [article 4665] section three of this act, and within fifteen days from the time of receiving and making up the several amounts and the sums due upon such amounts as occupation tax, the collector shall forward to the comptroller of public accounts a transcript or duplicate of the return and the amount as shown by his record; this transcript and the record from which it is taken, to show the amount of such quarterly returns and the tax due thereon from every person, firm or association of persons liable to such tax; and any collector failing to forward such transcript or duplicate, taken from the pages of such collector's record herein provided for, or who shall forward a false or pretended transcript of such account, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than

fifty nor more than five hundred dollars; *provided*, that nothing contained in this act [section] is intended to affect the liability, which in the absence of this statute, would be incurred under any penal enactment of this State. [Supplement to Chap. 1, Title XCV, Rev. Stat., §6, Chap. 134, Acts 1879.]

Indictment, Willson's Cr. Forms, 34.

**§191 — ART. 109. — Obstruction of tax collections.** — If any person shall, by force or threats of force, prevent, or attempt to prevent, the collection of taxes or other money due the State by an officer authorized to enforce such collection, he shall be punished by fine, not less than one hundred nor more than five hundred dollars, and by imprisonment in the county jail not less than three months nor more than one year.

When the means used to prevent the collection are such as to amount to a riot, or unlawful assembly, the punishment shall be that which is prescribed in article 296 of this Code. [O. C. 241.]

Indictment, Willson's Cr. Forms, 35.

**§192 — ART. 110. — Pursuing taxable occupation without license.** — Any person who shall pursue or follow any occupation, calling or profession, or do any act taxed by law, without first obtaining a license therefor, shall be fined in any sum not less than the amount of the taxes so due, and not more than double that sum. [Act March 13, 1875, pp. 94, 95.]

For the occupations which are now taxed. See, Act May 4, 1882, General Laws, 17 Leg., extra session, pp. 18, 19, 20, 21, 22, 23.

**§193 — ART. 111. — Penalty not exclusive.** — Article 110, in chapter 5 of the Penal Code of the State of Texas, shall not be construed so as to effect [?] any civil remedy to enforce the collection of taxes. [P. C. 111, amended by Act March 15, 1881, pp. 34-35.]

**§194 — ART. 112. — Payment of tax bars prosecution.** — Any person prosecuted under article 110 of the Penal Code of the State of Texas shall have the right at any time before conviction to have such prosecution dismissed upon payment of the tax, and all costs of said prosecution, and procuring the license to pursue or follow the occupation for the pursuing which, without license, the prosecution was instituted, and no prosecution shall be commenced against any person after the procuring said license, notwithstanding they may have followed such occupation, calling or profession before procuring said license; *provided*, said license shall cover the time said person has actually followed said occupation, calling or profession. The county clerk shall be entitled to ten cents for issuing the license, to be paid by the person to whom it is issued. [P. C. 112, amended by Act March 15, 1881, pp. 34-35.]

**§195 — Constitutionality of occupation taxes.** — The occupation tax imposed on liquor dealers by the Act of 1873, was held constitutional. *Harris v. S.*, 4 App. 131; *Tonella v. S.*, Id. 325. So, also, was the tax on lawyers, imposed by the Acts of 1873 and 1876. *Langville v. S.*, 4 App. 812; So, also, was the tax on dogs, now repealed. *Ex parte Cooper*, 3 App. 489; *Ex parte Mabry*, 5 App. 93. So, also, the "bell punch" tax of 1879. *Albricht v. S.*, 8 App. 216. So, also, the tax on the Police Gazette, Illustrated News, etc. *Thompson v. S.*, 17 App. 253; *Baldwin v. S.*, 21 App. 591. So, also, the tax on drummers. *Ex parte Asher*, 23 App. 662. See as to taxes on occupations, etc., levied by municipal corporations, *Ex parte Slaren*, 3 App. 667; *Ex parte Gregory*, 1 App. 753; *Ex parte Gregory*, 20 App. 210; *Ex parte Schmidt*, 2 App. 196.

**§196 — Indictment under Art. 110.** — The indictment must allege the amount of taxes due, as that is the basis of the penalty. *Spears v. S.*, 8 App. 467; *Archer v. S.*, 9 App. 78; *Sheffield v. S.*, 14 App. 238; *Rather v. S.*, 15 App. 556. The cases above cited overrule, upon this point, *Carr v. S.*, 5 App. 153; *Harris v. S.*, 4 App. 131; *Langville v. S.*, Id. 313; *Tonella v. S.*, Id. 325; *Munch v. S.*, 3 App. 552. It must further allege the levy of the tax by the commissioners' court. *Crews v. S.*, 10 App. 292. In an indictment for pursuing the occupation of a liquor dealer without payment of the tax, the name of the person to whom the liquor was sold need not be alleged. *Mansfield v. S.*, 17 App. 468. A mere sale of intoxicating liquors without engaging in or pursuing the occupation of selling is not an offense. An indictment, therefore, which charges merely a sale of intoxicating liquors without license charges no offense. But there are certain enumerated acts taxed by law, such as exhibiting a theater, dramatic performance, circus, sleight of hand performance, etc., which are made taxable whether engaged in as an occupation or not, and to commit such acts without paying the tax is a penal offense. In

such cases it would be sufficient to allege the commission of the act without alleging that the defendant engaged in or pursued such acts as an occupation, calling, etc. *Merritt v. S.*, 19 App. 435. The "Illustrated News" and the "Police Gazette" are publications specially enumerated in the statute levying occupation taxes, as among those the sale of which cannot be pursued as an occupation without the payment of the occupation tax. It is not necessary, therefore, that the indictment should describe them further than by name. But if the indictment be with reference to a publication not so specifically named it would be essential to allege the character of such publication and that it was illustrated. *Baldwin v. S.*, 21 App. 591. An indictment for pursuing the occupation of keeping a "pool table" was held bad because it did not allege that it was of a kind with some one or all of those enumerated in the statute levying the tax, and that it was used for profit. *Longenotte v. S.*, 22 App. 61. An indictment alleged that on the 25th day of December, 1883, the defendant followed the occupation, etc. Held, that this was a sufficient allegation of the year in which he followed the occupation, and of the year for which he failed to pay his occupation tax. *Mansfield v. S.*, 17 App. 468. For forms of indictments for this offense, see *Willson's Cr. Forms*, 37, 38, 39, 40, 41, 42, 43.

§197 — **Evidence.** — The levy of the county tax, and the amount of such tax levied must be proved, *Crews v. S.*, 10 App. 292, in order to warrant a conviction for both State and county taxes. But if the State fails to prove the levy of a county tax there may be a conviction as to the State tax. *Mansfield v. S.*, 17 App. 468. No particular form is prescribed by law for an order of the commissioners' court levying an occupation tax, nor is there any statute prescribing the requisites of such an order. See *Wade v. S.*, 22 App. 629, and *Haffin v. S.*, 18 App. 410, for orders held sufficient, and competent as evidence. It is *pursuing* or *following* an occupation, calling or profession, or doing an *act* taxed by law, without first obtaining a license therefor, that constitutes this offense, and therefore the mere *sale* of liquor without obtaining license to sell, is not an offense. In such case it must be proved that the defendant pursued or followed the occupation, or engaged in the business of a liquor dealer. *Merritt v. S.*, 19 App. 435; *Haffin v. S.*, 18 App. 410; *Wills v. S.*, Id. 417; *Stanford v. S.*, 16 App. 331; *La Norris v. S.*, 18 App. 33; *Williams v. S.*, 23 App. 499.

§198 — **Employee of liquor dealer liable.** — An employee of the Pulman Palace Car Company, who as such, sold liquors upon his employers' cars, was held to be "a person engaged in the business" within the meaning of the statute. *La Norris v. S.*, 18 App. 33.

§199 — **ART. 113. — Refusal to render or swear to assessment.** — If any person shall refuse or neglect to make out and render a list of his taxable property when called upon in person by the assessor of taxes or his deputy, or shall fail or refuse to qualify to the truth of his statement of taxable property, or shall fail or refuse to subscribe to any oath or affirmation required by law in the rendition of taxable property, he shall be fined in any sum not less than twenty nor more than one thousand dollars. [Act Aug. 19, 1876, pp. 196, 197.]

§200 — **Indictment.** — Article 113, P. C., must be construed in connection with the provisions of the Civil Statutes which prescribe the duties in this regard of all owners and holders of taxable property, and therefore an indictment based on said articles must allege *the year* for which the defendant's property was assessable. *Berry v. S.*, 10 App. 315; *Haugh v. S.*, 12 App. 343. An indictment under said Article 113 should allege: 1. That the accused was a person required by law to render such list. 2. That he held or owned taxable property on the first day of January of the year for which the property is required to be listed. 3. That he was called upon in person by the assessor of taxes to render a list of his taxable property for the year, naming the year, and stating the time when he was so called upon. 4. That he refused or neglected to make out and render such list of the taxable property held and owned by him on the first day of January of the year for which he was called upon to list. *Caldwell v. S.*, 14 App. 171; *Willson's Cr. Forms*, 44, 45.

§201 — **Prosecution for refusal to render list not maintainable until, etc.** — Article 4716 Revised Statutes authorizes a delinquent to exculpate himself before the board of equalization, for refusal, etc., to render a list of taxable property, and he has until the first Monday in June of the year for which he is delinquent, to give reasons for his refusal, etc. Therefore, a prosecution instituted against him for such refusal, etc., before the expiration of said date, is premature and not maintainable. *Mock v. S.*, 11 App. 56.

§202 — **Property held in fiduciary capacity must be rendered.** — A person is required to render, when called upon for assessment, not only the property owned by him in fact, but as well all property held by him as agent or trustee, or in any other fiduciary capacity. *Downes v. S.*, 22 App. 393.

§203 — **President of national bank must render, etc.** — The president of a national bank when called upon by the assessor to do so, must render a sworn statement showing the number and amount of shares of stock of such bank, and the names of the owners of such shares, and the number and amount of stock owned by each shareholder, and his refusal or neglect to do so, subjects him to punishment under Article 113, P. C. *Downes v. S.*, 22 App. 393; *Gen. Laws*, 19 Leg., Reg. Sess., pg. 105-106.

**NOTE.** — Article 114 of this chapter, submitted by the revisers, was stricken out by the legislature before adopting the Codes.

**§203a.—ART. 114a. — Failure to collect occupation taxes.**—It shall be the duty of the tax collector to make an affidavit before any justice of the peace against any person, firm, or association of persons engaging in or pursuing any occupation on which, under the laws of this State, a tax is imposed—who fails or refuses to pay the same. And any collector of taxes who shall knowingly permit any person, firm, or association of persons to engage in or pursue any occupation on which, by the laws of this State, a tax is imposed, without first paying all legal taxes assessed against such person, firm, or association of persons, for such occupation, for State and county purposes, shall be fined in any sum not less than fifty nor more than five hundred dollars for every such offense; *provided*, that evidence that such collector of taxes has made the affidavit herein required immediately against such person, firm, or association of persons so pursuing an occupation in violation of law, shall be a defense against all prosecutions under this section. [Act Apl. 2, '87, 128.]

**§203b.—ART. 114b. — Failure of dealer to post occupation license.**—**§1.** Any person, firm, or corporation required by the statutes of this State to pay an occupation tax as a retail liquor dealer, shall post and keep posted in a conspicuous place in his or their place or places of business, his or their occupation license for the tax due the State, county, and city on the occupation in which they are engaged. . Said occupation license shall be posted as above specified before any person, firm, or corporation subject to the occupation tax shall engage in business. [Act April 4, 1887, p. 132.]

**§2.** Any person, firm, or corporation failing, neglecting, or refusing to post and keep posted their occupation license, as required in section one of this act, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in double the amount of their occupation tax for each offense, and each day any person, firm, or corporation shall violate the provisions of this act shall constitute a separate offense.

Indictment, Willson's Add. Cr. Forms, No. 255a.

**§3.** If from any cause any certificate of occupation license shall be lost or destroyed, it shall be the duty of the clerk, upon application of the person, firm, or corporation who formerly had such license, to furnish a new certificate for the remainder of the term covered by the license lost or destroyed.

**§4.** Any person violating the provisions of this act may be arrested without warrant by any peace officer, and carried before the nearest justice of the peace for trial; and any peace officer who shall fail or refuse to arrest such person, on his own knowledge, or upon information from some credible person, shall be punished by fine not exceeding five hundred dollars.

Indictment, Add. Cr. Forms, No. 255b.

**§203c.—License may be revoked.**—It is within the power of the legislature to revoke, by general law, a license to sell liquors, for which an antecedent tax had been received by the State. Rowland v. S., 12 App. 418.

**§203d.—ART. 114c. — Officer purchasing property sold for taxes — Penalty for.**—If any sheriff, or collector of taxes of any county in this State, deputy sheriff, or deputy collector, or any employee of such sheriff or collector authorized by him to collect or receive taxes, or to assist in any way in making sales for the collection of taxes, shall in the county where he resides, bid for, purchase, or attempt to purchase, or be in any way interested in the purchase of any property, either real or personal, at any sale of such property, made or attempted to be, for the collection of State and county taxes, or either, he shall be fined not less than ten, nor more than one thousand (\$1,000) dollars and any such officer so offending shall be deemed guilty of official misconduct and upon conviction shall be removed from office. [Act Feb. 9, 1883, p. 7.]

## CH. 6.—DEALING IN FRAUDULENT LAND CERTIFICATES.

ART.	SEC.	ART.	SEC.
115. Purchasing, selling, locating or surveying fraudulent certificates.	204	117. Handling land office files without authority.	206
116. Surveyors locating unapproved certificates.	205		

§204 — ART. 115. — **Purchasing, selling, locating or surveying fraudulent certificates.** — If any person shall purchase or sell any fraudulent or forged certificate for land, or locate or survey, or cause to be located or surveyed, any such certificate, or be in any manner directly or indirectly concerned in the purchasing, selling, locating, or surveying of any such certificate for land, knowing the same to be fraudulent or forged, he shall be punished by confinement in the penitentiary for a term not less than two nor more than five years. [O. C. 242.]

Indictment, Willson's Cr. Forms, 46.

§205 — ART. 116. — **Surveyors locating unapproved certificates.** — It shall not be lawful for any district or deputy surveyor to locate any certificate for land, or to survey any land for any person holding a head-right certificate of the first or second class, unless it be certified under the hand and seal of the clerk of the county court of the county where the certificate was issued, or the county where it is proposed to be located, or under the hand and seal of the commissioner of the general land office, that the same has been reported by the commissioners appointed under an act of Congress to detect fraudulent land certificates, etc., passed January, 1840, as a genuine and legal claim against the government of Texas; and any surveyor offending against the true intent and meaning of this article, shall be deemed guilty of a high misdemeanor, and on conviction shall be fined in any sum not more than five thousand dollars. [O. C. 243.]

Indictment, Willson's Cr. Forms, 47.

§206 — ART. 117. — **Handling land office files without authority.** — If any person shall handle or examine any of the papers, files, or records in the general land office, without the consent of the commissioner or chief clerk, or without the presence and superintendence of a clerk in said office, he shall be fined not less than one dollar nor more than five hundred dollars. [O. C. 244.]

Indictment, Willson's Cr. Forms, 48.

## CH. 7. — DEALING IN PUBLIC LANDS BY OFFICERS.

ART.	SEC.	ART.	SEC.
118. Officers not to deal in public lands.	207	119. Clerks in land offices not to give information.	208

§207 — ART. 118. — **Officers not to deal in public lands.** — If any person who is an officer or clerk in the general land office, or a district surveyor, or deputy district surveyor, or county surveyor, or his deputy, shall directly or indirectly be concerned in the purchase of any right, title, or interest, in any public land, in his own name, or in the name of any other person; or shall take or receive any fee or emolument for negotiating or transacting any business connected with the duties of his office, other than the fees allowed by law, he shall be fined in any sum not exceeding five hundred dollars. [O. C. 244, amended in revising.]

Indictment, Willson's Cr. Forms, 49-50.

§208 — ART. 119. — **Clerks in land office not to give information.** — Any clerk or other employee in the general land office, who shall accept or receive from any person or persons, money, or other thing of value, in consideration of services performed in the designation of vacant land, or in discovering and making known to such person or persons any defects in any file or files or any paper, or document in said office, or who shall perform any work out of office hours, or receive extra compensation in money or otherwise for any work performed in office hours, or who shall handle or interfere with the records and files of said office, except in office hours, shall be fined in any sum not less than one hundred, nor more than five hundred dollars; and, in addition thereto, it shall be the duty of the commissioner of the general land office to immediately discharge such clerk or employee from said office. [Act June 2, 1873, p. 182.]

Indictments, Willson's Cr. Forms, 51-52.

## TITLE 5 — OFFENSES AFFECTING THE EXECUTIVE, LEGISLATIVE AND JUDICIAL DEPARTMENTS OF THE GOVERNMENT.

## CH. 1. BRIBERY.

## | CH. 2. DRUNKENNESS IN OFFICE.

### CH. 1. — BRIBERY.

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	Indictment for.	210	131.	Acceptance of bribe by same.	225
	Actual tender of bribe not necessary.	211	132.	Bribery of same to do any official act.	226
	Officer first suggesting bribe.	212	133.	Bribery of sheriff and peace officers.	217
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122.	Officers specified.	215	134.	Same subject.	230
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123.	Bribery of clerks, etc. of legislative and executive departments.	217	136.	Acceptance of bribe by sheriff, etc.	232
124.	Accepting bribe by same.	218	137.	Bribery of witness.	233
125.	Bribery of auditor, juror, etc.	219		Indictment under preceding article.	234
126.	Acceptance of bribe by same.	220	138.	Acceptance of bribe by witness.	235
127.	Offense complete, when.	221	139.	"Bribe" defined.	236
128.	Bribery of attorneys.	222	140.	Bribe need not be direct.	237
129.	Acceptance of bribe by same.	223			

§209 — ART. 120. — **Bribery of certain officers.** — If any person shall bribe, or offer to bribe, any executive, legislative, or judicial officer, after his election or appointment, and either before or after he shall have been qualified or entered upon the duties of his office, with intent to influence his act, vote, opinion, decision or judgment, on any matter, question, cause or proceeding which may be then pending, or may thereafter by law be brought before such officer in his official capacity, or to do any other act, or omit to do any other act in violation of his duty as an officer, he shall be punished by confinement in the penitentiary, for a term not less than two nor more than five years. [O. C. 250, amended by act of Feb. 12, 1858, p. 159.]

For bribery of electors and officers of election, see, Post, Title VI., Chap. I.

§210 — **Indictment for.** — In order to constitute the crime of bribery, the gift, advantage or emolument, must be bestowed for the purpose of inducing the officer to do a particular act, in violation of his duty, or as an inducement to favor, or in some manner to aid, the person offering the same, or some other person, in a manner forbidden by law, and the gift, advantage or emolument, must precede the act, and this should be charged in the indictment. *Hutchinson v. S.*, 36 Tex. 293. An indictment to bribe an attorney need not state the specific acts to be done or omitted by the attorney. *Reed v. S.*, 43 Tex. 319. An indictment for offering to bribe a district or county attorney must allege the cause or charge and proceeding in which it was sought to influence such officer, or give some definite description of it, so that it will appear to be a matter pending in court in which such officer was required or authorized by law to act in his official capacity. *Collins v. S.*, 25 Tex. Supp. 202; *Willson's Cr. Forms*, 53, et seq.

§211 — **Actual tender of bribe not necessary.** — To constitute the offense of offering to bribe, an actual tender of the bribe is not essential. Any expression of an ability to produce the bribe is all that is necessary to perfect the crime. *O'Brien v. S.*, 6 App. 665.

§212 — **Officer first suggesting bribe.** — Where an officer first suggests his willingness to a person to accept a bribe, and thereby originates the criminal intent, and apparently joins the defendant in a criminal act first suggested by the officer, merely to entrap the defendant, it seems, this would not constitute the offense of offering to bribe the officer. *O'Brien v. S.*, 6 App. 665; *S. C.*, 7 App. 181. But, if the defendant first offered to bribe the officer, no subsequent conduct of the officer would exculpate the defendant. *O'Brien v. S.*, 7 App. 181.



**§213 — ART. 121. — Officer accepting bribe.** — Any legislative, executive or judicial officer, who shall accept a bribe, or consent to accept a bribe, under an agreement, or with an understanding that his act, vote, opinion or judgment, shall be done or given in any particular manner, or upon a particular side of any question, cause or proceeding, which is or may thereafter by law be brought before him, or that he shall make any particular nomination or appointment, or do any other act, or omit to do any act in violation of his duty as an officer, shall be punished by confinement in the penitentiary not less than two nor more than ten years. [O. C. 251, amended in revising.]

Indictment, Willson's Cr. Forms, 54-56-58-60-62-65.

**§214 — Change made in revising.** — Prior to the revision of the Code it was held that an agreement by an officer to accept a bribe was not an offense. *Hutchinson v. S.*, 36 Tex. 293. But the words, "or consent to accept a bribe," were inserted in the foregoing Article by the revisers, with a view, doubtless, to supply the defect therein pointed out by the decision above cited.

**§215 — ART. 122. — Officers specified.** — Under the name of executive, legislative and judicial officers, are included the governor, lieutenant governor, comptroller, secretary of State, State treasurer, commissioner of the general land office, commissioner of insurance, statistics and history, superintendent of public instruction, members of the legislature, aldermen of all incorporated cities and towns in this State, judges of the supreme, district and county courts and of the court of appeals, attorney-general, district and county attorneys, justices of the peace, mayors and judges of such city courts as may be organized by law, county commissioners, and all other city, county and State officials. [O. C. 152, amended by act March 30, 1885, p. 69.]

**§216 — County Attorney. Road Overseer — Held to be officers.** — Prior to the adoption of the Revised Codes, Article 122 did not specify "county attorney" as an officer, as it now does. It was nevertheless held that such officer was within the meaning of said articles, such officer being a judicial one. *S. v. Currie*, 35 Tex. 17. In *Hutchinson v. S.*, 36 Tex. 293, the prosecution was against an overseer of a road for accepting a bribe in that capacity. It was not questioned but that he was such an officer as came within the meaning of Art. 122.

**§217 — ART. 123. — Bribery of clerks, etc., of legislative and executive departments.** — If any person shall bribe, or offer to bribe, any clerk or other officer of either branch of the legislature, or any clerk or employee in any department of the State government, with the intent to influence such officer to make any false entry in any book or record pertaining to his office, or to mutilate or destroy any part of such book or record, or to violate any other duty imposed upon him as an officer, he shall be punished by confinement in the penitentiary not less than two nor more than five years. [O. C. 253, amended by act Feb. 12, 1858, p. 159.]

Indictment, Willson's Cr. Forms, 55.

**§218 — ART. 124. — Accepting bribe by same.** — If any officer named in the preceding article shall accept a bribe so offered, or consent to accept the same, he shall be punished by confinement in the penitentiary not less than two nor more than five years. [O. C. 254, amended by Act Feb. 12, 1858, p. 159.]

Indictment, Willson's Cr. Forms 56.

**§219 — ART. 125. — Bribery of auditor, juror, etc.** — If any person shall bribe, or offer to bribe any auditor, juror, arbitrator, umpire or referee, with intent to influence his decision, or bias his opinion in relation to any cause or matter which may be pending before, or may thereafter by law be submitted to such auditor, juror, arbitrator, umpire or referee, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years. [O. C. 299, amended by Act Feb. 1858, p. 161.]

Indictment, Willson's Cr. Forms, 57.

**§220 — ART. 126. — Acceptance of bribe by same.** — If any juror, auditor, arbitrator, umpire or referee shall accept, or agree to accept a bribe offered for the purpose of biasing or influencing his opinion or judgment, as set forth in the preceding article, he shall be punished by confinement in the penitentiary not less than two nor more than five years. [O. C. 300, amended by Act Feb. 12, 1858.]

Indictment, Willson's Cr. Forms, 58.

**§221 — ART. 127. — Offense complete, when.** — To complete the offenses mentioned in the two preceding articles, it is not necessary that the auditor, umpire, arbitrator, or referee shall have been actually selected or appointed; it is sufficient if the bribe be offered or accepted with a view to the probable appointment or selection of the person to whom the bribe is offered, or by whom it is accepted. Nor is it necessary that the juror shall have been actually summoned; it is sufficient if the bribe be given or accepted in view of his being summoned as a juror or selected as such, to sit in any particular case, civil or criminal. [O. C. 301.]

**§222 — ART. 128. — Bribery of attorneys.** — If any person shall bribe, or offer to bribe any attorney at law, charged with the prosecution or defense of a suit, with intent to induce him to divulge any secret of his client, or any circumstance which came to his knowledge as counsel, to the injury of his client, or with intent to induce him to give counsel, or in any way advise or assist the opposite party, to the injury of his client, in any cause civil or criminal, or to neglect the interests of his client, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years. [O. C. 302, amended by Act Feb. 12, 1858, p. 161.]

Indictment, Willson's Cr. Forms, 59, Ante, § 210.

**§223 — ART. 129. — Acceptance of bribe by same.** — If any attorney at law, charged as above stated with the management of any cause, civil or criminal, shall accept or agree to accept a bribe offered to induce him to divulge any secret of his client, or any circumstance which came to his knowledge as counsel, to the injury of his client, or to give counsel or in any way advise or assist the opposite party to the injury of his client, or to neglect the interests of his client, he shall be punished in the manner provided in the preceding article. [O. C. 303.]

Indictment, Willson's Cr. Forms, 60.

**§224 — ART. 130. — Bribery of clerks of courts.** — If any person shall bribe, or offer to bribe, any clerk or deputy clerk of any court of record, to induce such officer to alter, destroy or mutilate any book, record or paper pertaining to his office, or to surrender to the person offending any book, record or paper for any unlawful purpose, he shall be punished by imprisonment in the penitentiary for a term not less than two nor more than five years. [O. C. 304, amended by Act Feb. 12, 1858, p. 161.]

Indictment, Willson's Cr. Forms, 61.

**§225 — ART. 131. — Acceptance of bribe by same.** — If any clerk, or deputy clerk, of any court of record in this State, shall accept or agree to accept a bribe offered for the purposes enumerated in the preceding article, he shall be punished by imprisonment in the penitentiary for a term not less than two nor more than five years. [O. C. 305, amended by Act Feb. 12, 1858, p. 161.]

Indictment, Willson's Cr. Forms, 62.

**§226 — ART. 132. — Bribery of same to do any official act.** — If any person shall bribe, or offer to bribe, any officer named in article 130, to do any other act not enumerated in said article, in violation of the duties of his office,

or to omit to do any other act incumbent on him as an officer, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years. [O. C. 306, amended by Act Feb. 12, 1858, p. 161.]

§227 — ART. 133. — **Bribery of sheriffs and peace officers.** — If any person shall bribe, or offer to bribe, any sheriff or other peace officer, to permit any prisoner in his custody to escape, he shall be punished by imprisonment in the penitentiary for a term not less than two nor more than five years. [O. C. 307, amended by act Feb. 12, 1858, p. 162.] Willson's Cr. Forms, 63.

§228 — **De facto officer — An offense to bribe, etc.** — Where the indictment charged with offering to bribe a deputy sheriff, it was held sufficient to prove that said deputy sheriff was such *de facto*, and the offense did not depend upon whether he was such officer *de jure*. *Florez v. S.* 11 App. 102.

§229 — **Legality of custody of prisoner cannot be questioned.** — A defendant charged with offering to bribe an officer to release a prisoner, cannot question the manner in which such officer became charged with the custody of such prisoner. Said officer being a deputy sheriff *de facto* and jailor. *Florez v. S.* 11 App. 102.

§230 — ART. 134. — **Same subject.** — If any person shall bribe, or offer to bribe, any sheriff or other peace officer, in any case, civil or criminal, to make a false return upon any process directed to him, or to fail to return any such process, or to summon, or fail to summon, any one to serve on a jury, with a view to produce a result favorable to a particular side in any cause, civil or criminal, he shall be punished by confinement in the penitentiary not less than two nor more than five years. [O. C. 308, amended by Act Feb. 12, 1858, p. 162.] Indictment, Willson's Cr. Forms, 64.

§231 — ART. 135. — **Same subject.** — If any person shall bribe, or offer to bribe, a sheriff or any other peace officer to do any other act not heretofore enumerated, contrary to his duty as an officer, or to omit to do any duty incumbent upon him as an officer, he shall be punished by confinement in the penitentiary not less than two nor more than five years. [O. C. 309, amended by Act Feb. 12, 1858, p. 162.] Willson's Cr. Forms, 64.

§232 — ART. 136. — **Acceptance of bribes by sheriffs, etc.** — If any sheriff, or other executive or peace officer, shall accept or agree to accept a bribe offered, as mentioned in articles 133, 134 and 135, he shall receive the same punishment as is affixed to the offense of giving or offering a bribe in the particular case specified. [O. C. 310, as revised.] Willson's Cr. Forms, 65.

§233 — ART. 137. — **Bribery of witness.** — If any person shall bribe or offer to bribe any witness in any case, either civil or criminal, to disobey a subpoena or other legal process, or to avoid the service of the same by secreting himself, or by any other means, he shall be punished by confinement in the penitentiary not less than two nor more than five years. [Added to O. C. as Art. 310a, by Act Feb. 11, 1860, p. 95.]

§234 — **Indictment under preceding article.** — If the offense be offering a bribe to a witness to *disobey* a subpoena or other legal process, the indictment must allege the issuance of such subpoena or other legal process; but if it be for offering a witness a bribe to *avoid* a subpoena, or other legal process, it need not allege the issuance of a subpoena, or other legal process. *Scoggins v. S.* 18 App. 298; *Brown v. S.* 13 App. 358; *Jackson v. S.* 48 Tex. 421; *Hughes v. S.* Id. 518; Willson's Cr. Forms, 66. In the Form cited, the issuance of a subpoena or other legal process is alleged in the case of an *avoidance*, which is an unnecessary allegation.

§235 — ART. 138. — **Acceptance of bribe by witness.** — If any witness in any case, civil or criminal, shall accept or agree to accept a bribe offered for the purpose or purposes mentioned in the preceding article, he shall be punished by imprisonment in the penitentiary not less than two or more than five years. [Added to O. C. as Art. 310b, by Act Feb. 11, 1860, p. 95.]

Indictment, Willson's Cr. Forms, 67.

§236 — ART. 139. — **"Bribe" defined.** — By a "bribe," as used throughout this Code, is meant any gift, emolument, money, or thing of value, testimonial, privilege, appointment, or personal advantage, or the promise of

either, bestowed or promised, for the purpose of influencing an officer, or other person, such as are named in this chapter, in the performance of any duty, public or official; or as an inducement to favor the person offering the same, or some other person. [O. C. 255, amended in revising. See Const. Art. 16, Sec. 41.]

§237 — ART. 140. — **Bribe need not be direct.** — The bribe, as defined in the preceding article, need not be direct; it may be hidden under the semblance of a sale, wager, payment of a debt, or in any other manner designed to cover the true intention of the parties. The bribe, or the promise thereof, must precede the act which it is intended to induce the person bribed to perform. [O. C. 256.] See Ante, §§ 210-211.

## CH. 2. — DRUNKENNESS IN OFFICE.

ART.	SEC.	ART.	SEC.
141. State or district officer guilty of drunkenness.	238	144. Drunkenness defined.	241
142. "State or district officer" defined.	239	144a. Drunkenness in public place — How punished.	242
143. County or municipal officers guilty of drunkenness.	240		

§238 — ART. 141. — **State or district officer guilty of drunkenness.** — Any State or district officer in this State, who shall be guilty of drunkenness, shall be subject to removal from office in the manner provided by law; and upon conviction thereof, in any court of competent jurisdiction, shall be fined in any sum not less than ten nor more than two hundred dollars. [Act July 31, 1876, pp. 76, 77.] Indictment, Willson's Cr. Forms, 68.

§239 — ART. 142. — **"State or district officer" defined.** — Within the term "State or district officer" are included the governor, lieutenant-governor, the heads of the several executive departments at the capital, and their chief clerks, the judges of the supreme court, court of appeals, and the district courts, district attorneys, members and officers of the senate and house of representatives, and all other officers who derive their appointment directly from State authority.

§240 — ART. 143. **County or municipal officer guilty of drunkenness.** — Any county or municipal officer who shall be guilty of drunkenness, shall, for the first offense, be fined in any sum not less than five and not more than fifty dollars; upon a second conviction for the same offense, he shall be fined not less than fifty nor more than one hundred dollars; and upon a third conviction for the same offense, he shall be fined not less than one hundred nor more than three hundred dollars, and be subject to removal from office in the manner provided by law. [Act July 31, 1876, pp. 76, 77.]

Indictment, Willson's Cr. Forms, 69, 70.

§241 — ART. 144. **"Drunkenness" defined.** — Drunkenness, as used in this chapter, is the immoderate use of any spirituous, vinous or malt liquors to such an extent as to incapacitate an officer from the discharge of the duties of his office, either temporarily or permanently. [Act July 31, 1876, p. 76.]

§242 — ART. 144a. — **Drunkenness in public place — How punished.** —

Any person, who shall get drunk, or be found in a state of intoxication, in any public place, shall be deemed guilty of a misdemeanor, and on conviction before a court of competent jurisdiction, shall be fined in a sum of not more than one hundred dollars for each and every such offense. [Added by legislature in adopting the Revised Code.] Indictment, Willson's Cr. Forms, 71.

## TITLE 6—OF OFFENSES AFFECTING THE RIGHT OF SUFFRAGE.

### CH. 1. BRIBERY AND UNDUE INFLUENCE.

#### 2. OFFENSES BY JUDGES AND OTHER OFFICERS OF ELECTIONS.

### CH. 3. RIOTS AND UNLAWFUL ASSEMBLIES AT ELECTIONS, AND VIOLENCE USED OR MENACED TOWARD ELECTORS.

#### 4. MISCELLANEOUS OFFENSES AFFECTING THE RIGHT OF SUFFRAGE.

### CH. 1 — BRIBERY AND UNDUE INFLUENCE.

ART.	SEC.	ART.	SEC.
145. Bribing of elector.	243	149. Bribery of any person to influence voters.	247
146. Elector accepting a bribe.	244	150. Furnishing money for election purposes.	248
147. Bribery of election officers.	245		
148. Election officer accepting a bribe.	246		

§243 — ART. 145. — **Bribery of elector.** — If any person shall bribe, or offer to bribe, any elector, for the purpose of influencing his vote at any public election he shall be punished by fine not exceeding five hundred dollars. [O. C. 257.]

Indictment, Willson's Cr. Forms, 72.

§244 — ART. 146. — **Elector accepting a bribe.** — If any elector shall accept a bribe offered as set forth in the preceding article, he shall be punished in like manner as is provided with respect to the person offering the bribe. [O. C. 258.]

Indictment, Willson's Cr. Forms, 73.

§245 — ART. 147. — **Bribery of election officers.** — If any person shall bribe, or offer to bribe, any manager, judge, or clerk of a public election, or any officer attending the same, as a consideration for some act done or omitted to be done, or to be done or omitted contrary to his official duty in relation to such election, he shall be punished by fine not exceeding five hundred dollars. [O. C. 259.]

Indictment, Willson's Cr. Forms, 74.

§246 — ART. 148. — **Election officer accepting a bribe.** — If any manager, judge or clerk of an election, or officer attending thereon, shall accept a bribe offered as set forth in the preceding article, he shall be punished in the same manner as is provided in reference to the persons offering the bribe. [O. C. 260.]

Indictment, Willson's Cr. Forms, 75.

§247 — ART. 149. — **Bribery of any person to influence voter.** — If any one shall offer or give a bribe to any person whatever, for the purpose of inducing him to persuade, or by means not amounting to bribery, to procure persons to vote at any public election, for or against any particular candidate, the person so giving or offering, and the person so accepting, shall be punished by fine not exceeding two hundred dollars. [O. C. 261.]

Indictment, Willson's Cr. Forms, 76-77.

§248 — ART. 150. — **Furnishing money for election purposes.** — If any person shall furnish money to another, to be used for the purpose of promoting the success or defeat of any particular candidate, or of any particular question submitted to a vote of the people, he shall be punished by fine not exceeding two hundred dollars. [O. C. 262.]

Indictment, Willson's Cr. Forms, 78.

## CH. 2—OFFENSES BY JUDGES AND OTHER OFFICERS OF ELECTION.

ART.	SEC.	ART.	SEC.
151. Sundry offenses by election officers	249	156. Intimidation by election officer.	254
152. Election officer opening ballots, etc.	250	157. Presiding officer failing to deliver	
153. Election officer divulging vote.	251	ballots.	255
154. Officer corruptly refusing vote.	252	Change in election law by Act of 1887.	256
155. Officer attempting to influence voters.	253	158. Officer giving false certificate.	257

§249 — ART. 151. — **Sundry offenses by election officers.** — If any manager, judge or clerk of an election, shall knowingly make or consent to any false entry on the list of voters, or put into the ballot-box, or permit to be put in, any ballot not given by a voter, or take out of such box, or permit to be taken out, any ballot deposited therein, except in the manner prescribed by law, or change any ballot given by an elector, or make any false return as to the number of votes given for or against any particular candidate, the person so offending shall be punished by fine not less than one hundred dollars nor more than one thousand dollars. [O. C. 264.]

Indictment, Willson's Cr. Forms, 78-79.

§250 — ART. 152. — **Election officer opening ballot, etc.** — Any manager, or other officer of election, who shall unfold or examine any ballot, or who shall examine the indorsement on any ballot by comparing it with the list of voters when the votes are counted or being counted, or who shall examine or permit to be examined by any other person the ballots subsequent to their being received into the ballot-box, except in the manner prescribed by law, shall be punished by confinement in the penitentiary for a term not less than one nor more than two years. [Act Aug. 23, 1876, p. 308, § 16; also, Act April 19, 1879, p. 119.]

Indictment, Willson's Cr. Forms, 80.

§251 — ART. 153. — **Election officer divulging vote.** — Any presiding officer, judge, clerk or other officer of an election, who shall divulge how any person has voted at such an election, from an inspection of the tickets, unless in a judicial investigation, shall be fined in any sum not less than one hundred nor more than five hundred dollars. [Act Aug. 23, 1876, p. 309, § 16; also, Act April 19, 1889, p. 120.]

Indictment, Willson's Cr. Forms, 81.

§252 — ART. 154. — **Officer corruptly refusing vote.** — If any manager, or judge of an election, shall corruptly refuse to receive the vote of any qualified elector, who shows by his own oath, that he is entitled to vote, when his vote is objected to, such manager or judge shall be punished by fine not exceeding two hundred dollars. [O. C. 266.]

As to qualified voters, see Post, § 266; Indictment, Willson's Cr. Forms, 82.

§253 — ART. 155. — **Officer attempting to influence voters.** — Any manager, judge or clerk of an election, who shall, while discharging his duties as such, attempt to influence the vote of an elector, for or against any particular candidate, shall be punished by fine not exceeding two hundred dollars. [O. C. 267.]

Indictment, Willson's Cr. Forms, 88.

§254 — ART. 156. — **Intimidation by election officer.** — Any manager, judge or clerk of an election, who shall, while in discharge of his duties as such, by violence or threats of violence, attempt to influence the vote of an elector for or against any particular candidate, shall be punished by fine, not exceeding one thousand dollars. [O. C. 268.]

Indictment, Willson's Cr. Forms, 83.

**§255 — ART. 157. — Presiding officer failing to deliver ballots.** — Any presiding officer of any election precinct, who shall fail, immediately after such election, to securely box, in the mode prescribed by law, all the ballots cast thereat, and within five days thereafter, to deliver the same to the county clerk of his county, shall be fined not less than fifty nor more than five hundred dollars, and, in addition thereto, may be imprisoned in the county jail for a period not exceeding six months. [Act Aug. 23, 1876, p. 308, § 16; also Act April 19, 1879, p. 119; Act April 4, 1881, p. 97; Act April 9, 1883, pp. 50-51.]

Indictment, Willson's Cr. Forms, 84.

**§256 — Change in election law by act of 1887.** — By the Act of March 14, 1887, Gen. Laws, 20 Leg. p. 22, § 3, the duty of delivering the returns of the election is devolved upon the judges of the election, and not upon the presiding officer as it is under the acts of 1876 and 1881, cited in the margin above. What effect this change may have upon the preceding penal article remains to be decided.

**§257 — ART. 158. — Officer giving false certificate.** — If any officer authorized by law to give a certificate of election shall, knowingly and corruptly, give any false certificate thereof, he shall be punished by fine not exceeding three hundred dollars, and, in addition thereto, may be imprisoned in the county jail for a term not less than one month nor more than one year. [O. C. 269.]

Indictment, Willson's Cr. Forms, 85.

### CH. 3.—RIOTS AND UNLAWFUL ASSEMBLIES AT ELECTIONS, AND VIOLENCE USED OR MENACED TOWARD ELECTORS.

ART.	SEC.	ART.	SEC.
159. Riot at elections.	258	162. Intimidation of electors.	261
160. Unlawful assemblies to prevent.	259	163. Carrying arms about election.	262
161. Tumults, mobs and disturbances at elections.	260	Decisions under preceding article.	263

§258 — ART. 159. — **Riots at elections.** — If any riot be committed at the place of holding a public election, or within one mile of such place, with a design to disturb or influence such election, every person engaged therein shall be punished by a fine not exceeding one thousand dollars. [O. C. 271.]

As to riots, see Post, Title IX, Ch. II; Indictment, Willson's Cr. Forms, 86.

§259 — ART. 160. — **Unlawful assemblies to prevent.** — If any unlawful assembly meet at the place of holding an election, or within a mile thereof, for the purpose of preventing the holding of such election, all persons engaged in such unlawful assembly shall be punished by fine not exceeding five hundred dollars. [O. C. 272.]

As to unlawful assemblies, see Post, Title IX, Ch. I; Indictment, Willson's Cr. Forms, 87.

§260 — ART. 161. — **Tumults, mobs and disturbances at elections.** — If any person shall disturb any election, by inciting or encouraging a tumult or mob, or shall cause any disturbance in the vicinity of any poll or voting place, he shall be punished by fine of not less than one hundred nor more than five hundred dollars, and, in addition thereto, may be imprisoned in the county jail for a period not exceeding one month. [Act Aug. 23, 1876, p. 311, § 25.]

Indictment, Willson's Cr. Forms, 88.

§261 — ART. 162 — **Intimidation of electors.** — If any person shall, by force or intimidation, obstruct or influence, or attempt to obstruct or influence any voter in the free exercise of the elective franchise, he shall suffer the punishment prescribed in the preceding article. [Act Aug. 23, 1876, p. 311, § 25.]

Indictment, Willson's Cr. Forms, 89.

§262 — ART. 163. — **Carrying arms about elections.** — If any person, other than a peace officer, shall carry any gun, pistol, bowie knife, or other dangerous weapon, concealed or unconcealed, on any day of election, during the hours the polls are open, within the distance of one-half mile of any poll or voting place, he shall be punished as prescribed in article 161 of this Code. [Act Aug. 23, 1876, p. 311, § 25.]

Indictment, Willson's Cr. Forms, 90.

§263 — **Decisions under preceding article.** — The preceding article is but a re-enactment of sec. 31 of the Act of March 31, 1873. It is constitutional. *Livingston v. S.* 3 App. 74. That the defendant's life had been threatened and was in danger and that he carried a gun to protect himself, is no defense to a charge under art. 163. *Livingston v. S.* 3 App. 74. Nor is it a defense to such charge that five months before the election the defendant was deputized to execute a warrant. *Snell v. S.* 4 App. 171.



## CH. 4.—MISCELLANEOUS OFFENSES AFFECTING THE RIGHT OF SUFFRAGE.

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§264 — ART. 164.— **Illegal arrest of voter.**— If any magistrate or peace officer shall, knowingly, cause an elector to be arrested in attending upon, going to, or returning from an election, except in cases of treason, felony, or breach of the peace, he shall be punished by fine not exceeding three hundred dollars. [O. C. 270.]

Indictment, Willson's Cr. Forms, 91.

§265 — ART. 165.— **Illegal voting.**— If any person, knowing himself not to be a qualified voter, shall at any election held vote for any officer to be then chosen, or for or against any measure or proposition to be determined by said election, he shall be punished by confinement in the penitentiary not less than two nor more than five years. [O. C. 275, amended by Act March 23, 1887, p. 37.]

Indictment, Willson's Cr. Forms, 92.

§266 — **Qualified voter — Who is, and who is not.**—The following articles of the Revised Statutes will show who are qualified to vote, within the meaning of the preceding article, viz. :—

ART. 1687. The following classes of persons shall not be allowed to vote, to wit: 1. Idiots and lunatics. 2. All paupers supported by any county. 3. All persons convicted of any felony. 4. All soldiers, marines and seamen employed in the service of the army or navy of the United States.

ART. 1688. Every male person who is subject to neither of the disqualifications named in the preceding article, who shall have attained the age of twenty-one years, and who shall be a citizen of the United States, and who shall have resided in the State for one year next preceding an election, and the last six months within the district or county in which he offers to vote, shall be deemed a qualified voter; and every male person of foreign birth, subject to none of the disqualifications aforesaid, who, at any time before an election, shall have declared his intention to become a citizen of the United States in accordance with the federal naturalization laws, and shall have resided in this State one year next preceding such election, and the last six months in the county in which he offers to vote, shall also be deemed a qualified voter.

ART. 1689. Voters in an organized county shall vote in the election precinct in which they reside.

ART. 1665a. Each unorganized county in the State of Texas shall constitute an election precinct, and the commissioners' court of a county to which an unorganized county is attached for judicial purposes shall, by an order duly spread on the minutes of the commissioners' court, designate one place within each unorganized county, at which all elections in such unorganized county shall be held.

Articles 1689 and 1665a are taken from the Act April 4, 1881, p. 97.

**ART. 1690.** The residence of a married man, if not separated from his wife, shall be where his wife resides. If a married man be separated from his wife he shall be considered, as to residence, a single man. The residence of a single man shall be where he usually sleeps.

**ART. 1691.** All qualified voters of the State who shall have resided for six months immediately preceding an election within the limits of any city, town or village, shall have the right to vote for all elective officers of such city, town or village; but in all elections to determine expenditure of money or assumption of debt, only those shall be qualified to vote who pay taxes on property in said city, town or village.

§267 — **ART. 166. — Repeating.** — If any person shall vote, or attempt to vote more than once at the same election, he shall be punished as prescribed in the preceding article. [Act Aug. 23, 1876, p. 310, § 25.]

Indictment, Willson's Cr. Forms, 93.

§268 — **ART. 166a. — Depositing illegal ballots folded together.** — All ballots shall be written or printed on plain white paper without any picture, sign, vignette, device or stamp mark, except the writing or printing in black ink or black pencil of the names of the candidates and the several offices to be filled, and except the name of the political party whose candidates are on the ticket; *provided*, such ballots may be written or printed on plain white foolscap, legal cap or letter paper; *provided*, that all ballots containing the name of any candidate pasted over the name of any other candidate shall not be counted for such candidate whose name is so pasted; and any ticket not in conformity with the above, shall not be counted in counting out the votes, and no ticket, not numbered as provided in this act, shall be counted in counting out the votes, nor shall either of two or more tickets folded together be counted; and any person who shall deposit any ballot except as provided in this section, or shall deposit two or more tickets folded together at any election in this State, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not exceeding one hundred dollars. [Act April 19, 1879, p. 119, § 16.]

Indictment, Willson's Cr. Forms, 94.

§269 — **ART. 167. — Instigating illegal voting.** — Every person who shall procure, aid, assist, counsel, or advise another to give his vote at any election, knowing that the person is not duly qualified to vote, or shall procure, aid, assist, counsel, or advise another to give his vote more than once at such election, shall be fined in a sum not less than one hundred nor more than five hundred dollars, and may, in addition thereto, be imprisoned in the county jail for a period not exceeding one month. [O. C. 276, and Act Aug. 23, 1876, p. 311, § 25.]

Indictment, Willson's Cr. Forms, 95-96.

§270 — **ART. 168. — False swearing by voter.** — If any person challenged as unqualified shall be guilty of willful and corrupt false swearing, in taking any oath prescribed by law, he shall be punished by confinement in the penitentiary not less than two nor more than five years. [O. C. 278.]

Indictment, Willson's Cr. Forms, 97.

§271 — **ART. 169. — Procuring voter to swear falsely.** — Every person who shall willfully and corruptly procure any person to swear falsely, as prescribed in the preceding article, shall be punished by confinement in the penitentiary for any time not exceeding three years, or by fine not exceeding three thousand dollars. [O. C. 279.]

Indictment, Willson's Cr. Forms, 98.

§272 — **ART. 170. — Altering, suppressing, etc., ballots.** — If any person

shall fraudulently alter or obliterate, or willfully secrete, suppress, or destroy any ballots, election return, or certificate of election, he shall be punished by fine not exceeding three thousand dollars. [O. C. 280.]

Indictment, Willson's Cr. Forms, 99-100-101-102.

§273 — ART. 171. — **Failing to deliver returns.** — If any person intrusted with the transmission of an election return, shall willfully do any act that shall defeat the delivery thereof, or shall willfully neglect to deliver the same, as directed by law, he shall be punished by fine not exceeding one thousand dollars. [O. C. 281.]

See Ante, §§ 255-256; Indictment, Willson's Cr. Forms, 103.

§274 — ART. 172. — **Preventing delivery of returns.** — If any person shall take away such election return from any person intrusted therewith, either by force or in any other manner, or shall willfully do any act that shall defeat the due delivery thereof, as directed by law, he shall be punished by fine not exceeding two thousand dollars. [O. C. 282.]

Indictment, Willson's Cr. Forms, 104.

§275 — ART. 173. — **Officer opening ballots.** — Any officer or person with whom may be legally deposited the ballots cast in an election, who shall open and read any ballot, or who shall permit it to be done, except in cases provided for by law, shall be punished by fine not less than fifty nor more than five hundred dollars, and may, in addition thereto, be imprisoned in the county jail not to exceed six months. [O. C. 269a; Act Feb. 12, 1858, p. 160; Act Aug. 23, 1879, p. 120.]

Indictment, Willson's Cr. Forms, 105.

§276 — ART. 174. — **County clerk failing to keep ballot boxes securely.** — If any clerk of the county court, in this State, shall fail, neglect, or refuse to securely keep any ballot box containing tickets of election committed to his custody by the presiding officer of any election precinct, he shall be punished by fine not less than fifty nor more than five hundred dollars, and, in addition thereto, he may be imprisoned in the county jail for a period not exceeding six months. [Act Aug. 23, 1876, p. 308, § 16.]

Indictment, Willson's Cr. Forms, 106.

§277 — ART. 175. — **County clerk failing to destroy ballots.** — If any clerk of the county court, in this State, shall fail, after the expiration of one year from the date of any election, to destroy by burning, all the ballots cast at such election which may have come to his custody, he shall be punished as prescribed in the preceding article. [Act Aug. 23, 1876, p. 308, § 16.]

Indictment, Willson's Cr. Forms, 107.

§278 — ART. 176. — **Not applicable to cases of contest.** — The provisions of the foregoing article shall not apply to cases in which a contest may have grown out of any election, within one year after the date of any such election. [Act Aug. 23, 1876, p. 308, § 16.]

§279 — ART. 177. — **Willful neglect of official duty.** — If any officer on whom a duty is enjoined, in any statute relating to elections, shall be guilty of a willful neglect of such duty, or shall act corruptly, or with partiality, in the discharge of such duty, in any matter not provided for in this title, he shall be fined in a sum not less than one hundred nor more than one thousand dollars. [O. C. 283.]

Indictment, Willson's Cr. Forms, 108.

§280 — ART. 178. — **Keeping open bar-rooms on election day.** — If any person shall open or keep open any bar-room, saloon, or other place, house or establishment where vinous, malt, spirituous, or intoxicating liquors are sold, during any portion of the day on which an election is held for any pur-

pose or office whatsoever, in the voting precinct, village, town, or city where such election is held, or within three miles of any such voting precinct, village, town, or city where such election is held; or shall, in such voting precinct, village, town, or city, or within three miles thereof, sell, barter, or give away any vinous, malt, spirituous or intoxicating liquor, during the day on which any such election is held; or if any person shall carry to the polling place on the day of an election, or in the neighborhood of the same, any intoxicating liquors for the purpose of sale or gift; or if any person shall find and take possession of any intoxicating liquors at or near the polling place, or inform another of the whereabouts of the said intoxicating liquors, he shall be fined not less than one hundred nor more than five hundred dollars. [Act Aug. '23, 1876, p. 310, amended by Act March 23, 1887, p. 36.]

Indictment, Willson's Cr. Forms, 109-110.

§281 — ART. 179. — **Not applicable in what cases.** — The provisions of the preceding article shall not apply to the sale of liquor at any drug store or establishment where drugs are sold for medical purposes, when such sale is made on the day of election, on the prescription of a practicing physician, nor to the sale of liquor by regular wholesale merchants to be shipped or sent out of the county, nor shall such provisions be construed so as to prevent stores from being opened for the sale of other goods, wares, and merchandise, on the day of any election [Act Aug. 20, 1876, p. 310, § 21.]

§282 — **Decisions under article 178 before amended.** — Article 178, as originally enacted in 1876, was held to be not obnoxious to art. 3, sec. 35, of the constitution requiring that an act shall not embrace more than one subject, etc. — that act being entitled, "An act regulating elections." *English v. S.* 7 App. 171. The judges of election, nor any other official can legally permit any establishment named in art. 178 to be kept open in disregard of said article. *English v. S.* 7 App. 171. An indictment for the offense should allege what the election was for. It is not sufficient to allege that an election was then and there held. *Hoskey v. S.* 9 App. 202. And it must allege that the offense was committed in the defendant's voting precinct, village, town or city. *Zweifel v. S.* 16 App. 154; *Smith v. S.* 18 App. 454. *But this allegation would not now be required.* The word "day" as used in art. 178, includes the time elapsing from one midnight to the succeeding one. It is not to be understood as denoting only the hours during which the polls are open. *Haines v. S.* 7 App. 30; *Lawrence v. S.* Id. 192. In a prosecution under art. 178 it was shown that on the morning of the day a special election was to be held, the defendant opened his saloon, and kept it open for a short time, but being informed that it was an election day, he immediately closed it, declaring at the time that he was not aware that an election was to be held on that day. It was held that these facts raised the issue of a mistake of *fact*, not a mistake of *law*, and that said issue should have been submitted to the jury. *Hailes v. S.* 15 App. 93. A prosecution for this offense may be by information as well as by indictment. *Haines v. S.* 7 App. 30.

## TITLE 7—OF OFFENSES WHICH AFFECT THE FREE EXERCISE OF RELIGIOUS OPINION.

CH. 1. DISTURBANCE OF RELIGIOUS WORSHIP. | CH. 2. SUNDAY LAWS.

### CH. 1.—DISTURBANCE OF RELIGIOUS WORSHIP.

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		Other decisions under same article.	285

§283 — ART. 180.—**Disturbance of congregation in any manner.** — Any person who by loud or vociferous talking or swearing, or by any other noise, or in any other manner willfully disturbs any congregation or part of a congregation assembled for religious worship and conducting themselves in a lawful manner, or who willfully disturbs in any manner any congregation assembled for the purpose of conducting or participating in a Sunday-school, or to transact any business relating to or in the interest of religious worship, or a Sunday-school and conducting themselves in a lawful manner, shall be fined in any sum not less than twenty-five nor more than one hundred dollars, and may be imprisoned in the county jail not exceeding thirty days, at the discretion of the jury. [O. C. 284, amended by Act April 23, 1873, p. 43, and by Act Feb. 28, 1883, p. 17.]

Indictment, Willson's Cr. Forms, 111-112.

§284.—**Indictment under preceding article.**—The indictment may charge the offense generally in the language of the statute, without specifying the particular acts done. *Wupperman v. S. 13 Tex. 33; Corley v. S. 3 App. 412; Bush v. S. 5 App. 64; Lockett v. S. 40 Tex. 4.* But the indictment must allege the *manner* of the disturbance, as well in order that it may be determined whether or not the statutory offense has been charged, as that the accused may know the "nature and cause of the accusation against him." It is not necessary in charging the *manner* of the disturbance to enter into details. A general statement, as that it was effected by "loud talking," "swearing," "discharging fire-arms," "whistling," "fighting," or the like will be sufficient. *Kindred v. S. 33 Tex. 67*, holds a contrary doctrine to the above, but that decision was made under a statute materially different from the existing one, and is not now applicable. *Thompson v. S. 16 App. 159.* Where all the prescribed modes of disturbance are charged in one count, as they may be, they must be charged conjunctively. *Copping v. S. 7 App. 61.* If the prosecution be by information, and the information charges the offense sufficiently, it is immaterial that the complaint is very general. *Phants v. S. 2 App. 398; Wood v. S. 11 App. 318.* But the information and the complaint must not be materially variant. *Hefner v. S. 16 App. 573; Wood v. S. 11 App. 318.*

§285 — **Other decisions under same article.**—The statute protects the congregation so long as any of them are on the ground, before, during, and after services. *Dawson v. S. 7 App. 59.* But the congregation must be assembled for some one of the purposes named in the statute, and if it be assembled for business purposes exclusively, to disturb it would not be an offense under this article. *Wood v. S. 11 App. 318.* But the statute has been materially changed since the decision last cited, by making it an offense to disturb a congregation assembled to transact any business relating to, or in the interest of religious worship, or a Sunday-school. Before the change made in the article 180, it was held that the evidence must show that the defendant disturbed the congregation in one of the modes specified in the statute. *Richardson v. S. 5 App. 470.* But as the statute now reads, it is an offense to "in any manner," willfully disturb, etc. The gist of this offense is that it was committed "willfully," that is, with evil intent, or legal malice, or without reasonable grounds for believing the act to be lawful. *Wood v. S. 16 App. 574.* And the evidence must therefore show that the act was *willful*. *Richardson v. S. 5 App. 470.* In a prosecution for this offense, a witness was asked by the prosecution, "Was the manner in which the defendant spoke, calculated to disturb the congregation?" He answered in the affirmative. Both question and answer were objected to by the defendant and it was held that the court erred in not sustaining said objections. It was further held that defendant's questions propounded to the same witness, viz.: "Why was it that defendant called you a d—liar?" "What had you done or said?" were competent, and should have been permitted, not in justification of the offense, but in mitigation of punishment.

Calvert v. S. 14 App. 154. In the following cases, the evidence was held sufficient to support the conviction: McElroy v. S. 25 Tex. 507; Hunt v. S. 3 App. 116; Friedlander v. S. 7 App. 204; Lott v. S. 41 Tex. 121; Dorn v. S. 4 App. 67. In the following cases the evidence was held to be insufficient: Richardson v. S. 5 App. 470; Bush v. S. 6 App. 421; Wood v. S. 16 App. 574.

§286 — ART. 181. — **Offender may be bound over, etc.** — If complaint be made to any magistrate that a person has committed the offense mentioned in the preceding article, he may be, at the discretion of the magistrate, bound over to keep the peace, and to refrain from like disturbance for the term of one year. [O. C. 285.]

For forms relating to peace bonds, see Willson's Cr. Forms, pp. 414-415-416-417.

§287 — ART. 182. — **Double penalty for second offense.** — Double the punishment prescribed in article 180 shall be imposed for any subsequent offense of the same kind. [O. C. 286.]

Indictment, Willson's Cr. Forms, 113.

## CH. 2. — SUNDAY LAWS.

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Sunday.	291	187. Drugs not included.	295
186. Selling goods on Sunday.	292	Decisions under these laws.	296

§288 — ART. 183. — **Working on Sunday.** — Any person who shall hereafter labor, or compel, force, or oblige his employees, workmen, or apprentices to labor, on Sunday, or any person who shall hereafter hunt game of any kind whatsoever on Sunday within one-half mile of any church, school house, or private residence, shall be fined not less than ten nor more than fifty dollars. [Act April 2, 1887, p. 108.]

Indictment, Willson's Cr. Forms, 114-115.

§289 — **Former statutes.** — The preceding article as adopted in the Revised Code, read as follows:—

"Any person who shall hereafter labor, or compel, force or oblige his employees, workmen or apprentices, to labor on Sunday, shall be fined not less than ten nor more than fifty dollars."

It will be observed that the only change made by the amendment, is to make it an offense to hunt game on Sunday within one-half mile of any church, school house or private residence.

§290 — ART. 184. — **Not Applicable, when.** — The preceding article shall not apply to household duties, works of necessity or charity; nor to necessary work on farms or plantations in order to prevent the loss of any crop; nor to the running of steamboats and other water crafts, rail cars, wagon trains, common carriers, nor to the delivery of goods by them or the receiving or storing of said goods by the parties, or their agents to whom said goods are delivered; nor to stages carrying the United States mail or passengers; nor to foundries, sugar mills, or herders who have a herd of stock actually gathered and under herd; nor to persons traveling; nor to ferrymen or keepers of toll-bridges, keepers of hotels, boarding houses, and restaurants and their servants; nor to keepers of livery stables and their servants; nor to any person who conscientiously believes that the seventh or any other day of the week ought to be observed as the Sabbath, and who actually refrains from business and labor on that day for religious reasons. [Act Dec. 2, 1871, p. 62].

§291 — ART. 185. — **Horse-racing, gaming, etc., on Sunday.** — Any person who shall run or be engaged in running any horse race, or who shall permit or allow the use of any nine or ten-pin alley, or who shall be engaged in match-shooting, or any species of gaming for money or other consideration, within the limits of any city or town on Sunday, shall be fined not less than twenty nor more than fifty dollars. [Act Dec. 2, 1871, p. 62.]

Indictment, Willson's Cr. Forms, 116-117-118-119.

§292 — ART. 186. — **Selling goods on Sunday.** — Any merchant, grocer, or dealer in wares or merchandise, or trader in any business whatsoever, or the proprietor of any place of public amusement, or the agent or employee of any such person, who shall sell or barter, or permit his place of business or place of public amusement to be open for the purpose of traffic or public amusement, on Sunday, shall be fined not less than twenty nor more than fifty dollars. The term place of public amusement shall be construed to mean circuses, theaters, variety theaters, and such other amusements as are exhibited and for which an admission fee is charged; and shall also include dances at disorderly houses, low dives, and places of like character, with or without fees for admission. [Act Dec. 2, 1871, p. 62, amended in revising.]

Again amended by Act April 10, 1883, p. 66; and amended lastly by Act April 2, 1887, p. 108.]

Indictment, Willson's Cr. Forms, 120.

§293 — ART. 186a. — **Exceptions from operation of preceding article.** — The preceding article shall not apply to markets or dealers in provisions as to sales of provisions made by them before 9 o'clock a. m., nor to the sale of burial or shrouding material, newspapers, ice, ice cream, milk, nor to the sending of telegraph or telephone messages at any hour of the day, nor to keepers of drug stores, hotels, boarding houses, restaurants, livery stables, bath houses or ice dealers, nor to telegraph or telephone offices. [P. C. 186a, added by Act April 2, 1887, p. 108; Act 1891, Chap. 110, p. 173.]

§294 — **Article 186. — The changes it has undergone.** — Before the changes made in article 186 by the Act of April 2, 1887, amending the Act of April 10, 1883, it read as follows: "Any merchant, grocer, or dealer in wares or merchandise, or trader in any lawful business whatsoever, or the agent or employee of any such persons, who shall sell or barter on Sunday, shall be fined not less than twenty, nor more than fifty dollars; *provided*, this article shall not apply to markets or dealers in provisions as to sales of provisions made by them before nine o'clock a. m., nor the sale of burial or shrouding material; *provided*, the sale of newspapers, ice and milk at any hour in the day shall be permissible; *provided further*, that nothing in this title shall be construed to prevent the sending or receiving of telegraph messages." As adopted in the Revised Code it read as follows: "Any merchant, grocer or dealer in wares or merchandise, or trader in any lawful business whatsoever, who shall barter or sell on Sunday, shall be fined not less than twenty nor more than fifty dollars; *provided*, this article shall not apply to markets or dealers in provisions as to sales made by them before nine o'clock a. m." As enacted by the Act of Dec. 2, 1871, it read as follows: "Any merchant, grocer, or dealer in wares or merchandise, or trader in any lawful business whatsoever, who shall sell or barter on Sunday, between the hours of nine o'clock a. m. and four o'clock p. m., within the limits of any city or town, shall be fined in a sum of not less than twenty nor more than fifty dollars; *provided*, that nothing contained in this Act shall be construed to prohibit the sale of drugs and medicines on Sunday." 2 Pas. Dig., art. 6504.

§295 — ART. 187. — **Drugs not included.** — The preceding article shall not apply to the sale of drugs and medicines on Sunday. [Act Dec. 2, 1871, p. 62.]

§296 — **Decisions under these laws.** — This character of legislation is constitutional. *Gabel v. Houston*, 29 Tex. 336; *Bohl v. S.* 3 App. 683; *Usener v. S.* 8 App. 177. Each act of sale is a separate offense under article 186. *Albrecht v. S.* 8 App. 313; *Mosely v. S.* 18 App. 311. It is necessary, therefore, that the indictment shall, with reasonable certainty specify the sale alleged, as the offense for which the accused is to be tried. An indictment which alleged that the defendant on a certain Sunday sold "merchandise," without describing the merchandise, or naming the person to whom he sold it, or otherwise identifying such sale, was held bad. *Mosely v. S.* 18 App. 311. It is not necessary in the indictment to negative the provisos and exceptions in the statute. *Archer v. S.* 10 App. 482; *Mosely v. S.* 18 App. 311. The indictment should allege that the defendant, at the time of the offense, was a merchant, grocer, dealer in wares and merchandise, or a trader in a lawful business as the case may be, and it is also necessary to prove such allegation. *Archer v. S.* 10 App. 482. An indictment which alleged that the defendant was a "liquor dealer" was held sufficient upon the ground that "liquor" is "merchandise." *Day v. S.* 21 App. 213. When the allegation is that the defendant is a "dealer," proof that he was merely a clerk in the establishment does not sustain the allegation. *Archer v. S.* 10 App. 482. It is immaterial that the purchaser did not pay for the article sold by the defendant. *Elsner v. S.* 30 Tex. 524. A municipal corporation cannot enact a valid ordinance conflicting with art. 186, regulating the hours on Sunday when goods, etc., may be sold, unless specially empowered by the legislature so to do. *Flood v. S.* 19 App. 584, overruling *Craddock v. S.* 18 App. 567. See also *Bohmy v. S.* 21 App. 597; *Angerhoffer v. S.* 15 App. 613. Former jeopardy is a valid defense in prosecutions under the Sunday laws. *Brink v. S.* 18 App. 344. For evidence held insufficient to sustain a conviction for selling on Sunday. See *Caspary v. S.* 14 App. 567. A conviction for selling intoxicating liquor on Sunday is not sustained by proof of the gift of such liquor. *Keller v. S.* 23 App. 259. Where an indictment charged the sale of "whisky" on Sunday, it was held that the charge was sustained by proof that he sold a beverage known as "whisky-cocktail" on Sunday. *Galloway v. S.* 23 App. 398.



## TITLE 8—OF OFFENSES AGAINST PUBLIC JUSTICE.

## CH. 1. OF PERJURY.

## 2. OF FALSE SWEARING.

## 3. OF SUBORNATION OF PERJURY AND FALSE SWEARING.

## CH. 4. OFFENSES RELATING TO THE ARREST AND CUSTODY OF PRISONERS.

## 5. FALSE CERTIFICATES, AUTHENTICATION ON ENTRY BY AN OFFICER.

## MISCELLANEOUS OFFENSES.

## CH. 1.—OF PERJURY.

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§297—ART. 188.—"Perjury" defined.—Perjury is a false statement, either written or verbal, deliberately and willfully made, relating to something past or present, under the sanction of an oath, or such affirmation as is by law equivalent to an oath, where such oath or affirmation is legally administered, under circumstances in which an oath or affirmation is required by law, or is necessary for the prosecution or defense of any private right, or for the ends of public justice. [O. C. 287.]

§298—Essential constituents of perjury.—The essential constituents of the crime of perjury are—1. The making of a false statement, either written or verbal; 2. Said statement must be deliberately and willfully made; 3. It must relate to something past or present; 4. It must be made under the sanction of an oath, or affirmation equivalent by law to an oath; 5. The oath or affirmation must be legally administered, under circumstances in which it is required by law, or is necessary for the prosecution or defense of a private right, or for the ends of public justice. *S. v. Peters*, 42 Tex. 7; *West v. S.* 8 App. 119.

§299.—ART. 189.—Not perjury, when.—A false statement made through inadvertence, or under agitation, or by mistake, is not perjury. [O. C. 288.]

See *Davidson v. S.* 22 App. 372, for evidence held competent when adduced by the State, to show that the false statement was not made through inadvertence, etc.

§300—ART. 190.—Oath must be legally administered.—The oath or affirmation must be administered in the manner required by law, and by some person duly authorized to administer the same in the matter or cause in which such oath or affirmation is taken. [O. C. 289.]

§301—Decisions under preceding article.—An affidavit sworn to before a county clerk for the purpose of obtaining the issuance of a marriage license, will not support an assignment of perjury. Such an affidavit is extra-judicial, and an extra-judicial oath lays no foundation for perjury. No oath whatsoever, taken before persons acting merely in a private capacity, or before those who take upon them to administer oaths of a public nature, without legal authority for so doing, or before those who are legally authorized to administer some kinds of oaths, but not those which happen to be taken before them, or even before those who take upon them to administer justice by means of an authority seemingly colorable, but in truth unwarrantable and merely void, can ever amount to perjury in the eye of the law. But an affidavit such as mentioned above comes within the definition of the offense of false swearing under our Code. *Davidson v. S.* 22 App. 372; *Steber v. S.* 23 App. 176. In order to constitute perjury, the oath must be administered by some person authorized to administer the same, in the manner in which the oath is taken, and in the manner required by law. *S. v. Powell*, 28 Tex. 626; *S. v. Peters*, 42 Tex. 7; *Stewart v. S.* 6 App. 184. County attorneys have authority to administer oaths to complaints cognizable before justices of the peace, as well as to complaints or affidavits made as bases for informations in the county courts. *Bradbury v. S.*, 7 App. 373. The foreman of a grand jury has authority to administer oaths to witnesses appearing before that body to testify. *Massie v. S.* 5 App. 81.

**§302—ART. 191.—And about something past or present.**—The false statement must be of something past or present—oaths of office or any other promissory oaths, are, therefore, not included in the definition of perjury, except that part of the official oath prescribed by the constitution which relates to duelling. [O. C. 290.]

**§303—ART. 192.—In what sort of proceeding.**—All oaths or affirmations legally taken in any stage of a judicial proceeding, civil or criminal, in or out of court, or before a grand jury, are included in the description of this offense. [O. C. 290a.]

**§304—Instances.**—Perjury may be assigned upon an affidavit made in support of a motion for new trial, although such affidavit be made by a person other than the defendant in the cause in which the same is made, and although the motion for new trial was not filed in proper time. *Hernandez v. S.* 18 App. 134. Perjury may be assigned upon oral testimony taken before an examining court, although such testimony is required to be reduced to writing. *Covey v. S.* 28 App. 388.

**§305—ART. 193.—Immaterial statement not perjury.**—The statement of any circumstance wholly immaterial to the matter in respect to which the declaration is made is not perjury. [O. C. 291.]

**§306—Materiality of statement.**—To constitute perjury, the false statement must be material to the issue on the trial of which the defendant was sworn. But it is not necessary that the particular fact sworn to, should be immediately material to the issue. It must, however, have such a direct and immediate connection with a material fact as to give weight to the testimony on that point. A party not only commits perjury by swearing falsely and corruptly as to the fact which is immediately in issue, but also by swearing falsely and corruptly as to material circumstances tending to prove or disprove such fact. If the statement tend even circumstantially to the proof of the issue, it will be deemed material. The true test is, whether the statement could have properly influenced the tribunal. If it tends to do so, or to extenuate or increase the damage, it is material. The degree of materiality is of no importance. And if it be material as to a single fact, it is sufficient. *Davidson v. S.* 22 App. 372; *Lawrence v. S.* 2 App. 479; *S. v. Lindenburg*, 13 Tex. 27; *Bradberry v. S.* 7 App. 375; *Martinez v. S.* Id. 394; *Mattingly v. S.* 8 App. 345; *S. v. Webb*, 41 Tex. 67; *Donahoe v. S.* 14 App. 638; *Hernandez v. S.* 18 App. 134. Thus, perjury may be assigned upon a false statement affecting only a collateral issue, as that of the credit of a witness. *Washington v. S.* 22 App. 26. The materiality of the false statement is a question for the court, and not the jury to determine. *Jackson v. S.* 15 App. 579; *Davidson v. S.* 22 App. 372.

**§307—Person exempt from testifying may waive exemption.**—No one can be compelled to give evidence against himself, but this right may be waived, and it confers no immunity for false testimony. *Mattingly v. S.* 8 App. 345.

**§308—Indictment—Requisites of.**—The technical formal averments in an indictment for perjury, customary at common law, are not essential under our Code. It is sufficient if the ingredients of the offense, as prescribed by the Code, are set forth in plain and intelligible words. *Brown v. S.* 9 App. 171; *West v. S.* 8 App. 119; *Bradberry v. S.* 7 App. 375; *Watson v. S.* 5 App. 11; *Allen v. S.*, 42 Tex. 12.

**JUDICIAL PROCEEDING—ISSUE JOINED.**—If the indictment shows, by its allegations, that the perjury was committed in a judicial proceeding, describing such proceeding with reasonable certainty, it need only allege in general terms that a certain issue was joined in said proceeding, without specifically alleging what the issue was. *Covey v. S.* 23 App. 388.

**JURISDICTION.**—The indictment must directly allege that the court had jurisdiction of the judicial proceeding in which the perjury was committed, or it must allege the facts which clearly show such jurisdiction. Either mode of showing jurisdiction will be sufficient. *Anderson v. S.* 18 App. 17; *Cox v. S.* 13 App. 479; *S. v. Webb*, 41 Tex. 67; *S. v. Oppenheimer*, Id. 32; *Powers v. S.* 17 App. 428.

**OATH.**—It is not necessary that the indictment should set out the oath taken by the defendant in *hæc verba*. It is sufficient to allege that the defendant was "duly sworn," without describing the attendant ceremonies. *Jackson v. S.* 15 App. 579; *Massie v. S.* 5 App. 81. See, also, *S. v. Umdenstock*, 43 Tex. 554, which seems to restrict this doctrine. But if the indictment unnecessarily sets out the oath minutely, it must be proved as alleged, at least substantially. *Massie v. S.* 5 App. 81; *Anderson v. S.* 20 App. 317. And where the statute has prescribed the form of the oath, and the indictment sets out a different oath, the indictment is bad. *S. v. Perry*, 42 Tex. 238.

**AUTHORITY OF OFFICER.**—In alleging the authority of the officer to administer the oath, it is not necessary to aver the election or qualification of such officer, or to set out his commission. But such authority must be made to appear with certainty, by direct averment. *Stewart v. S.* 6 App. 184; *Bradberry v. S.* 7 App. 374; *St. Clair v. S.* 11 App. 297.

**FALSE STATEMENT.**—If the alleged false statement be in writing, it need not be set out in *hæc verba*. It will be sufficient to set it out substantially. Nor is it necessary to set out the whole of what the defendant has sworn. Only that portion of the statement which is alleged to be false need be recited. *Gabrielsky v. S.* 13 App. 428; *S. v. Umdenstock*, 43 Tex. 554.

**MATERIALITY.** — Either by direct averment, or from facts alleged it must plainly appear that the alleged false statement was material to the issue undergoing investigation when the same was made. *Smith v. S. 1 App. 620; Lawrence v. S. 2 App. 479; Martinez v. S. 7 App. 394; Mattingly v. S. 8 App. 345; Donohoe v. S. 14 App. 638; Washington v. S. 22 App. 26; Partain v. S. Id. 100.* This rule applies to each matter embraced in the alleged false statement, upon which an assignment of perjury is desired to be made. *Donahoe v. S. 14 App. 638.*

**NEGATIVING THE TRUTH OF FALSE STATEMENT** — The indictment must specifically negative the truth of each alleged false statement, and this should be done by direct averment. *Gabrielsky v. S. 13 App. 428; Rohrer v. S. Id. 163; Donahoe v. S. 14 App. 638; Juaraqui v. S. 28 Tex. 625.*

**KNOWLEDGE OF FALSITY.** — It must be averred positively that the defendant had knowledge of the falsity of the statement at the time he made it. *S. v. Powell, 28 Tex. 626.*

**"DELIBERATELY AND WILLFULLY."** — It must also be averred positively that the statement was made by the defendant "deliberately and willfully." *S. v. Powell, 28 Tex. 626; Juaraqui v. S. Id. 625; S. v. Webb, 41 Tex. 67; S. v. Peters, 42 Tex. 7; Allen v. S. Id. 12; S. v. Perry, Id. 238; Smith v. S. 1 App. 620.* It need not, however, negative that the statement was made "through inadvertence, or under agitation, or by mistake." *Brown v. S. 9 App. 171.* For forms of indictment for this offense, see *Willson's Cr. Forms, 121-122-123-124.*

**§309 — Evidence.** — All the essential allegations in the indictment must be proved. *Lawrence v. S. 2 App. 479.* Proof that the false testimony was admitted on the trial of the case in which it was given, is not sufficient evidence of its materiality on a trial for perjury. *Lawrence v. S. 2 App. 479.* When the perjury is assigned upon an affidavit which the defendant signed by making his mark thereto, there must be proof that he knew and understood the contents of such affidavit at the time he swore thereto. See evidence held insufficient to prove such knowledge. *Hernandez v. S. 18 App. 134.* Where the perjury was committed before a grand jury, it is competent to show by the records of the court, that said court was in session, and the grand jury organized when the perjury was committed. *St. Clair v. S. 11 App. 297.* The indictment alleging that the perjury was committed upon the trial of one P., the State was properly permitted to prove the proceedings had, and the evidence delivered by the defendant upon said trial, for the purpose of showing that the alleged false statements were made in a judicial proceeding, and were material to an issue in said proceeding. *Partain v. S. 22 App. 100.* The State was permitted, over the objection of the defendant, to prove by the attorney of B. upon whose trial the perjury was alleged to have been committed, his reason and purpose for placing the defendant upon the witness stand on said trial. Held, competent evidence for the purpose of negating that the alleged false statements were made through inadvertence, etc. *Davidson v. S. 22 App. 372.* A judgment rendered in the judicial proceeding in which the perjury is alleged to have been committed is admissible evidence as inducement, but not to prove the perjury. *Davidson v. S. 22 App. 372; Maines v. S. 23 App. 568.* But the record of a trial and judgment in a civil suit in which the perjury was alleged to have been committed was held to have been properly excluded when offered by the State, because the parties to said suit were not the parties to the prosecution; because the action was not *in rem*; nor the judgment of a public nature, and because said record and judgment were not sought to be used by way of inducement, or to establish a collateral fact, but as evidence to prove the alleged perjury. *Hill v. S. 22 App. 579.* See this case for certain conversations of defendant held to be competent evidence against him. And for other evidence held inadmissible, see *Washington v. S. 23 App. 336; Maines v. S. Id. 568.*

**§310 — Falsity of statement — Quantum of proof of.** — Article 746 of the Code of Civil Procedure provides that "in trials for perjury, no person shall be convicted, except upon the testimony of two credible witnesses, or of one credible witness corroborated strongly by other evidence, as to the falsity of the defendant's statement under oath; or upon his own confession." This provision is but a statutory declaration of the common law. If the evidence presents "only oath against oath," it does not warrant a conviction. *Hernandez v. S. 18 App. 184; Smith v. S. 22 App. 196.* The term "corroborated strongly by other evidence" means that this other evidence shall come from another source than from the witness who is to be corroborated. The witness to be corroborated, cannot be corroborated by proof of his own acts and declarations. *Gabrielsky v. S. 13 App. 428.* It means that the corroborating evidence must tend to show the falsity of the defendant's oath in a material matter, and, in the opinion of the court and the jury, must be cogent, and calculated to convince. But such corroboration may be by circumstantial evidence, consisting of proof of independent facts, which together, tend to establish the falsity of the oath, and which together strongly corroborate the testimony of the single witness who has testified to its falsity. *Hernandez v. S. 18 App. 134; S. v. Buie, 34 Tex. 532; Anderson v. S. 20 App. 312.*

**§311 — Duty of the court when the evidence is insufficient.** — Article 745, of the Code of Criminal Procedure provides, that, "in all cases where by law two witnesses, or one with corroborating circumstances, are required to authorize a conviction, if the requirement be not fulfilled the court shall instruct the jury to render a verdict of acquittal, and they are bound by the instruction." This article is an exception to the general rule that the jury are the exclusive judges of the credibility of the witnesses and the weight of evidence. It requires the court to pass first upon the competency and the sufficiency of the evidence, and to instruct the jury to acquit, when the requirements of the law as to the *quantum* of the evidence have not been fulfilled. This responsibility cannot be shifted by the court upon the jury. *Gabrielsky v. S. 13 App. 428; Cox v. S. 18 App. 479.*

**§312 — Charge of the court.** — The court should not submit to the jury the issue as to the materiality of the alleged false statement. That is a question for the determination of the court, and not the jury. *Jackson v. S. 15 App. 579; Washington v. S. 23 App. 336.* And where there

are several assignments of perjury, the charge of the court should be confined to those that are made upon material matter. *Donahoe v. S.* 14 App. 638. Article 746, of the Code of Criminal Procedure, or the substance thereof, should be given in charge to the jury, where the defendant has not confessed guilt in open court. *Gartman v. S.* 16 App. 215. And it is fundamental error to fail to give such instruction. *Washington v. S.* 22 App. 26. Where an accomplice testifies for the State, the law in relation to such testimony must be given in charge to the jury. *Anderson v. S.* 20 App. 312. Whenever extraneous matter is admitted in evidence for a specific purpose, but not to prove the main issue, it is the imperative duty of the court in its charge to the jury to limit and restrict such evidence to the specific purpose for which it was admitted. *Davidson v. S.* 22 App. 372; *Maines v. S.* 23 App. 568.

§313 — ART. 194. — **Punishment.** — The crime of perjury is punished by imprisonment in the penitentiary for a term not more than ten years nor less than five years. [O. C. 292.]

§314 — ART. 195. — **Perjury in capital case.** — When the perjury is committed on a trial of a capital felony, and the person guilty of such perjury has, on the trial of such felony, sworn falsely to a material fact tending to produce conviction, and the person so accused of the capital felony is convicted and suffers the penalty of death, the punishment of the perjury so committed shall be death. [O. C. 293.]

## CH. 2. — OF FALSE SWEARING.

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197. Past or present.	317	ing proceedings, etc.	319a
198. Officer falsely reporting collections			
of public moneys.	318		

§315 — ART. 196. — **"False swearing" — Definition of.** — If any person shall deliberately and willfully, under oath or affirmation legally administered, make a false statement by a voluntary declaration or affidavit, which is not required by law, or made in the course of a judicial proceeding, he is guilty of "false swearing," and shall be punished by imprisonment in the penitentiary not less than two nor more than five years. [O. C. 294.]

Indictment, Willson's Cr. Forms, 196-197.

§316 — **Distinction between perjury and false swearing.** — If the false statement be made under oath, legally administered, in or out of court, under circumstances which make it necessary for the ends of public justice, and during any stage of such judicial proceeding, it could not be false swearing, but might be perjury. Thus a false statement made in a complaint made before a magistrate in instituting a criminal prosecution is an affidavit required by law made in a judicial proceeding, and such false statement would not be "false swearing," but might be perjury. *Langford v. S.* 9 App. 283. An affidavit made before a clerk of a county court to obtain a marriage license would be false swearing, not perjury. *Steber v. S.* 23 App. 176; *Davidson v. S.* 22 App. 376.

§317 — ART. 197. — **Past or present.** — The false swearing must, as in regard to perjury, be relative to something past or present. [O. C. 295.]

§318—ART. 198. — **Officer falsely reporting collections of public moneys.** — If any officer of this State, or of any district or county thereof, who is charged by law with the duty of receiving or collecting public moneys, other than taxes, for the use of the State or counties, and reporting the same, under oath, to the district, county, or commissioners' court of any county, shall falsely report the amount of such collections, or any part thereof, he shall be deemed guilty of false swearing, and upon conviction, shall be punished as prescribed in article 196. [Act May 1, 1874, pp. 182-183.]

Indictment, Willsons Cr. Forms, 129.

§319 — ART. 198a. — **False swearing in relation to quarantine matters.** — Any person suspected of violating any quarantine law or regulation, and who, upon being sworn by any one authorized to administer an oath by the provisions of any law of this State, shall knowingly swear falsely about any matter concerning which the quarantine laws and regulations permit examination, shall be deemed guilty of false swearing, and shall, on conviction in a court of competent jurisdiction, be punished by imprisonment in the penitentiary not less than two nor more than five years. [Act March 21, 1883, p. 27.]

Indictment, Willson's Cr. Forms, 130.

§319a. — ART. 198a.† — **Witness before grand jury divulging proceedings, etc.** — Any grand juror, or any person who shall appear before any grand jury, in this State, and who after being sworn according to law as a witness before said grand jury shall afterwards divulge, either by word or sign, any matter about which said witness may have been interrogated, or any proceeding or fact said witness may have learned by reason of being said witness, shall be guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than one hundred nor more than one thousand dollars, and may be in addition thereto imprisoned in the county jail not exceeding six months; *provided*, this act shall not apply to persons required to testify to any of the aforesaid matters before a judicial tribunal. [Act April 4, 1887, p. 131.]

† This should be Art. 198b, but it is made 198a in the act.

Indictment, Willson's Add. Cr. Forms, No. 580a.

### CH. 3. — OF SUBORNATION OF PERJURY AND FALSE SWEARING.

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§320 — ART. 199. — **Subornation of perjury, or false swearing.** — If any person shall designedly induce another to commit perjury or false swearing, he shall be punished as if he had himself committed the crime. [P. C. 199.]

Indictment, Willson's Cr. Forms, 125-131.

§321 — ART. 200. — **Attempt at subornation of perjury.** — If any person shall, by any means whatever, corruptly attempt to induce another to commit the offense of perjury, or false swearing, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years. [O. C. 297-298, consolidated in revising.]

Indictment, Willson's Cr. Forms, 126-132; Watson v. S. 5 App. 11.

## CH. 4.—OFFENSES RELATING TO THE ARREST AND CUSTODY OF PRISONERS.

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§322 — ART. 201. — **Officer in charge of prisoner willfully permitting escape in capital case.** — Any officer, jailer or guard, having the legal custody of any person accused or convicted of a capital offense, who willfully permits such person to escape, or to be rescued, shall be punished by confinement in the penitentiary not less than two nor more than ten years. [O. C. 312.]

Indictment, Willson's Cr. Forms, 133. As to jurisdiction of the offense, see § 328.

§323 — **Indictment—Decisions as to.** — The indictment must charge that the defendant did *willfully* permit the escape. *Barthelow v. S.* 26 Tex. 175. *Willfully* and *negligently* permitting an escape, are distinct offenses, and an indictment which in the same count alleges that the defendant "did willfully and negligently" permit the escape is duplicitous and bad. *S. v. Dorsett*, 21 Tex. 656. The indictment need not show that the arrest and custody of the escaped prisoner were legal, nor that any accusation had been legally made against him, nor the particulars of the crime he had committed or was charged with committing. *S. v. Hedrick*, 35 Tex. 485.

§324 — ART. 202. — **In felonies.** — Any officer, jailer or guard, who has the legal custody of any person accused or convicted of a felony less than capital, who willfully permits such person to escape, or to be rescued, shall be punished by imprisonment in the penitentiary for a term not less than two and not exceeding five years. [O. C. 313.]

Indictment, Willson's Cr. Forms, 133. See preceding section.

§325 — ART. 203. — **In misdemeanors.** — Any officer, jailer or guard, having the legal custody of a person accused or convicted of a misdemeanor, who willfully permits such person to escape, or to be rescued, shall be fined not exceeding one thousand dollars. [O. C. 314.]

Indictment, Willson's Cr. Forms, 133. See § 323.

§326 — **What constitutes this offense.** — A sheriff who permits a person convicted of misdemeanor to go at large, when such prisoner has been committed to jail until the fine and costs are paid, is guilty of permitting such prisoner to escape. *Luckey v. S.* 14 Tex. 400. The escape must be permitted knowingly and intentionally by the officer, and such knowledge and intention must appear satisfactory from the evidence. *Barthelow v. S.* 26 Tex. 175.

§327 — ART. 204. — **Negligently permitting escape in capital case.** — Any officer, jailer or guard, who has the legal custody of a person accused or con-

victed of a capital offense, and who negligently permits such person to escape, or to be rescued, shall be punished by fine not exceeding two thousand dollars. [O. C. 315.]

Indictment, Willson's Cr. Forms, 133. See § 323.

§328 — **Negligence is official misconduct.**—Negligently permitting the escape of a prisoner is official misconduct, and is an offense of which the district and not the county court has jurisdiction. Hatch v. S. 10 App. 515, overruling upon this point Watson v. S. 9 App. 212.

§329 — **ART. 205. — In felonies.**—Any officer, jailer or guard, who has the legal custody of a person accused or convicted of a felony less than capital, and who negligently permits such person to escape, or to be rescued, shall be punished by fine not exceeding one thousand dollars. [O. C. 316.]

Indictment, Willson's Cr. Forms, 133. See § 323.

§330 — **ART. 206. — In misdemeanors.**—Any officer, jailer or guard, who has the legal custody of a person accused or convicted of a misdemeanor, and who negligently permits such person to escape, or to be rescued, shall be punished by fine not to exceed five hundred dollars. [O. C. 317.]

Indictment, Willson's Cr. Forms, 133. § 323.

§331 — **ART. 207. — Officer refusing to arrest or receive, in felony.**—Any sheriff or other officer who willfully refuses or fails from neglect to execute any lawful process in his hands, requiring the arrest of a person accused of a felony, whereby such person escapes, or willfully refuses to receive in a jail under his charge, or to receive into his custody any person lawfully committed to such jail and ordered to be confined therein on an accusation of felony, or lawfully committed to his custody on such accusation, shall be fined not exceeding two thousand dollars. [O. C. 318, amended by act Feb. 11, 1860, p. 96.]

Indictment, Willson's Cr. Forms, 134-135.

§332 — **ART. 208. — Same in cases of misdemeanor.**—Any sheriff or other officer who willfully refuses or fails from neglect to execute any lawful process in his hands, requiring the arrest of a person accused of a misdemeanor, whereby the accused escapes, or who willfully refuses to receive into a jail under his charge, or to receive in his custody any person lawfully committed to such jail on an accusation of misdemeanor, or lawfully committed to his custody on such accusation, shall be punished by fine not exceeding five hundred dollars. [O. C. 319, amended by act February 11, 1860, p. 96.]

Indictment, Willson's Cr. Forms, 134-135.

§333 — **ART. 209. — Private person appointed to execute, same as officer.**—If any private person, appointed with his own consent to execute a warrant of arrest, shall be guilty of any one of the offenses heretofore enumerated in this chapter, he shall be punished in the same manner as an officer in a like case. [O. C. 320.]

Indictment, Willson's Cr. Forms, 136.

§334 — **ART. 210. — Conveying arms, disguises, etc., into jail to aid felon.**—If any person shall convey, or cause to be conveyed, into any jail, any disguise, instrument, arms, or any other thing useful to aid any prisoner in escaping, with intent to facilitate the escape of a prisoner lawfully detained in such jail, on an accusation of felony, or shall, in any other manner calculated to effect the object, aid in the escape of a prisoner legally confined in jail, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years. [O. C. 321, amended by Act Feb. 12, 1858, p. 162.]

Indictment, Willson's Cr. Forms, 137. See Post, 348.

§335 — **Indictment for aiding.**—When the indictment charges the aid to have been given in a particular manner, such manner must be proved, and unless proved as laid, a conviction will not be sustained. White v. S. 13 Tex. 133. "Furnish" is not equivalent to the word "con-

vey," and an indictment which employs the former and not the latter word, charges no offense. *Frances v. S.* 21 Tex. 280. See a sufficient, but inartistic indictment in *Clayton v. S.* 4 App. 515.

§336 — **Kind of aid intended.** — The aid conveyed must be *physical*. Counsel and advice will not constitute the aid intended by the statute. *White v. S.* 18 Tex. 133.

§337 — **Variance.** — If the defendant is indicted for aiding in the escape of a prisoner, he cannot be convicted under such indictment, upon proof that the prisoner was in his custody, and that he negligently or willfully permitted him to escape. *White v. S.* 13 Tex. 133.

§338 — **Is a substantive offense.** — This offense is a substantive one, and the culpability of the party charged therewith is in no wise dependent upon, or affected by, the guilt or innocence of the succored prisoner. *Peeler v. S.* 3 App. 533.

§339 — **Relatives of prisoner not exempt from liability.** — Articles 86 and 87, P. C., relating to accessories, are not applicable in a prosecution for this offense, and afford no immunity to the relatives of the prisoner, who violate the preceding article 210. *Peeler v. S.* 3 App. 533.

§340 — **ART. 211. — Same in misdemeanor.** — If any person shall, by any of the means contemplated in the preceding article, aid in the escape of a person legally confined in jail upon an accusation for a misdemeanor, he shall be fined not exceeding five hundred dollars. [O. C. 323.]

Indictment, *Willson's Forms*, 137. See Ante, §§ 335-336-337-338-339; Post, § 348.

§341 — **ART. 212. — Breaking into jail to rescue prisoner.** — If any person shall break into any jail for the purpose of effecting the rescue or escape of a prisoner therein confined, or for the purpose of aiding in the escape of any prisoner so confined, he shall be punished by imprisonment in the penitentiary for a term not less than two nor more than six years. [O. C. 322-324, consolidated in revising.]

Indictment, *Willson's Cr. Forms*, 138. For evidence insufficient to sustain conviction. See *Gillian v. S.* 3 App. 132. See Post, § 348.

§342 — **ART. 213. — Aiding prisoner to escape from officer.** — If any person shall willfully aid in the escape of a prisoner from the custody of an officer, by whom he is legally held in custody on an accusation for a felony, by doing any act calculated to effect that object, he shall be punished by imprisonment in the penitentiary not less than two nor more than seven years; and if, in aiding in the escape, he shall make use of arms, he shall be punished by imprisonment in the penitentiary for a term not less than two nor more than ten years. [O. C. 325, amended by Act Feb. 12, 1858, p. 162.]

Indictment, *Willson's Cr. Forms*, 139. See Post, § 348.

§343 — **Indictment under preceding article.** — An indictment under the preceding article, which in its charging part merely copies the language of the article, is not sufficient. Thus, an indictment which alleged that the defendant "did unlawfully make an assault upon one H., and did then and there and thereby, willfully aid in the escape of one K. from the custody of said H., the said H. being then and there the sheriff of T. county, State of Texas, and the said K. being then and there a prisoner, and then and there legally held in custody by the said H., sheriff, on an accusation for a felony, to wit, the theft of three steers," etc., was held to be insufficient. It should have alleged that the defendant, knowing that the sheriff had the custody of a prisoner, and with the intent to aid in the escape of said prisoner, did willfully make an assault upon the sheriff, describing the character of the assault, and that the assault so made was calculated to effect the escape of the prisoner. *Vaughn v. S.* 9 App. 563.

§344 — **ART. 214. — Same aid in case of misdemeanor.** — If any person shall willfully aid a prisoner to escape from the custody of an officer, by whom he is legally detained in custody on an accusation for a misdemeanor, by doing any act calculated to effect that object, he shall be punished by fine not exceeding five hundred dollars; and if, in aiding in the escape, he shall make use of arms, he shall be punished by fine not exceeding one thousand dollars. [O. C. 326.]

Indictment, *Willson's Cr. Forms*, 139; Ante, § 343; Post, § 348.

§345 — **ART. 215. — Telegraph officer divulging process.** — Any executive officer, director, superintendent, manager, operator, clerk, messenger or other party in the employ of a telegraph company, who shall willfully divulge, or in any manner make known, except to the proper authority, the contents of any warrant, affidavit or telegram relating to any crime already committed, or for the prevention of the same, shall, upon conviction, be fined in a sum not



less than five hundred dollars, nor more than two thousand, or be imprisoned in the State penitentiary for a term not less than two years nor more than five years. [Act April 17, 1871, p. 40, § 7.]

Indictment, Willson's Cr. Forms, 140.

§346 — ART. 216. — **Preventing execution of civil process.** — If any person shall prevent or defeat the execution of any process in a civil cause, by any means not amounting to actual resistance, but which are calculated to prevent the execution of such process, he shall be punished by fine not exceeding five hundred dollars; evading the execution of such process is not an offense under this article. [O. C. 327.]

Indictment, Willson's Cr. Forms, 141; Post, § 351.

§347 — **Indictment under preceding article.** — An indictment under this article should allege the means used by the defendant to prevent or defeat the execution of the process, and that the defendant, at the time, knew the capacity in which the officer was acting, or pretending to act. *Horan v. S.* 7 App. 183.

§348 — ART. 217. — **Offenses complete without actual escape.** — The offenses enumerated in articles 210, 211, 212, 213 and 214 are complete without the actual escape of the prisoner; and a person accused of any of said offenses may be prosecuted and tried, although the person escaping be retaken, and although after being retaken he is brought to trial and acquitted. [O. C. 328-329, consolidated in revising.]

§349 — ART. 218. — **County convict, escaping from employer.** — Any person who has been convicted of a misdemeanor or petty offense, and afterwards hired under authority of law, who shall escape from his employer or person hiring him, during the term of which he may have been hired, shall be punished by imprisonment in the county jail for a term not exceeding two years. [Act Aug. 21, 1876, p. 228, § 4.]

Indictment, Willson's Cr. Forms, 142.

§350 — ART. 219. — **Person resisting officer in case of felony.** — If any person shall willfully oppose or resist an officer in executing, or attempting to execute, any lawful warrant for the arrest of another person, in a case of felony, he shall be punished by confinement in the penitentiary for a term not less than two nor more than five years; and if arms be used in such resistance, he shall be punished by imprisonment in the penitentiary not less than two nor more than seven years. [O. C. 331, amended by Act Feb. 12, 1858, p. 163.]

Indictment, Willson's Cr. Forms, 143. See *Pierce v. S.* 17 App. 232, for an indictment under this article held sufficient. See Post, § 354.

§351 — ART. 220. — **In cases of misdemeanors.** — If any person shall willfully oppose or resist an officer in executing or attempting to execute any lawful warrant for the arrest of another person in a case of misdemeanor, or in arresting or attempting to arrest any person without a warrant, where the law authorizes or requires the arrest to be made without a warrant, he shall be punished by a fine of not less than twenty-five nor more than five hundred dollars, and if arms be used, by a fine of not less than fifty nor more than one thousand dollars. [O. C. 332, amended by Act April 4, 1881, p. 108.]

Indictment, Willson's Cr. Forms, 143. See Post, § 354.

§352 — ART. 221. — **In civil cases.** — If any person shall willfully resist or oppose an officer in executing, or attempting to execute, any process in a civil cause, he shall be fined not exceeding five hundred dollars; and if arms be used in such resistance the punishment shall be doubled. [O. C. 333.]

Indictment, Willson's Cr. Forms, 144; Ante, §§ 345-346.

§353 — ART. 222. — **Accused resisting process.** — If the party against whom a legal warrant of arrest is directed in any criminal case, resist its ex-

ecution, when attempted by any person legally authorized to execute the same, he shall be fined not exceeding five hundred dollars; and if arms be used in making the resistance, in such manner as would make him liable for an assault and battery, or assault with intent to murder, or any other offense against the person, he shall receive the highest penalty affixed by law for the commission of such offense in ordinary cases. [O. C. 334.]

Indictment, Willson's Cr. Forms, 145. See McGrew v. S. 17 App. 613.

§354 — ART. 223. — **Process must be legal.** — To render a person guilty of any of the offenses included within the meaning of articles 219 and 220, the warrant or process must be executed, or its execution attempted, in a legal manner. [O. C. 335.]

§355 — ART. 224. — **"Accusation" defined.** — The word *accusation*, as used here, and in every part of this Code, means a charge made in a lawful manner against any person, that he has been guilty of some offense which subjects him to prosecution in the name of the State. A person is said to be *accused* of an offense from the time that any *criminal action* shall have been commenced against him. A legal arrest without warrant, a complaint to a magistrate, a warrant legally issued; an indictment, or an information, are all examples of *accusations*, and a person proceeded against by either of these, is said to be the *accused*. [O. C. 336.]

Cited in Pierce v. S. 17 App. 232.

§356 — ART. 225. — **"Legally confined in jail" defined.** — A person is "*legally confined in jail*," or "legally detained in custody," when he has been committed or arrested upon a legal warrant, or arrested in any of the modes pointed out in the Code of Criminal Procedure. [O. C. 337.]

§357 — ART. 226. — **"Jail" defined.** — The word "jail" means any place of confinement used for detaining a prisoner. [O. C. 338.]

§358 — ART. 227. — **"Officer" defined.** — By "officer," as used in this chapter, is meant any peace officer, as sheriff, deputy sheriff, constable of a beat, marshal, constable or policeman of a city or town, any jailer or guard, or any person specially authorized by warrant to arrest. [O. C. 339.]

§359 — ART. 228. — **"Arms" defined.** — The term "arms," as used in this chapter, includes any deadly weapon. [Added in revising.]

§360 — ART. 229. — **Refusing to aid an officer.** — If any person, being called on by a magistrate, or peace officer, shall fail or refuse to aid such officer in any matter in which, by law, he may be rightfully called on to aid or assist in the execution of a duty incumbent upon such magistrate, or peace officer, he shall be punished by fine not exceeding one hundred dollars. [O. C. 339a, added by act Feb. 12, 1858, p. 163.]

Indictment, Willson's Cr. Forms, 146.

## CH. 5. — FALSE CERTIFICATE, AUTHENTICATION OR ENTRY BY AN OFFICER.

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§361 — ART. 230. — **Commissioner of deeds giving false certificate.** — If any person, being a commissioner of deeds and depositions, who is residing out of this State, and acting as such commissioner under authority of a law of the State, shall fraudulently certify to the execution of any instrument of writing which was never in fact acknowledged or proved before him, as the same purports to have been acknowledged or proved, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years. [O. C. 340.]

Venue, see C. C. P. art. 217; Indictment, Willson's Cr. Forms, 147.

§362 — ART. 231. — **"Instrument in writing" defined.** — By "instrument of writing" is meant any deed, conveyance, transfer, release, obligation, or other written instrument of any kind or description whatever which such commissioner is, by law, authorized to authenticate for record. [O. C. 341.]

§363 — ART. 232. — **Commissioner certifying falsely to deposition.** — If any such commissioner shall falsely certify to any deposition purporting to have been taken before him, and to be used in any cause pending in a court of this State, he shall be punished in the same manner as is prescribed in article 230. [O. C. 342.]

Venue, C. C. P. art. 217; Indictment, Willson's Cr. Forms, 148. See Post, § 369

§364 — ART. 233. — **Same as to affidavit.** — If any such commissioner shall falsely certify to any affidavit purporting to have been made before him, and which, by law, he is authorized to take, he shall be punished as prescribed in article 230. [O. C. 343.]

Venue, C. C. P. art. 217; Indictment, Willson's Cr. Forms, 149.

§365 — ART. 234. — **Clerks of court making false entry.** — If any clerk of a court in this State, shall knowingly make any false entry upon the records of his court, which may prejudice or injure the rights of any person, he shall be punished by confinement in the penitentiary not less than two nor more than five years. [O. C. 344.]

Indictment, Willson's Cr. Forms, 150.

§366 — **"Person" includes the State.** — The State is a "person" within the meaning of the preceding article, and so is a corporation. *Martin v. S.* 24 Tex. 61; *Ante*, § 61.

§367 — ART. 235. — **Giving false certificate.** — If any such clerk shall give a false certificate, stating that any person has done any act whatever, to which he has a right to certify, or that such person is entitled to any right whatever, when such clerk may by law give such certificate if the same were true, he shall be punished as directed in the preceding article. [O. C. 345.]

Indictment, Willson's Cr. Forms, 151.

§368 — ART. 236. — **Notary public giving false certificate.** — If any notary public, or other officer authorized by law, shall give a false certificate for the purpose of authenticating any instrument of writing for registration, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years. [O. C. 346.]

Indictment, Willson's Cr. Forms, 152.

§369 — ART. 237. — **Officer giving blank certificate.** — If any officer authorized by law to take depositions or administer oaths in this State, shall falsely certify that any deposition was sworn to before him, or any oath made, or shall with fraudulent intent place his certificate, signature or seal to any affidavit which is drawn with blanks as to any matter of substance, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years. Within the meaning of this article shall be included the case of an officer who, with design that the same may be filled up and used for fraudulent purposes, attaches his signature or seal of office to any paper wholly blank. [O. C. 347, amended by Act Feb. 12, 1858, p. 163.]

Indictment, Willson's Cr. Forms, 153-154; An'e, § 363.

§370 — ART. 238. — **Failing to keep a record of acknowledgment.** — Any county clerk, justice of the peace, notary public, or any other officer in this State authorized by law to take acknowledgments, or proof of instruments required or permitted by law to be placed on record, who shall willfully fail, neglect or refuse to enter and record in a well-bound book, a short statement of each acknowledgment or proof taken by him, and sign the same officially, shall be fined in any sum not less than one hundred nor more than five hundred dollars. [Act April 28, 1874, p. 156.]

Indictment, Willson's Cr. Forms, 155.

§371 — ART. 239. — **Requisites of such record.** — By "short statement," as used in the preceding article, is meant that such statement shall recite the true date on which such acknowledgment or proofs were taken, the name of the grantor and grantee of such instrument, its date, if proved by a subscribing witness, the name of the witness, the known or alleged residence of the witness, and whether personally known or unknown to the officer; if personally unknown, this fact shall be stated, and by whom such person was introduced to the officer, if by any one; and the known or alleged residence of such person. Such statement shall also recite, if the instrument is acknowledged by the grantor, his then place of residence, if known to the officer; if unknown, his alleged residence, and whether such grantor is personally known to the officer; if personally unknown, by whom such grantor was introduced, if by any one, and his place of residence. If land is conveyed or charged by the instrument, the name of the original grantee shall be mentioned, and the county where the same is situated; and a failure to comply with any one of these requirements shall be punished as prescribed in the preceding article. Act April 28, 1874, p. 156.]

## CH. 6.—MISCELLANEOUS OFFENSES.

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## I.—EXTORTION.

§372 — ART. 240. — **Extortion by officers.** — If any officer authorized by law to demand or receive fees of office, or any person employed by such officer, shall willfully demand, or receive higher fees than are allowed by law, or shall willfully demand or receive fees not allowed by law, he shall be punished by fine not less than twenty-five, nor more than one hundred dollars for each offense. [O. C. 352, amended by Act Feb. 9, 1883, p. 5.]

Indictment, Willson's Cr. Forms, 156.

§373 — **Decision under preceding article before it was amended.** — Before the preceding article was amended, it was held that a prosecution under said article for demanding and receiving fees *not allowed by law*, could not be maintained under it. *Smith v. S.* 10 App. 413. The amendment cures this defect in the article, and also changes the penalty. The extortion must be knowingly done. *Millar v. Douglas*, 42 Tex. 288.

§374 — ART. 241. — **Applies to all officers.** — The preceding article applies to all persons holding any office to which fees are attached, and to the head of the departments of the government in whose offices fees may be charged. [O. C. 353.]

## II.—CONVERSION.

§375 — ART. 242. — **Conversion by sheriff, etc.** — If any sheriff or other officer, having collected money for any party to a suit, shall, without the con-

sent of such party, unlawfully convert the same, or any part thereof, to his own use, he shall be punished in the same manner as if he had committed theft of such money. [O. C. 354a, added by Act Feb. 12, 1858.]

Indictment, Willson's Cr. Forms, 157.

§376—ART. 243. — **Appropriation of trust funds.** — If any officer of any court who has the legal custody of any money, evidence of debt, scrip, instrument of writing, or other article, that may have been deposited in court to abide the result of legal proceedings, shall appropriate the same to his own use, he shall be punished as if he had committed theft of such money, evidence of debt, scrip, instrument of writing, or other article. [Act May 19, 1876, p. 7.]

Indictment, Willson's Cr. Forms, 158.

§377—ART. 244. — **Officer failing to deposit trust funds, etc.** — Any officer of any court having the custody by law of any money, evidence of debt, scrip, instrument of writing, or other article that may have been deposited in court to abide the result of any legal proceedings, who shall fail to seal up in a secure package the identical money or other article received by him, and deposit the same in some iron safe or bank vault; or who, when such money or other article is so deposited, shall fail to keep it always accessible and subject to the control of the proper court; or who shall fail to keep, in a well-bound book, a correct statement showing each and every item of money or other article so received or deposited; on what account received, and what disposition has been made of the same, shall be punished by fine not less than ten nor more than two hundred dollars, or by imprisonment in the county jail for a period not exceeding three months; and may, in addition thereto, be punished by the proper court for contempt. [Act May 19, 1876, p. 7.]

Indictment, Willson's Cr. Forms, 159.

§378—ART. 245. — **Failing to turn over funds, etc., to successor.** — Any officer such as is enumerated in the preceding article, who shall fail or refuse to turn over to his successor in office, on the expiration of his own term of office, the record of trust funds therein specified, together with the packages of money or other articles in his possession or control, shall be punished as prescribed in the preceding article. [Act May 19, 1876, p. 7.]

Indictment, Willson's Cr. Forms, 160.

### III.—PECULATION.

§379—ART. 246. — **State officer buying claims against State.** — Any officer of this State who shall trade for, buy or be in any way concerned in the purchase of any claim or demand against the State, shall be fined in the sum of one thousand dollars. [Act May 3, 1873, p. 62.]

Indictment, Willson's Cr. Forms, 161.

§380—ART. 247. — **"State officer" defined.** — By the term "officer of this State," as used in the preceding article, is meant the governor, lieutenant-governor, the heads or employees of any of the executive departments, members and officers of both houses of the legislature, the judges of the several courts, district and county attorneys, sheriffs, tax collectors and tax assessors. [Added in revising.]

§381—ART. 248. — **County or city officer trading in claims.** — Any officer of any county in this State, or of any city or town therein, who shall contract directly or indirectly, or become in any way interested in any contract, for the purchase of any draft or order on the treasurer of such county, city, or town, or for any jury certificate or any other debt, claim, or demand for which said county, city or town may, or can in any event, be made liable,

shall be punished by fine of not less than ten nor more than twenty times the amount of the order, draft, jury certificate, debt, claim or liability so purchased or contracted for. [Act March 30, 1874, p. 47.]

Indictment, Willson's Cr. Forms, 162; Robinson v. S. 2 App. 390; S. v. Smith, 44 Tex. 443.

§382 — ART. 249. — **Ex-officer included, when.** — Within the term "officer," as used in the preceding article, are included ex-officers, until they have made a final settlement of their official accounts. [Act March 30, 1874, p. 47.]

§383 — ART. 250. — **County or city officers becoming interested in contracts.** — If any officer of any county in this State, or of any city or town therein, shall become in any manner pecuniarily interested in any contract made by such county, city, or town, through its agents or otherwise, for the construction or repair of any bridge, road, street, alley, or house, or any other work undertaken by such county, city, or town, or shall become interested in any bid or proposal for such work, or in the purchase or sale of anything made for or on account of such county, city or town, or who shall contract for or receive any money or property, or the representative of either, or any emolument or advantage whatsoever, in consideration of such bid, proposal, contract, purchase or sale, he shall be fined in a sum not less than fifty nor more than five hundred dollars. [Act March 30, 1874, p. 47.]

Indictment, Willson's Cr. Forms, 163. Hutchinson v. S. 36 Tex. 293, was decided prior to this statute, and under the statute against bribery. The facts of that case would seem to fall within this article.

§384 — ART. 251. — **Purchase of witness fees by officer.** — Any county judge, clerk or deputy clerk of any district or county court, sheriff or his deputy, justice of the peace, or constable, who shall purchase, or otherwise acquire from the party interested, any fee or fees coming to any witness in any proceeding whatever, either before the district or county court, or the court of any justice of the peace, or before any coroner's inquest, shall be punished by fine not exceeding one hundred dollars. [O. C. 354b, added by Act Feb. 12, 1858, p. 164.]

Indictment, Willson's Cr. Forms, 164.

#### IV. FAILURE OF DUTY.

§385 — ART. 252. — **Officer refusing to issue or execute process.** — Whenever any officer, who is by law charged with the issuance or execution of process, either in civil or criminal actions, corruptly and willfully refuses to issue or execute such process, or corruptly and willfully refuses to perform any other duty enjoined upon him by law, he shall, when the act or omission is not otherwise provided for or punished, be deemed guilty of a misdemeanor, and shall be fined not exceeding five hundred dollars, and may, in the discretion of the jury, be imprisoned in the county jail not exceeding one year. [O. C. 348.]

Indictment, Willson's Cr. Forms, 165.

§386 — ART. 253. — **Failure to arrest offender.** — If any justice of the peace, sheriff, or other peace officer, shall willfully neglect to return, arrest, or prosecute any person committing a breach of the peace, or other crime or misdemeanor, which has been committed within his view or knowledge, or shall willfully and knowingly absent himself from any place where such crime or misdemeanor is being committed, or is about to be committed, for the purpose of avoiding seeing or having a knowledge of the same, he shall be guilty of a misdemeanor, and, on conviction, shall be fined not less than seventy-five dollars nor more than five hundred dollars. [O. C. 354, changed in revising.]

Indictment, Willson's Cr. Forms, 166-167.

**§387 — ART. 254. — Officers of old county failing to deliver records to new.** — Any district or county clerk, sheriff, justice of the peace, county treasurer or surveyor, or any other officer of a county to which some other unorganized or disorganized county is attached for judicial or other purposes, who shall fail, neglect, or refuse to turn over to the proper officers, of such unorganized or disorganized county, on demand, and after the organization of such unorganized or disorganized county and the qualification of its officers, all books, records, maps, and all other property belonging to said county so organized, that may be in his possession, shall be fined in a sum not less than one hundred nor more than one thousand dollars, or be confined in the county jail for a period not exceeding one year. [Act May 1, 1874, p. 188.]

Indictment, Willson's Cr. Forms, 168.

**§388 — ART. 255. — Approval of bond when security is non-resident.** — Any officer whose duty it may be to pass upon and approve the official bond of a sheriff, or other county officer, who shall approve such bond, when any surety thereon is not a resident of the county of such sheriff or other officer, shall be punished by fine not less than one hundred nor more than five hundred dollars. [Act April 14, 1874, p. 93.]

Indictment, Willson's Cr. Forms, 169.

**§389 — ART. 256. — Officer failing to report collections for State.** — Any district attorney, sheriff, deputy sheriff, constable, or other officer, whose duty it may be to collect money, other than taxes, for the use of the State, who shall fail to report to the district court of his county, in writing and under oath, on the first day of each term thereof, the amount of money that may have come into his hands for the use of the State since the last term of said court, from whom the same was collected, and by virtue of what process, shall be punished by fine not less than twenty nor more than two hundred dollars. [Act May 1, 1874, p. 182.]

Indictment, Willson's Cr. Forms, 170; Post, § 391; Report, Id. 920; C. C. P. arts. 975, 976, 978.

**§390 — ART. 257. — Officer failing to report collections for county.** — Any officer such as is named in the preceding article, whose duty it may be to collect money, other than taxes, for the use of any county, who shall fail to report in writing, and under oath, to the commissioners' court of such county at each regular term thereof, the amount of money that may have come into his hands for the use of such county since the last term of said court, from whom the same was received, and by virtue of what process, shall be punished as prescribed in the preceding article. [Act May 1, 1874, p. 182.]

Indictment, Willson's Cr. Forms, 170; Report, Id. 921; C. C. P. arts. 976-977-978.

**§391 — Indictment under two preceding articles.** — The indictment must allege that the defendant was authorized to collect money other than taxes, and that such money had come into his hands, and that he had failed to report the same. Merely to charge that he failed to report, without charging that he had collected moneys is not sufficient. *Edwards v. S. 2 App. 525; Addison v. S. 41 Tex. 462.* But see C. C. P. arts. 976, sub. 5, 976.

**§392 — Applies to ministerial officer only.** — The two preceding articles apply to ministerial officers only. A justice of the peace is not such an officer. *Edwards v. S. 2 App. 525.* But see in this connection C. C. P. arts. 977-978.

**§393 — ART. 258. — Town or city officer failing to report collections.** — Any town or city marshal, or constable, or other officer or person who may collect money, other than taxes, for the use of such town or city, who shall fail to report in writing, and under oath, to the mayor and board of aldermen, or common council, of such town or city, on the first Monday of each month, the amount of money that may have come into his hands during the month preceding such report, for the use of such town or city, from whom the same was collected, and by virtue of what process, shall be punished as prescribed in article 256. [Act May 1, 1874, p. 182.]

Indictment, Willson's Cr. Forms, 170; Report, C. C. P. arts. 976-978-979.



**§394—ART. 259.—Commissioners' court failing to make quarterly statement.**—If the Commissioners' court of any county in this State shall willfully fail, neglect or refuse to make, or cause to be made, a tabular statement of the assets, expenditures and indebtedness of such county at each regular term of the said court, specifying therein the names of creditors and the items of indebtedness, with their respective dates of accrual, and also the names of persons to whom moneys have been paid, with the amounts paid each during the quarter for which such statement is prepared, or shall willfully fail, neglect or refuse to publish an exhibit showing the aggregate receipts and disbursements of each separate fund for the quarter in some newspaper published in the county (or if there be no newspaper, then by posting such exhibit in at least four public places in the county), immediately after the first regular term in each calendar year, or shall willfully fail, neglect or refuse to post such exhibit made at the third regular meeting of said court in each calendar year at the court house door, and at least three other public places in the county, the members of the court so failing, neglecting or refusing, shall be fined in any sum not less than twenty nor more than one hundred dollars. [Act March 8, 1873, p. 13; Acts 1891, Ch. 73, pp. 91, 92.]

Indictment, Willson's Cr. Forms, 171-172.

**§395 — ART. 259a. — Commissioner failing to attend court.**—Should any member of the county commissioners' court of any county in this State, willfully fail or refuse to attend any regular meeting or term of said court at which the business or question of levying a county tax for any purpose is to be acted on, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than two hundred nor more than five hundred dollars. [Act March 25, 1885, p. 51.]

**§396 — ART. 260. — County treasurer failing to report.**—If any county treasurer in this State shall fail, neglect, or refuse to furnish to the commissioners' court of his county, upon demand, a tabular statement of the amount of county funds by him received from any given time, the amount on hand, the amounts paid out, to whom paid, on what account, from what fund taken, and the kinds of funds received and disbursed, he shall be fined in any sum not less than one hundred nor more than five hundred dollars, and, in addition thereto, he may be punished for contempt by said commissioners' court. [Act March 8, 1873, p. 14.]

Indictment, Willson's Cr. Forms, 173.

**§397 — ART. 261. — Clerk failing to keep indexes.**—Any clerk of the county or district court in this State who shall fail to provide and keep in his office, as part of the records thereof, well-bound alphabetical indexes and cross-indexes of the names of the parties to all suits disposed of or pending in his court, together with a reference opposite each party's name to the page of the minute book upon which is entered the final judgment in each case, shall be punished by fine not less than fifty nor more than one hundred dollars for each offense. Each month's failure shall constitute a separate offense. [Act June 21, 1876, p. 25.]

Indictment, Willson's Cr. Forms, 174.

**§398 — ART. 262. — Clerk permitting withdrawal of deeds when records are burned.**—If the clerk of the county court of any county in this State, the land records or records of titles in which have been burned or otherwise destroyed, or any deputy of such clerk, shall permit any deed filed for record in his office to be withdrawn within twelve months after the same is filed, he shall be fined not less than one hundred nor more than five hundred dollars, and may, in addition thereto, be imprisoned in the county jail for a period of time not to exceed one year. [Act Aug. 21, 1876, p. 252.]

Indictment, Willson's Cr. Forms, 175.

**§399 — ART. 263. — To what deeds not applicable.**—The preceding arti-

cle shall not apply to deeds executed, or purporting to have been executed, subsequent to the destruction of such land records or records of titles. [Act Aug. 21, 1876, p. 252.]

§400 — ART. 264. — **County judge practicing in inferior courts.** — Any county judge in this State who shall practice, or offer or attempt to practice as an attorney or counselor at law, in any county court, or court of a justice of the peace, shall be fined not less than one hundred nor more than five hundred dollars. [Act Aug. 19, 1876, p. 216.]

Indictment, Willson's Cr. Forms, 176.

§401 — **Preceding article not applicable, when.** — The preceding article does not apply to county judges in counties where the civil or criminal jurisdiction of the county court is diminished, in cases wherein the courts over which they preside, have neither original nor appellate jurisdiction. Rev. Stat. art. 1136.

§402 — ART. 265. — **Issuing marriage license to minor, etc.** — If the clerk of any county court or other officer, authorized by law to issue a license for marriage, shall, without the consent of the parent or guardian of the party applying, issue a marriage license to a male person under the age of twenty-one years, or to a female under the age of eighteen years, he shall be fined not exceeding one thousand dollars. [O. C. 791a, added by Act Feb. 11, 1860, p. 101, and inserted here in revising.]

Indictment, Willson's Cr. Forms, 177.

§403 — ART. 266. — **Father's consent sufficient, when.** — Where both parents of any minor may be alive, the consent of the father alone shall be sufficient to authorize the issuance of license to the minor. [O. C. 791b, added by Act Feb. 12, 1858, p. 186, and inserted here in revising.]

§404 — ART. 267. — **Surveyor failing to return corrected field notes.** — If any district or county surveyor in this State, who has been paid his fees for making and recording a survey, shall fail or unnecessarily delay to correct the field-notes of such survey, upon the request of the commissioner of the general land office, or of the party interested and return the same to the general land office, when such field-notes have been returned to him by such commissioner for correction, shall be fined in a sum not less than double nor more than four times the amount of the fees originally paid him for such survey. [Act Oct. 24, 1871, p. 12.]

Indictment, Willson's Cr. Forms, 178.

§405 — ART. 268. — **Surveyor failing, or refusing, to make survey on homestead application, etc.** — Any district or county surveyor, who shall fail or refuse to make a survey upon a homestead application, within one month after such application is made, or who shall fail to record the field-notes of such survey, and forward certified copies thereof and all other papers relating thereto to the general land office, within one month after such survey is made, or who shall fail to correct any field-notes of such surveys that may be returned to him for correction by the commissioner of the general land office, within ten days after receipt thereof, or who shall charge, demand, or receive higher fees than those allowed by law for making, recording, and certifying to such survey, shall be fined not less than ten and not more than one hundred dollars for each offense. [Act May 26, 1873, p. 102.]

Indictment, Willson's Cr. Forms, 179.

§406 — ART. 269. — **Not applicable, when.** — No surveyor shall be punishable criminally for a failure or refusal to make a survey upon a homestead application, or for a failure to record and return the field-notes of any such survey, unless the fees allowed by law for such service shall have been first tendered him. [Added in revising.]

§407 — ART. 270. — **Surveyor willfully altering lines.** — If any surveyor or other person shall, without authority of law, willfully destroy, deface,

alter, or change any established line, corner, or line or bearing tree, of any legal survey, or shall willfully make any new line or corner on any established legal survey, without authority of law, he shall be fined not less than one hundred nor more than five hundred dollars. [Act May 4, 1874, p. 220.]

Indictment, Willson's Cr. Forms, 180; Woolsey v. S. 14 App. 57.

#### V. — BARRATRY.

§408 — ART. 271. — “**Barratry**” defined and punished. — If any person, shall willfully instigate, maintain, excite, prosecute or encourage the bringing of any suit or suits at law, or equity, in any court in this State, in which such person has no interest, with the intent to distress or harass the defendant therein, or shall willfully bring or prosecute any false suit or suits at law or equity, of his own, with the intent to distress or harass the defendant therein, he shall be deemed guilty of barratry, and shall be fined in any sum not exceeding five hundred dollars, and, in addition thereto, may be imprisoned in the county jail not exceeding one year. [Act Aug. 21, 1876, p. 227.]

Indictment, Willson's Cr. Forms, 181.

#### VI. — COMPOUNDING CRIME.

§409 — ART. 272. — **Agreeing with offenders not to prosecute.** — If any person has knowledge that an offense against the penal laws of this State has been committed, and shall agree with the offender, either directly or indirectly, not to prosecute or inform on him in consideration of money or other valuable thing paid, delivered, or promised to him by such offender, or other person for him, he shall be fined not less than one hundred nor more than one thousand dollars. [Added in revising.]

Indictment, Willson's Cr. Forms, 182.

#### VII. — MALICIOUS PROSECUTION.

§410 — ART. 273. — “**Malicious prosecution**” defined and punished. — If any person in this State, for the purpose of extorting money from another, or the payment or security of a debt due him by such other person, or with intent to vex, harass, or injure such person, shall institute or cause to be instituted any criminal prosecution against such other person, he shall be deemed guilty of malicious prosecution, and, upon conviction, shall be fined not less than one hundred nor more than one thousand dollars, or be imprisoned in the county jail not less than one month nor more than one year. [Added in revising.]

Indictment, Willson's Cr. Forms, 183.

#### VIII. FALSE PERSONATION.

§411 — ART. 274. — **Falsely pretending to be an officer.** — Any person who shall falsely assume or pretend to be a judicial or executive officer of this State, or a justice of the peace, sheriff, deputy sheriff, constable, or any other judicial or ministerial officer of any county in the State, and shall take upon himself to act as such, shall be punished by imprisonment in the county jail for a term not exceeding six months, or by fine not exceeding five hundred dollars. [Act Nov. 12, 1866, p. 201.]

Indictment, Willson's Cr. Forms, 184.

§412 — **Construction of preceding article.** — It is not the intent of the preceding article to punish one who honestly believes that he is entitled to the office in which he assumes to act. The ordinary test of criminality is the criminal intent or guilty knowledge, and in this offense such intent or knowledge is an essential constituent. The provisions of the Code as to mistake do not apply to offenses of this character. Brown v. S. 43 Tex. 478.

§413 — ART. 275. — **Willful neglect of official duty.** — If any officer of the law shall willfully or negligently fail to perform any duty imposed on him by the Penal Code or Code of Criminal Procedure, he shall, when the act or omission is not otherwise defined, be deemed guilty of a misdemeanor and be punished as prescribed in the succeeding article. [O. C. 348a, added by Act May 12, 1864, pp. 7-8.]

Indictment, Willson's Cr. Forms, 185.

§414 — **Decisions under preceding article.** — This article covers every willful failure or neglect to discharge an official duty, the penalty for which is not otherwise provided for. *S. v. Baldwin*, 39 Tex. 155; *Gordon v. S* 2 App. 154.

§415 — ART. 276. — **General penalty in the absence of any other.** — Whenever, in the Penal Code or Code of Criminal Procedure, it is declared that an officer is guilty of an offense on account of any particular act or omission, and there is not in the Penal Code any punishment assigned for the same, such officer shall be deemed guilty of a misdemeanor, and shall be fined not exceeding two hundred dollars. [O. C. 349, amended by Act March 5, 1863, p. 12.]

§416 — ART. 277. — **Malfeasance, when not otherwise designated.** — All offenses committed by officers of the law, when not otherwise designated, are known under the general name of *malfeasance in office*. [O. C. 350.]

§417 — ART. 278. — **"Officer" defined.** — By an "officer of the law," as used in the preceding article is meant any magistrate, peace officer, or clerk of a court. [O. C. 351.]

§418 — ART. 278a. — **Sheriff failing to make report to adjutant-genl.**

§1. Hereafter it shall be the duty of each sheriff in this State upon the close of any regular term of the district court in his county, or within thirty days thereafter, to make out and forward by mail to the adjutant-general of this State a certified list of all persons who, after indictment for a felony, have fled from said county. Such lists shall contain the full name of each of such fugitives, with a description giving his age, height, weight, color, and occupation, the complexion of skin, and the color of eyes and hair, and any peculiarities in person, speech, manner, or gait that may serve to identify such fugitive, so far as the sheriff may be able to give them, and shall state the offense with which such person is charged. [Act March 25, 1887, p. 44.]

§2. The adjutant-general shall prescribe, have printed, and forward to the sheriffs of the several counties the necessary blanks upon which are to be made the lists herein required. [Ibid.]

§3. Any sheriff in this State failing or refusing to make out and forward said certified lists within the time and according to the forms herein provided for, shall be deemed guilty of official misconduct, and upon conviction shall be fined not less than ten nor more than one hundred dollars. [Ibid.]

## TITLE 9—OF OFFENSES AGAINST THE PUBLIC PEACE.

### CH. 1. UNLAWFUL ASSEMBLIES. 2. RIOTS.

### CH. 3. AFFRAYS AND DISTURBANCES OF THE PEACE. 4. UNLAWFULLY CARRYING ARMS.

### CH. 1. — UNLAWFUL ASSEMBLIES.

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§419 — ART. 279. — "Unlawful assembly" defined. — An "unlawful assembly" is the meeting of three or more persons, with intent to aid each other by violence or in any other manner either to commit an offense or illegally to deprive any person of any right, or to disturb him in the enjoyment thereof. [O. C. 355.]

McGehee v. S. 23 App. 330.

§420 — ART. 280. — To prevent elections. — If the purpose of the unlawful assembly is to prevent the holding of any public election, or to prevent any particular person, or number of persons, from voting at a public election, the punishment shall be that which is prescribed in article 160. [O. C. 356.]

Ante, §259; — Indictment, Willson's Cr. Forms, 87-186-187.

§421 — ART. 281. — To prevent execution of law, etc. — If the purpose of the unlawful assembly be to oppose or prevent the execution or enforcement of any law of the State, or the lawful decree or judgment of a court in a civil action, the punishment shall be a fine not exceeding five hundred dollars. [O. C. 357.]

Indictment, Willson's Cr. Forms, 188-189.

§422 — ART. 282. — To effect the rescue of capital felon. — If the purpose of the unlawful assembly be to effect the rescue of a prisoner lawfully convicted of a capital offense, the punishment shall be a fine not exceeding one thousand dollars. [O. C. 358.]

Indictment, Willson's Cr. Forms, 190.

§423 — ART. 283. — To effect the rescue of a felon. — If the purpose of the unlawful assembly be to effect the rescue of any person lawfully convicted of a felony less than capital, the punishment shall be fine not exceeding five hundred dollars. [O. C. 359.]

Indictment, Willson's Cr. Forms, 190.

§424 — ART. 284. — To rescue one accused of capital felony. — If the purpose of the unlawful assembly be to rescue any person arrested or imprisoned for a capital offense before trial, the punishment shall be fine not exceeding five hundred dollars. [O. C. 360.]

Indictment, Willson's Cr. Forms, 191.

§425 — ART. 285. — **To rescue one accused of lesser felony.** — If the purpose of the unlawful assembly be to rescue any person lawfully arrested or imprisoned for any felony less than capital, the punishment shall be fine not exceeding three hundred dollars. [O. C. 361.]

Indictment, Willson's Cr. Forms, 191.

§426 — ART. 286. — **To rescue one accused of misdemeanor.** — If the purpose of the unlawful assembly be to rescue a person accused of a misdemeanor, the punishment shall be fine not exceeding two hundred dollars. [O. C. 362.]

Indictment, Willson's Cr. Forms, 191.

§427 — ART. 287. — **To prevent the sitting of any tribunal.** — If the purpose of the unlawful assembly be to prevent or oppose the sitting of any lawful court, board of arbitrators or referees, the punishment shall be fine not exceeding one thousand dollars. [O. C. 362a.]

Indictment, Willson's Cr. Forms, 192.

§428 — ART. 288. — **To prevent the collection of taxes.** — If the purpose of the unlawful assembly be to prevent the collection of taxes, or other money due the State, the punishment shall be fine not exceeding five hundred dollars. [O. C. 363.]

Indictment, Willson's Cr. Forms, 193.

§429 — ART. 289. — **To prevent any person from pursuing his labor.** — If the purpose of the unlawful assembly be to prevent any person from pursuing any labor, occupation or employment, or to intimidate any person from following his daily avocation, or to interfere in any manner with the labor or employment of another, the punishment shall be by fine not exceeding five hundred dollars. [Added in revising.]

Indictment, Willson's Cr. Forms, 194; cited in *McGehee v. S.* 23 App. 330.

§430 — ART. 290. — **To frighten any one by disguise.** — If the purpose of the unlawful assembly be to alarm and frighten any person by appearing in disguise, so that the real persons so acting and assembling cannot be readily known, and by using language or gestures calculated to produce in such person the fear of bodily harm, the punishment shall be by fine not exceeding five hundred dollars. [O. C. 363a, added by Act Nov. 6, 1871, p. 19.]

Indictment, Willson's Cr. Forms, 195.

§431 — ART. 291. — **To disturb families.** — If the purpose of the unlawful assembly be to repair to the vicinity of any residence, and to disturb the inmates thereof by loud, unusual or unseemly noises, or by the discharge of fire-arms, the punishment shall be by fine not exceeding five hundred dollars. A residence may be either a public or private house. [Added in revising.]

Indictment, Willson's Cr. Forms, 196.

§432 — ART. 292. — **To effect any other illegal object.** — If the purpose of the unlawful assembly be to effect any illegal object other than those mentioned in the preceding articles of this chapter, all persons engaged therein shall be liable to fine not exceeding two hundred dollars. [O. C. 364.]

§433 — ART. 293. — **Lawful meetings not included.** — No public meeting for the purpose of exercising any political, religious or other lawful rights; no assembly for the purpose of lawful amusement or recreation, is within the meaning of this chapter. [O. C. 365.]

§434 — ART. 294. — **Lawful meetings included, if unlawful purpose is afterwards agreed on.** — Where the persons engaged in any unlawful assembly met at first for a lawful purpose, and afterward agreed upon an unlawful purpose, they are equally guilty of the offense defined in article 279. [O. C. 366.]

## CH. 2. — RIOTS.

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§435 — ART. 295. — "Riots" defined. — If the persons unlawfully assembled together do, or attempt to do, any illegal act, all those engaged in such illegal act are guilty of riot. [O. C. 366.]

Indictment, Willson's Cr. Forms, 197; Post, §450-1; cited in *McGehee v. S.* 23 App. 330.

§436 — ART. 296. — To prevent collection of taxes. — If the purpose of a riot be to prevent the collection of taxes or other money due the State, any person engaged therein shall be punished by fine, not less than two hundred dollars, and not exceeding one thousand dollars, although the purpose of the riot be not effected; and if such illegal purpose be effected, in addition thereto, imprisonment in the county jail not exceeding two years may be added. [O. C. 367.]

§437 — ART. 297. — Execution of law. — If any person, by engaging in a riot, shall prevent the execution or enforcement of any law of the State, or the unlawful decree or judgment of any court in a civil cause, he shall be punished by imprisonment in the county jail not exceeding two years, and by fine not less than two hundred nor more than one thousand dollars. [O. C. 368.]

§438 — ART. 298. — Rescue of felon under sentence of death. — If any person, by engaging in a riot, shall rescue another lawfully convicted, or under lawful sentence of death, he shall be punished by imprisonment in the penitentiary not less than five nor more than ten years. [O. C. 369.]

§439 — ART. 299. — Rescue of felon less than capital. — If any person, by engaging in a riot, shall rescue any prisoner lawfully convicted of felony less than capital, or lawfully under sentence for such offense, he shall be punished by imprisonment in the penitentiary not less than two nor more than seven years. [O. C. 370.]

§440 — ART. 300. — Rescue of one convicted of misdemeanor. — If any person, by engaging in a riot, shall rescue any prisoner, lawfully convicted of a misdemeanor, he shall be punished by imprisonment in the county jail not less than six months nor more than two years. [Added in revising.]

§441 — ART. 301. — Rescue of one imprisoned for capital felony. — If any person, by engaging in a riot, shall rescue any prisoner lawfully arrested or imprisoned for a capital felony, he shall be punished by confinement in the penitentiary not less than two nor more than seven years. [O. C. 371.]

§442 — ART. 302. — Felony less than capital. — If any person, by engaging in a riot, shall rescue any prisoner lawfully arrested or imprisoned for a felony less than capital, he shall be punished by confinement in the penitentiary not less than two nor more than seven years. [O. C. 372.]

§443 — ART. 303. — Misdemeanor. — If any person, by engaging in a riot, shall rescue any prisoner lawfully arrested or imprisoned for a misdemeanor, he shall be punished by confinement in the county jail not less than six nor more than twelve months. [Added in revising.]

§444 — ART. 304. — **Preventing any person from labor.**— If any person, by engaging in a riot, shall prevent any other person from pursuing any labor, occupation or employment, or intimidate any other person from following his daily avocation, or interfere in any manner with the labor or employment of another, he shall be punished by confinement in the county jail not less than six months nor more than one year. [Added in revising.]

§445 — ART. 305. — **Disturbing residence.**— If any person, by engaging in a riot, shall disturb the inmates of any residence by loud, unusual or unseemly noises, or by the discharge of fire-arms in the immediate vicinity of such residence, he shall be punished by fine not less than fifty nor more than five hundred dollars. A residence may be either a public or a private house. [Added in revising.]

§446 — ART. 306. — **Committing any other illegal act.**— If any person, by engaging in a riot, shall commit any illegal act, other than those mentioned in the ten preceding articles, he shall, in addition to receiving the punishment affixed to such illegal act by other provisions of this Code, be also punished by confinement in the county jail not exceeding one year, or by fine not exceeding one thousand dollars. [O. C. 373.]

§447 — ART. 307. — **Half penalty when object not accomplished.**— When the purpose of the riot was to effect any of the illegal acts mentioned in the preceding articles of this chapter, and such unlawful object is not effected, the punishment may, in the discretion of the jury, be diminished to half the penalty affixed to such riot where the illegal purpose was effected. [O. C. 374.]

§448 — ART. 308. — **All participants guilty.**— A person engaged in any riot, whereby an illegal act is committed, shall be deemed guilty of the offense of riot, according to the character and degree of such offense, whether the said illegal act was in fact perpetrated by him, or by those with whom he is participating. [O. C. 375.]

§449 — ART. 309. — **Where assembly was at first lawful.**— Where the assembly was at first lawful, and the persons so assembled afterward agree to join in the commission of an act which would amount to a riot, if it had been the original purpose of the meeting, all those who do not retire when the change of purpose is known, are guilty of riot. [O. C. 377.]

§450 — ART. 310. — **One may be prosecuted before others are arrested.**— Any one person engaged in an unlawful assembly or riot may be prosecuted and convicted before the others are arrested, but the indictment or information must state, and it must be proved on the trial, that three or more persons were assembled, and their names given, if known; if not known, it must be so alleged. [O. C. 378.]

§451 — ART. 311. — **Indictment — Requisites of.**— The indictment or information must likewise state the illegal act which was the object of the meeting, or which they proceeded to do, if the assembly was originally lawful. [O. C. 379.]

§452. — ART. 312. — **Duty of officers in case of riot.**— If any persons shall be unlawfully or riotously assembled together, it shall be the duty of any magistrate or peace officer, so soon as it may come to his knowledge, to go to the place of such unlawful or riotous assembly, and command the persons assembled to disperse; and all who continue so unlawfully assembled, or engaged in a riot, after being warned to disperse, shall be punished by the addition of one-half the penalty to which they would otherwise be liable, if no such warning had been given. [O. C. 380.]



## CH. 3. — AFFRAYS AND DISTURBANCES OF THE PEACE.

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§453 — ART. 313. — "Affray" defined. — If any two or more persons shall fight together in a public place, they shall be punished by fine not exceeding one hundred dollars. [O. C. 381.]

Indictment, Willson's Cr. Forms, 198; S. v. Washington, 19 Tex. 128; Shelton v. S. 30 Tex. 431; S. v. Billingsly, 48 Tex. 93.

§454 — What is an affray. — It is not essential to constitute an affray that the fighting should be by consent of the parties concerned. It is not the mere fighting of the persons engaged that constitutes the *gravamen* of this offense. It is because the violence is committed in a public place and to the terror of the people that the crime is called an affray, instead of an assault and battery. Hence one of the parties engaged in an affray may be convicted and punished, whilst the other may be acquitted. Saddler v. R. Dallam, 610.

§455 — ART. 314. — Disturbance of the peace. — If any person shall go into, or near any public place, or into or near any private house and shall use loud and vociferous or obscene, vulgar or indecent language, or swear or curse, or yell or shriek or expose his person, or rudely display any pistol or other deadly weapon, in a manner calculated to disturb the inhabitants of such public place or private house, he shall be fined in any sum not exceeding one hundred dollars. [O. C. 382, amended by Act Feb. 19, 1883, p. 12.]

Indictment, Willson's Cr. Forms, 199.

§456 — Province of the jury. — In a prosecution for using loud and vociferous, obscene, vulgar and indecent language, cursing, etc., near a private house, the prosecuting witness, over defendant's objection, was asked by the State if the imputed language was used in a manner calculated to disturb his family, and he answered in the affirmative. Held error. The witness could have testified to the words used, the manner of their use, the tone of voice, etc., leaving it to the jury, whose province it was to decide whether or not they were calculated to disturb the inhabitants of the house. Lumbkin v. S. 12 App. 341. And a charge of the court which invades this province of the jury is erroneous, and upon the weight of evidence. McCandless v. S. 21 App. 411.

§457 — ART. 315. — "Public place" defined. — A public place within the meaning of the two preceding articles, is any public road, street or alley, of a town or city, or any inn, tavern, store, grocery or workshop, or place at which people are assembled or to which people commonly resort for purposes of business, amusement, recreation or other lawful purpose. [O. C. 383, amended by Act of Feb. 19, 1883, p. 12.]

§458 — ART. 316. — Shooting in public place. — If any person shall discharge any gun, pistol, or fire-arms of any description, on or across any public square, street or alley in any city, town or village in this State, he shall be fined in a sum not exceeding one hundred dollars. [Act Nov. 12, 1866, p. 210.]

Indictment, Willson's Cr. Forms, 200.

§459 — ART. 317. — Horse-racing on public road or street. — Any person who shall run, or be in any way concerned in running any horse race in, along, or across any public square, street or alley in any city, town or village, or in, along or across any public road within this State, shall be fined in a sum not less than twenty-five nor more than one hundred dollars. [Act May 19, 1873, pp. 83, 84.]

Indictment, Willson's Cr. Forms, 201-202-203; S. v. Catchings, 48 Tex. 654; King v. S. 3 App. 7.

## CH. 4. — UNLAWFULLY CARRYING ARMS.

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§460. — ART. 318. — Unlawfully carrying arms. — If any person in this State shall carry on or about his person, saddle, or in his saddlebags, any pistol, dirk, dagger, slung shot, sword cane, spear, or knuckles made of any metal or any hard substance, bowie knife, or any other kind of knife manufactured or sold for purposes of offense or defense, he shall be punished by fine of not less than twenty-five nor more than two hundred dollars, (and shall be confined in the county jail not less than twenty nor more than sixty days.) [Amended by Act of Feb. 24, 1887, pp. 6-7.] Willson's Cr. Forms, 204.

§461 — ART. 319. — Not applicable when and to whom. — The preceding article shall not apply to a person in actual service as a militiaman, nor to a peace officer or policeman, nor person summoned to his aid, nor to a revenue or other civil officer engaged in the discharge of official duty, nor to the carrying of arms on one's own premises or place of business, nor to persons traveling, nor to one who has reasonable ground for fearing an unlawful attack upon his person, and the danger is so imminent and threatening as not to admit of the arrest of the party about to make such attack, upon legal process. [Act April 12, 1871, p. 25.]

§462 — Constitutionality of statute. — This statute is constitutional. It does not conflict with section 23 of the Bill of Rights of this State, which declares that "every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the legislature shall have power by law to regulate the wearing of arms with a view to prevent crime." S. v. Duke, 42 Tex. 455; English v. S. 35 Tex. 478; Lewis v. S. 7 App. 567.

§463 — Indictment under art. 318. — Under the original act the exceptions embraced in article 319 were embodied in the enacting clause, and it was held that it was necessary in the indictment to either directly, or by necessary inference, negative each one of said exceptions. S. v. Duke, 42 Tex. 455; Smith v. S. Id. 464; S. v. Clayton, 43 Tex. 410; Woodward v. S. 5 App. 296; Leatherwood v. S. 6 App. 244. In revising the Code the exceptions were separated from the enacting clause and placed to themselves in article 319, and since this change it is held that it is not necessary to negative any of said exceptions, either by allegation or proof. Lewis v. S. 7 App. 567; Zallner v. S. 15 App. 23. To charge that the defendant "did have about his person a certain pistol," is equivalent to charging that he "did carry" it about his person. S. v. Carter, 88 Tex. 89. The indictment need not charge that the weapon was "unlawfully" carried. It is sufficient to use the words of the statute. Pickett v. S. 10 App. 290.

§464 — Acts not in violation of the law. — It is not the object of the law to punish a person for carrying a weapon when it clearly appears he did not intend to violate the law. Lyle v. S. 21 App. 153. Purchasing a pistol in a town, and carrying it from store to store in quest of ammunition for it, and then carrying it a distance of fifteen miles to defendant's home, was held to be not an offense under article 318. Waddell v. S. 37 Tex. 354. So purchasing a pistol in a town and carrying it to one's own residence in said town, was held to be no offense. Christian v. S. 87 Tex. 475. (The transportation of a pistol home from the place of purchase, by the party purchasing it, or its transportation to a shop for repairs, or from the shop home, whether loaded or unloaded, and although the defendant discharged the pistol while so transporting it, does not constitute an offense. Pressler v. S. 19 App. 52; West v. S. 21 App. 427. To carry the barrel and stock of a revolver, without having the cylinder also, is not an offense. Cook v. S. 11 App. 19. To find and carry a pistol to one's home is not an offense. Mangum v. S. 15 App. 362. The defendant and another person were going along a road in a wagon; a rabbit was seen by them; the other person handed defendant a pistol; the defendant got out of the wagon and shot at the rabbit; held, these facts did not constitute an offense. Sanderson v. S. 23 App. 520.)

§465 — Acts in violation of the law. — A person has no right to carry a pistol while hunting

hogs in the range, or while hunting for anything off his own premises. *Baird v. S.* 38 Tex. 599; *Titus v. S.* 42 Tex. 578. Nor to take a pistol out on the range to kill a beef, although the defendant had no other means at hand to kill the beef. *Reynolds v. S.* 1 App. 616.

§466 — **Officer, etc., exception as to.** — A sergeant or under officer in the penitentiary service is, while in charge of a convict camp and engaged in duties incidental thereto, a "civil officer engaged in the discharge of official duty" within the meaning of article 819, and as such is expressly exempt from amenability for carrying a pistol. *Carmichael v. S.* 11 App. 27. At the time a defendant was seen with a pistol he declared that he was deputy sheriff of the county, and had been over in another county after a horse thief. Held, that, as the declaration accompanied the act of carrying the pistol, it was *res gestæ*, and therefore competent evidence, and as it was a reasonable explanation of his having the pistol, and was not controverted, it was sufficient to show that he was a civil officer engaged in the discharge of an official duty at the time of the alleged offense, and was therefore not culpable for having the pistol on his person. *Irvine v. S.* 18 App. 51. The defense, in a prosecution for carrying a pistol, offered in evidence the commission of the sheriff of the county, appointing the accused a special deputy to pursue and capture horse thieves. This evidence, upon objection made thereto by the State was rejected. Held, error. The commission, whether legal or illegal, being of a nature calculated to lead the accused to believe that he had the right to carry the pistol, should have been admitted. It is also suggested that a citizen, who is not an officer, when in hot pursuit of a thief, or of stolen property, would not violate the law in carrying a pistol. *Lyle v. S.* 21 App. 153. A person summoned by an officer legally authorized to execute a search warrant, to attend him armed as one of the posse to assist in its execution, cannot be convicted for carrying deadly weapons while thus employed, though he may, in company with the officer, and while under his orders, have gone in a direction which he was not required to go in executing the process. *O'Conner v. S.* 42 Tex. 27. Whether or not a *de facto* officer is within the exception seems to be an open question. *Rainey v. S.* 8 App. 62. A deputy sheriff is a peace officer, and may carry weapons in any county in the State, and will not thereby violate the law. *Clayton v. S.* 21 App. 343. A defendant who had been deputed special constable by a justice of the peace could not, it was held, justify under such authority five months thereafter. *Snell v. S.* 4 App. 171.

§467 — **Carrying arms on one's own premises.** — Where the premises were in the possession of a tenant of defendant under an unexpired lease, and the lease contained no reservation authorizing the defendant to enter upon the premises, it was held that such premises were not the defendant's within the meaning of the exception in the statute. *Zallner v. S.* 15 App. 23. The premises on which the pistol was carried belonged jointly to defendant's wife and one M., but were occupied by said M., and not by defendant or his wife. Held, that the premises were not the defendant's own within the meaning of this exception in the statute. *Brannon v. S.* 28 App. 428.

§468 — **Traveler — Exceptions as to.** — When found carrying a pistol, the defendant was en route with a herd of cattle driving the same from another county to a market in the State of Kansas. Held, that he was a traveler. *Rice v. S.* 10 App. 288. Under the former statute the exception as to a traveler was qualified by requiring that the weapon should be carried with his baggage. *Chaplin v. S.* 7 App. 87; *Lewis v. S.* 2 App. 26; *Woodward v. S.* 5 App. 296; *Smith v. S.*, 42 Tex. 464. But as the law now is, he may carry the weapon on or about his person. *Chaplin v. S.* 7 App. 87. The accused when he carried the pistol on his person was going from his home in the county to the county site of said county, intending to return to his home the next day. Held, he was not a traveler. *Darby v. S.* 23 App. 407.

§469 — **Imminent danger.** — Whether the fear of an unlawful attack was reasonable; or whether the danger was so imminent and threatening as not to admit of the arrest of the party about to make such attack, upon legal process, are mixed questions of law and fact, to be determined by the jury, under proper instructions from the court. *Young v. S.* 42 Tex. 462.

§470 — **"Brass-knuckles" — Construed.** — The former statute used the term "brass-knuckles," instead of the words "knuckles made of any metal, or any hard substance" substituted by the amendment. It was held, however, before this amendment, that the term "brass-knuckles" included a weapon of that character made of steel; that "brass-knuckles" was the name of a particular weapon, the word "brass" being used to designate the weapon, and not to specify the metal of which it must be made. *Harris v. S.* 22 App. 677.

§471 — **Jurisdiction of this offense.** — The penalty prescribed by the former statute was a fine of not less than twenty-five, nor more than one hundred dollars. It was held that the county courts and justices of the peace had concurrent jurisdiction of the offense. *Woodward v. S.* 5 App. 296; *Jennings v. S.* 5 App. 298; *Solon v. S.* Id. 301; *Leatherwood v. S.* 6 App. 244; *Chaplin v. S.* 7 App. 87. But the amended article has changed the penalty for this offense, fixing it at a fine of not less than twenty-five nor more than two hundred dollars, and confinement in the county jail not less than twenty nor more than sixty days. This deprives justices of the peace of jurisdiction of this offense. Const. art. V. § 19, C. C. P. art. 76; *Tuttle v. S.* 1 App. 364.

§472 — **ART. 320. — Carrying arms in church or other assembly.** — If any person shall go into any church or religious assembly, any school room, or other place where persons are assembled for amusement or for educational or scientific purposes, or into any circus, show, or public exhibition of any kind, or into a ball-room, social party, or social gathering, or to any election precinct on the day or days of any election, where any portion of the people of this State are collected to vote at any election, or to any other place where

people may be assembled to muster, or to perform any public duty or to any other public assembly, and shall have or carry about his person a pistol or other fire-arm, dirk, dagger, slung-shot, sword-cane, spear, brass-knuckles, bowie-knife, or any other kind of a knife manufactured and sold for the purposes of offense and defense, he shall be punished by fine not less than fifty nor more than five hundred dollars, and shall forfeit to the county the weapon or weapons so found on his person. See § 479. [Act April 12, 1870, p. 25.]

Indictment, Willson's Cr. Forms, 205.

§473 — **Indictment.** — Where the indictment was for carrying a weapon into a "ball room," it was held that it was not necessary to allege that a ball or dance was going on, or that the persons there assembled were human beings. *Owens v. S.* 3 App. 404. (But it must be alleged that persons had assembled. The purpose of the law is not the protection of the edifice or premises, but the protection of the persons there assembled.) *Rainey v. S.* 8 App. 62. It need not negative any of the exceptions in the statute, as none of them are now embraced in the enacting clause. Ante, § 463. See *Owens v. S.* 3 App. 404; *Summerlin v. S.* Id. 444, decided under the statute as it was before the revision.

§474 — **Where people are assembled, etc.** — A justice's court in session and engaged in a trial is a "public assembly" within the meaning of the preceding article. *Summerlin v. S.* 3 App. 444. An indictment charged that the defendant went upon the public square of a town where people had assembled to attend district court, and carried a pistol upon his person. It was held that to sustain this charge it was necessary to prove that people were assembled on the public square at the time and for the purpose alleged. *Scott v. S.* 40 Tex. 503.

§475 — **One's premises no exception.** — The owner of house in which a ball was going on, invited the defendant to act as doorkeeper and general manager, with authority to preserve peace and good order, and armed him with a pistol. Held, that such authority did not justify him in having the pistol on or about his person. *Owens v. S.* 3 App. 404. No person, unless he be a peace officer, can go into an assembly of people such as is named in the statute and have and carry about his person a prohibited weapon, without violating the law. Not even the owner of the premises is exempt under art. 320. *Brooks v. S.* 15 App. 88.

§476 — **Without intent to violate the law.** — The mere taking from its place in a house, and immediately replacing a weapon, without intending to violate the law, would not be an offense. *Brooks v. S.* 15 App. 88.

§477 — **Jurisdiction of this offense.** — Justices of the peace do not have jurisdiction of this offense, as the penalty may exceed two hundred dollars. Const. art. V, § 19, C. C. P. art. 76; *Anderson v. S.* 18 App. 17.

§478 — **ART. 321. — Not applicable, to whom.** — The preceding article shall not apply to peace officers, or other persons authorized or permitted by law to carry arms at the places therein designated. [Act April 12, 1871.]

§478a — **"Peace officers" who are.** — Article 44 of the Code of Criminal Procedure designates who are peace officers. See also arts. 117-246 of Code of Criminal Procedure, and Acts 1879, chap. 23, § 6, for other persons named as peace officers. A deputy marshal of an incorporated city or town is not a peace officer unless made so by the charter of such city or town. Nor is an ex-bailiff of a grand jury. *Alford v. S.* 8 App. 545. Whether or not a peace officer *de facto* is within the meaning of the preceding article, seems to be an open question. *Rainey v. S.* 8 App. 62. It is not necessary to make this exception a valid defense, that the officer should show that he was then and there in the discharge of his duties as such. He need only show that he was at the time of the alleged offense a peace officer. *Williams v. S.* 42 Tex. 466. See further as to officers, Ante, § 466.

§479 — **Forfeiture of weapon.** — That portion of the preceding article which declares that the weapon shall be forfeited is unconstitutional. *Hudeberg v. S.* 38 Tex. 535; *Jennings v. S.* 5 App. 298; Ante § 472.

§480 — **ART. 322. — Arrest without warrant — Officer failing, punished.** — Any person violating any of the provisions of articles 318 and 320, may be arrested without warrant by any peace officer, and carried before the nearest justice of the peace for trial; and any peace officer who shall fail or refuse to arrest such person on his own knowledge, or upon information from some credible person, shall be punished by fine not exceeding five hundred dollars. [Act April 12, 1871, p. 26.] Indictment, Willson's Cr. Forms, 206.

§481 — **ART. 323. — Not applicable to frontier counties.** — The provisions of this chapter shall not apply to or be enforced in any county which the governor may designate, by proclamation, as a frontier county and liable to incursions by hostile Indians. [Act April 12, 1871, p. 26.]

§482 — **Revocation of proclamation.** — The governor may revoke his proclamation at any time, and subject a county previously exempted, to the operation of the law. *S. v. Clayton*, 43 Tex. 410. In such case, defendant cannot plead as a defense ignorance of such revocation, as it is matter of law and not of fact. *Chaplin v. S.* 7 App. 87.

# TITLE 10—OFFENSES AGAINST PUBLIC MORALS, DECENCY AND CHASTITY.

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2. INCEST.  
3. OF ADULTERY AND FORNICATION.

CH. 4. DISORDERLY HOUSES.  
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## CH. 1.—UNLAWFUL MARRIAGES.

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§483—ART. 324.—"Bigamy" defined.—If any person who has a former wife or husband living shall marry another in this State, such person shall be punished by imprisonment in the State penitentiary for a term not less than two nor more than five years. [O. C. 384, amended by Act March 23, 1887, p. 37.]

Indictment, Willson's Cr. Forms, 207.

§484—ART. 325.—Preceding article not applicable, when.—The provisions of the preceding article shall not extend to any person whose husband or wife shall have been continually remaining out of the State, or shall have voluntarily withdrawn from the other and remained absent for five years, the person marrying again not knowing the other to be living within that time. Nor shall the provisions of said article extend to any person who has been legally divorced from the bonds of matrimony. [O. C. 385.]

§485—Indictment.—The indictment need not state the name of the first or lawful spouse of the defendant. *Watson v. S. 13 App. 76*. But it must allege a valid marriage of the defendant, and his or her subsequent marriage during the life of the lawful spouse. It need not negative the exceptions contained in article 325, as they are matters of defense. *Hull v. S. 7 App. 593*.

§486—Bigamy and adultery are different offenses.—Bigamy and adultery are different offenses and are not maintainable by the same evidence; and, therefore, a former acquittal of bigamy, will not bar a prosecution for adultery. *Swancoat v. S. 4 App. 105; Hildreth v. S. 19 App. 195*. See Post, § 518.

§487—Mistake of fact a defense.—Bigamy is not committed by the intermarriage of a man and woman, one of them having a lawful spouse alive, if such marriage was entered into under a mistake of fact as to the death of the former spouse. *Hildreth v. S. 19 App. 195; Watson v. S. 13 App. 76; Alonzo v. S. 15 App. 378*. But if after discovering such mistake they continue to cohabit together, they would be guilty of adultery, and the fact that they had been married to each other would be no defense to a prosecution against them for adultery. *Hildreth v. S. 19 App. 195*. See §§ 100-102.

§488—ART. 326.—Intermarriage of whites and blacks.—If any white person and negro shall knowingly intermarry with each other within this State, or having so intermarried, in or out of the State, shall continue to live together as man and wife within this State, they shall be punished by confinement in the penitentiary for a term not less than two nor more than five years. [O. C. 386, amended in revising.]

Indictment, Willson's Cr. Forms, 208-209.

§489 — **Constitutionality of this and the former statute.** — Prior to the revision of the Code the preceding article prescribed a punishment for the *white* person only. The *negro* was not punishable. Now *both* are punishable. Even before the change in the article it had been held to be valid, and not in conflict with the constitution of the United States, or of the act of congress known as the Civil Rights Bill. *Fraser v. S. 3 App. 263.* Or of the constitution of this State. *Francois v. S. 9 App. 144.*

§490 — **ART. 327. — “Negro” and “white person” defined.** — The term “negro” as used in the preceding article, includes also a person of mixed blood descended from negro ancestry to the third generation inclusive, although one ancestor of each generation may have been a white person. All persons not included in the definition of “negro” shall be deemed a white person within the meaning of this article. [Added in revising.]

§491 — **ART. 328. — Proof of marriage.** — In trials for the offenses named in the preceding articles of this chapter, proof of marriage by mere reputation shall not be sufficient. [O. C. 328.]

§492 — **Marriages must be proved.** — In a prosecution for bigamy a valid marriage of the defendant, and a subsequent marriage by him, or her, during the life of his or her lawful spouse, must be proved. *May v. S. 4 App. 424; Dumas v. S. 14 App. 464.*

§493 — **Reputation as evidence of marriage.** — Although general reputation of marriage is *alone* not sufficient evidence to prove marriage, it is admissible as tending to do so, and taken in connection with the cohabitation of the parties, and the admissions of the defendant, would be sufficient to sustain a conviction. See this subject fully discussed in *Dumas v. S. 14 App. 464.* The preceding article of the statute does not declare that reputation is not admissible evidence of marriage, but only that reputation *alone*, without other evidence, is insufficient to establish the fact of marriage. *Patterson v. S. 17 App. 102.* Emancipated slaves who were declared lawfully married by the constitution of 1869, are within the law defining and punishing bigamy, and proof of such marriage is not proof by reputation; but the evidence must show that they were living together at the date said constitution took effect. *Stewart v. S. 7 App. 326.*

§494 — **Marriage license, etc., as proof of marriage.** — The marriage license and the return thereon, of the officer or minister who executed the same, or the testimony of witnesses who were present at the marriage, are legal and sufficient evidence of marriage. *Dumas v. S. 14 App. 464; Fraser v. S. 3 App. 263.* A certified copy of a marriage certificate from the records of another State, properly authenticated, was held competent and sufficient proof of marriage, in connection with evidence identifying each of the persons named in said certificate. For a full discussion of the questions relating to such evidence; the mode of authenticating the same, and of proving the laws of other States, see *Patterson v. S. 17 App. 102.*

§495 — **Husband and wife as witnesses.** — The lawful spouse is a competent witness for the defendant, and, like other witnesses, may be compelled, at the instance of the defendant, to testify. *Dumas v. S. 14 App. 464.* But in prosecutions for adultery, incest, and bigamy, these not being “offenses committed by one against the other,” the lawful husband or wife cannot testify, the one against the other. *Compton v. S. 13 App. 271* — overruling *Morrill v. S. 5 App. 447* and *Roland v. S. 9 App. 277.* See, also, *Thomas v. S. 14 App. 70; R. v. Mumford, Dallam, 374.*

§496 — **“Valid marriage” — What is.** — A valid marriage is one solemnized with the legal prerequisites of, and in accordance with the *lex loci contractus*. In this State, a license is a legal prerequisite, and the rights of matrimony must be performed by some one of the functionaries authorized by the statute to perform them. Since the prerequisites have been in force, it must be shown that they were complied with to constitute a valid marriage in accordance with the laws of this State. *Dumas v. S. 14 App. 464.*

§497 — **Proof that lawful spouse was living.** — The burden of proof is on the State to prove beyond a reasonable doubt that the lawful spouse was living at the date of the second marriage. This proof need not be made by direct or positive testimony, but like any other fact, may be established by circumstantial evidence under the rules of law applicable to that character of evidence. *Hull v. S. 7 App. 594; Gorman v. S. 23 Tex. 646.*

§498 — **Miscegenation — Proof of.** — In a prosecution for miscegenation, the fact of marriage must be proved. Mere cohabitation without a marriage will not constitute the offense. It must also be proved that one of the parties to the marriage was a white person, and the other a negro. The mere opinion of a witness that one of them looked like a white person, or, as the case may be, looked like a negro, is insufficient. The different race of the parties must be proved with certainty beyond a reasonable doubt. *Moon v. S. 7 App. 608.*

§499 — **Acquittal of one will not bar prosecution against the other.** — In *Alonzo v. S. 15 App. 378*, it is held that in a prosecution for adultery, the acquittal of one of the parties to the offense, will not bar a prosecution against the other. The reasoning and doctrine of that decision seems applicable also to the offenses of bigamy and miscegenation.

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§500 — ART. 329. — **Punishment.**— All persons who are forbidden to marry by the succeeding articles, who shall intermarry or carnally know each other, shall be punished by imprisonment in the penitentiary not less than two nor more than ten years. [O. C. 388.]

Indictment, Willson's Cr. Forms, 210-211-212; Compton v. S. 13 App. 271.

§501 — ART. 330. — **Certain marriages prohibited.**— No man shall marry his mother, his father's sister or half-sister, his mother's sister or half-sister, his daughter, the daughter of his father, mother, brother, or sister, or of his half-brother or sister, the daughter of his son or daughter, his father's widow, his son's widow, his wife's daughter, or the daughter of his wife's son or daughter. [O. C. 389.]

§502 — ART. 331. — **Same subject.**— No woman shall marry her father, her father's brother or half-brother, her mother's brother or half-brother, her own brother or half-brother, her son, the son of her brother or sister, or of her half-brother or half-sister, the son of her son or daughter, her mother's husband after the death of her mother, her daughter's husband after the death of her daughter, her husband's son, the son of her husband's son or daughter. [O. C. 390.]

§503 — **Not an offense at common law.**— Incest is not an offense at common law. It was made a statutory offense in this State by the Act of 1848, which took effect January 1, 1849, and prior to said act a prosecution for said offense was not maintainable in this State. Tuberville v. S. 4 Tex. 128.

§504 — ART. 332. — **Relationship, how proved.—Proof of marriage unnecessary.**— Upon a trial for incest, the fact of the relationship between the parties may be proved in the manner in which that fact is established in civil suits, and proof of cohabitation or carnal knowledge shall be in all cases sufficient, without proof of marriage. [O. C. 391.]

§505 — **Relationship by affinity ceases, when.**— Relationship by affinity ceases with the dissolution of the marriage creating it. Incest, therefore, between parties whose relationship is one of affinity founded upon the marriage of one of them, is impossible after the dissolution of the marriage. Johnson v. S. 20 App. 609; Clanton v. S. Id. 615.

§506 — **Proof of relationship by affinity.**— Where the step-father is charged with incest with his step-daughter, a legal marriage of the defendant with the mother of such daughter must be established, before the carnal intercourse of such father and daughter can be held to be incest. McGrew v. S. 13 App. 340. The fact of such legal marriage may be proved by circumstantial, as well as by direct evidence. Nance v. S. 17 App. 385. If there be evidence tending to show that the mother of the step-daughter, prior to her marriage with defendant, had been married to another man, it devolves upon the State to show that such former marriage was illegal, or had ceased to exist at the time of her marriage with defendant, otherwise her marriage with defendant would be illegal, and there would be no relationship between defendant and her daughter. Nance v. S. 17 App. 385; McGrew v. S. 13 App. 340.

§507 — **Husband and wife — Cannot testify against each other.**— In this offense the husband and the wife are incompetent to testify against each other, but are competent witnesses for each other, and as such may be compelled to testify. Dumas v. S. 14 App. 464; Compton v. S. 13 App. 271; overruling Morrill v. S. 5 App. 447 and Roland v. S. 9 App. 277. See, also, Thomas v. S. 14 App. 70.

§508 — **Accomplice testimony.**— If the female with whom the incestuous intercourse is alleged to have been had, is shown to have knowingly, voluntarily, and with the same intent which actuated the accused, united with him in the commission of the offense, she is an accom-

plce in the crime, and her uncorroborated testimony is insufficient to support a conviction of the accused. On the other hand, if the evidence shows that in the commission of the incestuous act, she was the victim of force, threats, fraud or undue influence, so she did not act voluntarily, and did not join in the act with the same intent that actuated the accused, then she is not an accomplice, and a conviction might stand even upon her uncorroborated testimony. *Mercer v. S.* 17 App. 452.

§509 — **Consent of female to the offense.** — The question of the consent of the female to the incestuous intercourse does not necessarily enter into the composition of the offense of incest, but a prosecution for said offense can be maintained against the man, when the evidence shows that she did not consent to such intercourse. *Mercer v. S.* 17 App. 452.

§510 — **Acquittal of one, will not bar prosecution against the other.** — The acquittal of one of the parties to the incestuous intercourse will not bar the prosecution and conviction of the other. One may be innocent and the other guilty of the offense. *Alonzo v. S.* 15 App. 378.

§511 — **Insufficient evidence.** — For evidence held insufficient to support convictions for this offense, see *Tuberville v. S.* 4 Tex. 128; *Gay v. S.* 2 App. 127; *McGrew v. S.* 13 App. 340.

§512 — **Province of the jury — Charge of the court as to.** — In its charge to the jury the court is required to distinctly set forth the law applicable to the case as made by the evidence. The jury are the exclusive judges of the facts proved and of the weight to be given to the testimony, and it is usual for the court in its charge to instruct the jury that such is their province. See *Jackson v. S.* 22 App. 442 for a state of facts which demanded such an instruction, and because of the failure of the court to give it, the conviction was set aside.



## CH. 3.—OF ADULTERY AND FORNICATION.

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Subsequent marriage.	522		
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§513 — ART. 333. — "Adultery" defined. — Adultery is the living together and carnal intercourse with each other, or habitual carnal intercourse with each other, without living together, of a man and woman when either is lawfully married to some other person. [O. C. 392, amended in revising.]

Indictment, Willson's Cr. Forms, 213-214-215.

§514 — Indictment. — It is sufficient to allege that one of the offenders is married to some person other than to the person with whom the adultery is charged. But it is not necessary that the name of such person be alleged; nor is it necessary to allege that one of the offenders is a man and the other a woman. *Hildreth v. S.* 19 App. 195; *Collum v. S.* 10 App. 708; *Holland v. S.* 14 App. 182; *Clay v. S.* 3 App. 499. The adultery need not be alleged with a *continuando*, but may be alleged as on a single, designated day. *Swancoat v. S.* 4 App. 105. An indictment which merely charges that the parties did "unlawfully cohabit together and carnally know each other," is insufficient. *Edwards v. S.* 10 App. 25.

§515 — Change in the law. — By the Revised Penal Code, the offense of adultery has been materially changed, and the offense may now be committed in either of two modes: 1st, by the living together and having carnal intercourse with each other, of a man and a woman, of whom either is married to some other person; or, 2d, by the habitual carnal intercourse of such parties with each other, without living together. The changes made in the law defining this offense, are such as require corresponding changes in the pleading, proof and instructions to the jury, and many of the adjudications under the former law are now inapplicable. *Collum v. S.* 10 App. 708. The author cites only such adjudications under the former statutes as seem to him to be still applicable.

§516 — ART. 334. — Proof of marriage. — The proof of marriage in such cases may be made by the production of the original marriage license and return thereon, or a certified copy thereof, or by the testimony of any person who was present at such marriage, or who has known the husband and wife to live together as married persons. [O. C. 393, amended in revising.]

*Holland v. S.* 14 App. 182.

§517 — Other proof of marriage, etc. — The preceding article does not prescribe the only mode of proving the marriage. It may be proved by the defendant's admissions, as may also the fact that his, or her lawful spouse was living at the time of the adultery. *Boger v. S.* 19 App. 91. Of course such admissions would ordinarily be admissible evidence only against the party making them.

§518 — Evidence. — It is not incumbent on the State to prove the name of the person to whom one of the adulterers is married. *Collum v. S.* 10 App. 708. Nor to prove a guilty knowledge on the part of the accused. *Fox v. S.* 3 App. 329. The evidence should be confined to the particular kind of adultery charged, that is, to adultery by cohabitation and carnal intercourse or, by habitual carnal intercourse, without cohabitation. Where but one of these modes of committing the offense is charged, evidence of its commission by the other mode is not admissible, and if admitted, will not support a conviction. *Randall v. S.* 12 App. 250; *Burns v. S.* Id. 394. A witness must not be allowed to testify his mere suspicions from general indications, as that, from the position in which he saw the parties, he received the impression that they had been having carnal intercourse. *McKnight v. S.* 6 App. 158. Although the evidence may show that the parties married each other and lived together as man and wife, they may still be convicted of adultery. *Hildreth v. S.* 19 App. 195. And, it has been held that a former acquittal of bigamy can constitute no bar against a charge of adultery. *Swancoat v. S.* 4 App. 105. This decision was rendered, however, before the adoption of the Revised Codes, and whether or not, in view of art. 714, sub. 8, of the Code of Criminal Procedure it would be adhered to, remains to be determined. In a prosecution for adultery, the State was permitted to prove acts of the parties occurring subsequent to the filing of the indictment, and in a county other than that of the prosecution. It was held that under the peculiar facts of that case, the evidence was admissible. *Funderburg v. S.* 23 App. 392.

§519 — Husband and wife as witnesses. — The husband or wife of a party prosecuted for this offense is not competent to testify against the accused; nor competent even to make a complaint

charging against him or her said offense. *Thomas v. S.* 14 App. 70; *Compton v. S.* 13 App. 271, overruling *Morrill v. S.* 5 App. 447, and *Roland v. S.* 9 App. 277. But husband and wife are competent witnesses for each other, and as such, may be compelled to testify at the instance of the defendant. *Alonzo v. S.* 15 App. 378. The husband or wife of the defendant is a competent witness against the paramour of the defendant. *Alonzo v. S.* 15 App. 378; *Morrill v. S.* 5 App. 447.

§520 — **Accomplice testimony.** — The testimony of the paramour when introduced in behalf of the State as that of an accomplice, and uncorroborated will not support a conviction. *Merritt v. S.* 10 App. 402; *Merritt v. S.* 12 App. 203. An indicted adulterer is not a competent witness for the paramour. But if acquitted, or the indictment be dismissed, is then competent. *Morrill v. S.* 5 App. 447; *Batier v. S.* 4 App. 57.

§521 — **ART. 335. — Both parties guilty.** — When the offense of adultery has been committed, both parties are guilty, although only one of them may be married. [O. C. 394, amended in revising.]

§522 — **Subsequent marriage.** — A subsequent valid marriage of the parties does not condone the previous adultery, and is no defense to a prosecution for said offense. *Fox v. S.* 3 App. 329.

§523 — **Charge of the court.** — A charge which wholly ignores the question of the marriage of one of the parties, is erroneous. *Parks v. S.* 8 App. 337. When but one of the modes of committing adultery is charged in the indictment, it is radical error to instruct that a conviction may be had upon evidence which proves the other mode not alleged. *Randle v. S.* 12 App. 251; *Burns v. S.* Id. 394; *Hildreth v. S.* 19 App. 195. Where evidence of the acts of the parties occurring in another county from that of the prosecution, and subsequent to the presentment of the indictment, were admitted as tending to prove the adultery charged, it was held error for the court to omit to instruct the jury, as to the purpose for which such testimony was admitted, and that they could not convict for adultery committed in another county. *Funderburg v. S.* 23 App. 392. When the adultery is charged to have been committed by "habitual carnal intercourse," without cohabitation, it is error to instruct the jury so as to permit a conviction without proof that the carnal intercourse was *habitual*. The phrase "habitual intercourse," is a familiar and untechnical expression, and need not be explained in the charge. *Collum v. S.* 13 App. 708.

§524 — **Acquittal of one will not bar prosecution against the other.** — The acquittal of one of the parties to the adultery will not bar a prosecution and conviction of the other. *Alonzo v. S.* 15 App. 378.

§525. — **ART. 336. — Punishment for adultery.** — Every person guilty of adultery shall be punished by fine not less than one hundred nor more than one thousand dollars. [O. C. 392, amended by Act. Feb. 12, 1858, p. 165.]

§526 — **ART. 337. — "Fornication" defined.** — Fornication is the living together and carnal intercourse with each other, or habitual carnal intercourse with each other without living together, of a man and woman, both being unmarried. [Added in revising.]

Indictment, Willson's Cr. Forms, 216-217.

§527 — **When fornication was made an offense.** — Prior to the adoption of the Revised Penal Code, the offense of fornication was not defined by the Code, and was therefore not punishable under article 3 of said Code as it then existed. *Wolff v. S.* 6 App. 195 and cases there cited. But it is now made an offense and is punishable. *Wells v. S.* 9 App. 160; *Powell v. S.* 12 App. 238.

§528 — **Evidence.** — It is incumbent on the State to prove that both fornicators were unmarried at the time of the alleged offense. *Wells v. S.* 9 App. 160. See evidence held insufficient to sustain a conviction. *Cohen v. S.* 11 App. 337; *Smelson v. S.* 31 Tex 95; *Spenser v. S.* Id. 64.

§529 — **Charge of the court.** — When only one of the modes of committing fornication is charged in the indictment, it is radical error to instruct the jury that they may convict upon evidence proving that the offense was committed by the other mode not charged. *Powell v. S.* 12 App. 238.

§530 — **Former acquittal of one no bar to conviction of the other.** — The acquittal of one of the alleged fornicators is no bar to the prosecution and conviction of the other. *Alonzo v. S.* 15 App. 378.

§531 — **ART. 338. — Punishment for fornication.** — Every person guilty of fornication, shall be punished by fine not less than fifty nor more than five hundred dollars. [Added in revising.]

## CH. 4. — DISORDERLY HOUSES.

ART.	SEC.	ART.	SEC.
339. "Disorderly house" defined.	532	Evidence.	537
Indictment.	533	Charge of the court.	538
Keepers only, are liable.	534	340. Includes any room, etc.	539
Manner of keeping.	535	"House"—Meaning of.	540
License.	536	341. Punishment for keeping.	541

§532—ART. 339.—“Disorderly house” defined.—A disorderly house is one kept for prostitution, or where prostitutes are permitted to resort or reside for the purpose of plying their vocation, or any theatre, play house, or house where spirituous, vinous or malt liquors are kept for sale, and prostitutes, lewd women, or women of bad reputation for chastity are employed, kept in service, or permitted to display or conduct themselves in a lewd, lascivious, or indecent manner, or to which persons resort for the purpose of smoking or in any manner using opium. [O. C. 396, amended by Act March 29, 1887, p. 63; See Acts 1889, Chap. 38, p. 33.]

Indictment, Willson's Cr. Forms 218.

§533—**Indictment.**—It is sufficient to charge that the defendant “did unlawfully keep a disorderly house, being then and there kept for the purpose of public prostitution.” Thompson v. S. 1 App. 56; Thompson v. S. 2 App. 82; Brown v. S. Id. 189; Killman v. S. Id. 222; Lowe v. S. 4 App. 34; Brooks v. S. Id. 567; Loraine v. S. 22 App. 640. But an averment that the defendant “did commit the offense of keeping a disorderly house” is insufficient. Lasindo v. S. 2 App. 59; Tompkins v. S. 4 App. 161. Since the amendment of the preceding article the decision in Springer v. S. 16 App. 591, is not applicable. This offense is a continuous one, and a conviction bars all further prosecutions up to the time of such conviction. But if the indictment alleges certain dates within which the offense was committed, a conviction will not bar a prosecution for the same offense committed at a time not within the dates alleged. Huffman v. S. 23 App. 491; Wilson v. S. 16 App. 591; Handley v. S. Id. 444. No specific description of the house is necessary. Lowe v. S. 4 App. 34. Nor is it necessary to allege that prostitutes or vagrants did resort to the house. Brooks v. S. 4 App. 567. It may be alleged conjunctively that the offense was committed in all the modes specified in the statute, but if these modes be alleged disjunctively the indictment will be bad. Tompkins v. S. 4 App. 161.

§534—**Keepers only are liable.**—It is only the keeper of the disorderly house that is subject to punishment. Prostitutes who may occupy rooms in such house, but who are not the keepers, or concerned in the keeping of such house, are not guilty of this offense. Moore v. S. 4 App. 127; Stone v. S. 22 App. 185. Nor is the owner of the house who has rented it for the purpose of its being kept as a disorderly house guilty of the offense of keeping such house. Albertson v. S. 5 App. 89.

§535—**Manner of keeping.**—If the house is kept for the purposes named in the statute it is immaterial how quietly and peaceably it is kept. Sylvester v. S. 42 Tex. 496.

§536—**License.**—It is competent for the legislature by special act to empower municipalities to license, within limits, disorderly houses, and such license is a valid defense to a prosecution by the State for keeping such a house. Davis v. S. 2 App. 425.

§537—**Evidence.**—The character of the house alleged to be disorderly may be established by proof of its general reputation as such, and such proof is sufficient to warrant the finding that the house is disorderly. Stone v. S. 22 App. 185; Burton v. S. 16 App. 156; Allen v. S. 15 App. 320; Sylvester v. S. 42 Tex. 496; Morris v. S. 38 Tex. 603. But while the character of the house may be thus established, such evidence will not be sufficient or competent to prove that the defendant kept, or was concerned in keeping, the house. The evidence must directly connect the defendant with *keeping* the house. Sara v. S. 22 App. 639; Burton v. S. 16 App. 156; Allen v. S. 15 App. 320. The general reputation of the occupants of a house is also admissible to prove the character of the house, but not that the defendant was the keeper of the house. Allen v. S. 15 App. 320. Evidence offered by the defendant, which tends to show that another person was the keeper of the house at the time of the alleged defense, is admissible. Stone v. S. 22 App. 185. For evidence held sufficient to sustain a conviction, see Watts v. S. 22 App. 572; Brown v. S. 2 App. 189; Crouch v. S. 24 Tex. 557; Morris v. S. 38 Tex. 603; Huffman v. S. 23 App. 491. For evidence held insufficient, see McElhaney v. S. 12 App. 231; Smalley v. S. 11 App. 147; Sara v. S. 22 App. 639; Loraine v. S. Id. 640.

§538—**Charge of the court.**—It is advisable though not necessary that the word “prostitution” be defined in the charge. Bigby v. S. 5 App. 101. It is not error, when the evidence warrants it, to instruct the jury that if the defendant either alone, or in connection with another, kept a disorderly house, or was in any way concerned in keeping such house, he would be guilty. Stone v. S. 22 App. 85. Where a witness for the State was an accomplice in keeping a disorderly house, the Court must charge the law relating to accomplice testimony. Stone v. S. 22 App. 185.

§539—ART. 340.—**Includes any room, etc.**—Any room or part of a building, or other place appropriated or used for either of the purposes above enumerated, is a disorderly house within the meaning of this chapter. [O. C. 397.]

§540—"House."—**Meaning of.**—The house may be any kind of a structure, even a tent. Killman v. S. 2 App. 222.

§541—**ART. 341.—Punishment for Keeping.**—Any owner, lessee, or tenant who shall keep or be concerned in keeping, or knowingly permit the keeping of a disorderly house in any house, building, edifice, or tenement owned, leased or occupied by him, shall be deemed guilty of keeping, or being concerned in keeping, or knowingly permitting to be kept, as the case may be, a disorderly house, and shall be punished by a fine of two hundred dollars for each day he shall keep, be concerned in keeping, or knowingly permit to be kept such disorderly house. Any owner having information that his house is being kept, used or occupied as a disorderly house, shall be held guilty of knowingly permitting his house to be kept as a disorderly house under this act, unless he shall immediately proceed to prevent the keeping, using, or occupying of such house for such purpose by giving such information to the county or district attorney against such lessee, tenant, or occupant for violation of this act, or take such other action as may reasonably accomplish such result. [O. C. 398, amended by Act, Feb. 12, 1858, p. 165; Acts 1889, Chap. 38, p. 34.]

§541a—**ART. 341a.—Same.**—Every owner, lessee, tenant, or manager of any theatre, dance house, play house, or house where spirituous, vinous, or malt liquors are kept for sale, who shall knowingly employ or have in service in any capacity in such theatre, play house, or house where spirituous, vinous, or malt liquors are kept for sale, any prostitute, lewd woman, or woman of bad reputation for chastity, or who shall permit any prostitute, lewd woman, or woman of bad reputation for chastity to display or conduct herself therein in a lewd, lascivious, or indecent manner, shall be deemed guilty of keeping a disorderly house, and shall be punished by a fine not less than one hundred dollars nor more than five hundred dollars. Each day that such person is kept in service or employed or permitted to display or conduct themselves as hereinbefore provided, shall be deemed a separate offence. [Added by Acts 1889, p. 34.]

§541b—**ART. 341b.—Duty of Officers of Court.**—Sheriffs and their deputies, constables and their deputies, mayors, marshals, chiefs of police, their deputies and assistants, and policemen of towns and cities are especially charged diligently to discover and report to the proper legal authorities, and by all lawful means to aid in the enforcement of the law for all violations of the articles of this chapter; the district judges are required to give them specially in charge to the grand juries, and grand juries are required at every term of the district court of their county to call before them each and all officers charged with the enforcement of the articles of this chapter and examine them under oath touching their knowledge and information of violations thereof, and as to their diligence in their enforcement. [Added by Acts 1889, p. 34.]

## CH. 5.—MISCELLANEOUS OFFENSES.

ART.	SEC.	ART.	SEC.
342. "Sodomy" defined and punished.	542	343. Indictments.	547
Former decisions.	543	344. Desecration of graves.	548
Indictment.	544	Intention not material.	549
Carnal knowledge—Evidence.	545	345. Interference with dead bodies.	550
343. Indecent publications and exposures.	546		

**§542 — ART. 342. — “Sodomy” defined and punished.** — If any person shall commit with mankind or beast the abominable and detestable crime against nature, he shall be deemed guilty of sodomy, and on conviction thereof, he shall be punished by confinement in the penitentiary for not less than five nor more than fifteen years. [O. C. 399c, added by Act Feb. 11, 1860, p. 97.]

Indictment, Willson's Cr. Forms, 219-220-221.

**§543 — Former decisions.** — It was formerly held that this offense was not punishable, because not defined. Fennell v. S. 32 Tex. 378; Frazier v. S. 39 Tex. 390. But it is no longer necessary that the offense, to be punishable, should be expressly defined, and “sodomy” being an offense *eo nomine* with a penalty affixed thereto, is now punishable. Ex parte Berger, 14 App. 52; Cross v. S. 17 App. 476.

**§544 — Indictment.** — It is not enough to charge this offense in the very language of the statute. The facts which will put the defendant upon notice of the specific act, must be averred. S. v. Campbell, 29 Tex. 44. An indictment which charged that the defendant “did unlawfully and willfully, commit with a mare, the same being a beast, the abominable and detestable crime against nature, by then and there having carnal connection with said beast, and did then and there commit the crime of sodomy with said beast” was held sufficient. The objection to said indictment that it did not allege the *genus* of the mare, or that said mare was a female of her species, was not a valid one. A mare is the female of the horse or equine *genus* of quadrupeds. Cross v. S. 17 App. 476.

**§545 — Carnal knowledge — Evidence.** — Carnal knowledge is as essentially an element of this offense as it is of rape, and the rules of evidence which apply in a prosecution for rape should be observed in prosecutions for sodomy. Penetration, as in rape, must be proved, though to no particular depth. The jury may infer penetration from circumstances, without direct proof. Cross v. S. 17 App. 476.

**§546 — ART. 343. — Indecent publications and exposures.** — If any person shall make, publish or print, any indecent and obscene print, picture or written composition, manifestly designed to corrupt the morals of youth, or shall designedly make any obscene and indecent exhibition of his own or the person of another, in public, he shall be fined not exceeding one hundred dollars. [O. C. 399.]

Indictment, Willson's Cr. Forms, 222-223.

**§547 — Indictment.** — An indictment for indecent publication should allege or set out the publication sufficiently to enable the court to judge of its character. S. v. Hanson, 23 Tex. 232. An indictment for an indecent exposure of person is sufficient, if the offense be charged in the language of the statute. Moffit v. S. 43 Tex. 346; S. v. Griffin, Id. 538.

**§548 — ART. 344. — Desecration of graves.** — If any person shall wrongfully destroy, mutilate, deface, injure, or remove any tomb, monument, grave-stone, or other structure in any place used or intended for the burial of the dead, or any fence, railing, or curb, for the protection of such structure, or any inclosure for any such place of burial, or shall wrongfully injure, cut, remove, or destroy any tree or shrub growing within any such inclosure, he shall be punished by imprisonment in jail not exceeding six months, or by fine not exceeding five hundred dollars. [O. C. 399a, added by Act Feb. 12, 1858, p. 166.]

Indictment, Willson's Cr. Forms, 224-225-226; Phillips v. S. 29 Tex. 226.

**§549 — Intention not material.** — Where the defendant had placed a new fence instead of the old one, and his fence was a good one, this was held to be no defense. Having done what the law forbade, it would not avail him that in doing it, he intended an ultimate good. Phillips v. S. 29 Tex. 226.

**§550 — ART. 345. — Interference with dead bodies.** — If any person not authorized by law, or by a relative or friend, for the purpose of reinterment, shall disinter, remove or carry away any human body, or the remains thereof, or shall conceal the same, knowing it to be so illegally disinterred, he shall be punished by fine not exceeding two thousand dollars. [O. C. 399b, added by Act Feb. 12, 1858, p. 166.]

Indictment, Willson's Cr. Forms, 227-228.

## TITLE 11—OFFENSES AGAINST PUBLIC POLICY &amp; ECONOMY.

CH. 1. ILLEGAL BANKING AND PASSING SPURIOUS MONEY.  
 2. OF LOTTERIES AND RAFFLES.  
 3. GAMING.  
 4. NEGLECT OF OFFICERS TO ARREST OR PROSECUTE IN GAMING CASES.

CH. 5. BETTING ON ELECTIONS.  
 6. UNLAWFULLY SELLING INTOXICATING LIQUORS.  
 7. VAGRANCY.  
 8. MISCELLANEOUS OFFENSES.

## CH. 1.—ILLEGAL BANKING AND PASSING SPURIOUS MONEY.

ART.	SEC.	ART.	SEC.
346. Issuing bills to pass as money.	551	348. Also indorsement of foreign bills.	555
Decisions under former statutes.	552	349. Passing paper of broken bank	556
Decisions under preceding article.	553	350. Not applicable to United States banks.	557
347. Includes corporations.	554		

§551—ART. 346.—**Issuing bills to pass as money.**—If any person within this State shall issue any bill, promissory note, check, or other paper intended to circulate as money, he shall be fined not less than ten dollars nor more than fifty dollars for each bill, promissory note, check, or other paper so issued. [O. C. 400.] Indictment, Willson's Cr. Forms, 229.

§552—**Decisions under former statutes.**—For decisions under former statutes upon this subject, see the following: *Orton v. Engledow*, 8 Tex. 206; *S. v. Williams*, Id. 256; *S. v. Williams*, 14 Tex. 98; *Williams v. S.* 23 Tex. 264; *Mills v. S.* Id. 295.

§553—**Decisions under preceding article.**—Where an indictment charged that the defendant, without authority of law, did issue certain "bills," intended to circulate as money, and set out copies thereof, from which it appeared that the bills were drawn for "one dollar in currency," made payable to bearer, "when twenty dollars are presented," and accepted by the drawee; it was held that the instruments were properly termed bills, and if improperly designated, as they were copied in the indictment, it was an immaterial error. In such indictment, the bills were alleged to have been engraved, but in point of fact, they were printed; held, that it was not error to admit the bills in evidence, and that the allegation that they were engraved, was unimportant, and might be stricken out as surplusage. It was further held, that the fact that said bills were redeemable in Confederate notes, did not repel the intention manifested in issuing them, that they should circulate as money; nor did the fact that they were not regarded by the community as of equal value with gold and silver as a circulating medium, tend to show that the party issuing them did not violate the law. If it be shown that such bills were issued, and were used, with the knowledge of the party issuing them, by the community as a circulating medium in place of money; such facts will support a conviction. *Luckey v. S.* 26 Tex. 362.

§554—ART. 347.—**Includes corporations.**—Any officer of any banking company or body corporate who signs his own name, or that of another, by the authority of such other, to any bank bill, promissory note, check, or other paper, being evidence of a promise to pay, and intended to circulate as money, is guilty of the offense punishable by the preceding article. [O. C. 401.]

Indictment, Willson's Cr. Forms, 230.

§555—ART. 348.—**Also indorsement of foreign bills.**—Any person who may bring into this State any bank bill, purporting to be issued by any bank in any other State or Territory of the Union, or in any foreign country, and shall sign or indorse the same to be circulated as money in this State, shall be deemed guilty of the offense mentioned in article 346.\* [O. C. 402.]

§556—ART. 349.—**Passing paper of broken bank.**—If any person shall fraudulently pass or transfer, or offer to pass or transfer, any paper purporting to be bank paper, and to be issued by any bank which having once existed, has since broken, or the money of the same become valueless, he shall be punished by confinement in the penitentiary not less than two nor more than five years.† [O. C. 403, amended by Act Feb. 12, 1858, p. 166.]

§557—ART. 350.—**Not applicable to United States banks.**—The provisions of this chapter shall not apply to any bank incorporated under the laws of the United States, nor to bills issued by such bank.

\* Indictment, Willson's Cr. Forms, 231.

† Indictment, Willson's Cr. Forms, 232.

## CH. 2—OF LOTTERIES AND RAFFLES.

ART.	SEC.	ART.	SEC.
351. Establishing a lottery.	558	354. Offering for sale ticket in raffle for over \$500.	565
Decisions under preceding article.	559	Sale not an offense.	566
Constitutional provision concerning.	560	354a. Dealing in futures.	567
352. Selling lottery tickets.	561	354b. Permitting premises to be used for such business.	568
353. Raffle for over \$500.	562		
Raffle—What is.	563		
Raffling is gaming, when.	564		

§558 — ART. 351. — **Establishing a lottery.** — If any person shall establish a lottery, or dispose of any estate, real or personal, by lottery, he shall be fined not less than one hundred nor more than one thousand dollars. [O. C. 404.]

Indictment, Willson's Cr. Forms, 233.

§559 — **Decisions under preceding article.** — Every scheme for the distribution of prizes by chance is a lottery; and it matters not by what name such a scheme may be known, it comes within the prohibition of the preceding article. *S. v. Randle*, 41 Tex. 292. That every ticket-holder receives something does not render a distribution of prizes of unequal value to the ticket-holders any less a lottery than if they drew blanks when not drawing prizes. *Randle v. S.* 42 Tex. 580. A sale of boxes of candy, some of which contain money or a prize, the purchaser selecting in ignorance of contents, is a device in the nature of a lottery, and in violation of the preceding article. *Holoman v. S.* 2 App. 610.

§560 — **Constitutional provision concerning.** — The legislature shall pass laws prohibiting the establishment of lotteries and gift enterprises in this State, as well as the sale of tickets in lotteries, gift enterprises or other evasions involving the lottery principle, established or existing in other States. Const. art. 3, § 47.

§561 — ART. 352. — **Selling lottery tickets.** — If any person shall sell, offer for sale, or keep for sale, any ticket or part ticket in any lottery, he shall be fined not less than ten nor more than fifty dollars. [O. C. 405.]

Indictment, Willson's Cr. Forms, 234.

§562 — ART. 353. — **Raffle for over \$500.** — If any person shall establish a raffle for, or dispose by raffle of any estate, real or personal, exceeding five hundred dollars in value, he shall be fined not less than one hundred nor more than one thousand dollars. [O. C. 406.]

Indictment, Willson's Cr. Forms, 235.

§563 — **Raffle — What is.** — The raffle, which is in common use, is a game of perfect chance, in which every participant is equal with every other, in the proportion of his risk and prospect of gain. The prize is a common fund, or that which is purchased by a common fund. Each is an equal actor in developing the chances, in proportion to his risk. Whether they be developed with dice, or some other instrument, is not material. The successful party takes the whole prize, and all the rest lose. The element of one against the many, the keepers against the betters, either directly or indirectly, is not to be found in it. It has no keeper, dealer or exhibitor, and is not a banking game. *Stearnes v. S.* 21 Tex. 292.

§564 — **Raffling is gaming, when.** — Raffling is not prohibited unless the article raffled exceeds in value the sum of five hundred dollars. But the act of March 5 1881, Post § 592, prohibits betting at any game played with dice or dominoes, unless played at a private house. Under that act, a raffle for a gun of the value of seven dollars, played with dice at a saloon, was held to be an unlawful betting within the purview of said act. Nor in such case, does it make any difference whether such betting or raffle be for religious, benevolent, or profane purposes. *Long v. S.* 22 App. 194.

§565 — ART. 354. — **Offering for sale ticket in raffle for over \$500.** — If any person shall offer for sale, or keep for sale, any chance, ticket, or part ticket in any raffle of estate, real or personal, exceeding five hundred dollars in value, he shall be fined not less than ten nor more than fifty dollars. [O. C. 407.]

Indictment, Willson's Cr. Forms, 236.

§566. — **Sale not an offense.** — It will be observed that the preceding article does not make it an offense to *sell* a ticket in a raffle, as in the case of a lottery ticket. Ante, § 561.

§567 — ART. 354a. — **Dealing in futures.** — If any person shall, directly or through an agent or agents, manage or superintend for himself, or shall as

agent or representative of any other person, firm or corporation, conduct, carry on or transact any business which is commonly known as dealing in futures, in cotton, grain, lard, any kinds of meats, or agricultural products, or corporation stocks, or shall keep any house, or manage, conduct, carry on or transact any business commonly known as a produce or stock exchange, or bucket shop, where future contracts are bought or sold, with no intention of an actual *bona fide* delivery of the article or thing so bought or sold, such person, whether acting for himself or for another, as aforesaid, shall be deemed guilty of a misdemeanor, and shall be fined in any sum not less than one hundred nor more than five hundred dollars, and in addition thereto shall be imprisoned in the county jail not less than thirty days nor more than six months; *provided*, that each day that such business or house is carried on or kept shall constitute a separate offense. [Act March 1, 1887, p. 10, § 1.]

Indictment, Willson's Add. Cr. Forms, No. 530a.

§568 — ART. 354b. — **Permitting premises to be used for such business.** — Whoever knowingly permits any such business to be carried on in his building, house, booth, arbor, or erection, of which he is the owner, or has the possession, care, management, or renting, shall be guilty of a misdemeanor, and on conviction fined in any sum not less than one hundred nor more than five hundred dollars. Each day he so permits shall constitute a separate offense. [Act March 1, 1887, p. 10, § 2.]

Indictment, Willson's Add. Cr. Forms, No. 531a.

Section 3 of the foregoing act repeals the act of March 31, 1885, p. 86, upon the same subject.

### CH. 3. — GAMING.

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§569 — ART. 355. — **Playing cards in a public place.** — If any person shall play at any game with cards, at any house for retailing spirituous liquors, store-house, tavern, inn, or any other public house, or in any street, highway, or other public place, or in any out-house where people resort, he shall be fined not less than ten nor more than twenty-five dollars. [O. C. 409.]

Indictment, Willson's Cr. Forms, 237-238-239-240-241-242-243.

§570 — ART. 356. — **What included in preceding article.** — All houses commonly known as public, and all gaming-houses, are included within the meaning of the preceding article. Any room attached to such public house and commonly used for gaming, is also included, whether the same be kept closed or open. A private room of an inn or tavern is not within the meaning of public places, unless such room is commonly used for gaming; nor is a private business office or a private residence to be construed as within the meaning of a public house or place; *provided*, said private residence shall not be a house for retailing spirituous liquors. [O. C. 410, amended by Act Feb. 11, 1866, pp. 97, 98.]

§571 — ART. 357. — **Offense complete without betting.** — In prosecutions under the two preceding articles, it shall not be necessary for the State to prove that any money or article of value, or the representative of either, was bet at such game. The offense is complete without such proof. [O. C. 417, amended by Act Feb. 11, 1860, p. 98.]

§572 — **"Game" defined.** — A game is a trial of skill, or of chance between two or more contending parties, according to some rule by which each one may fail or succeed in the trial; of skill, as chess or billiards; of chance, as raffle and simple lottery; of chance and skill combined, as backgammon, whist, faro, etc. Stearnes v. S. 21 Tex. 692.

§573 — **Classes of games prohibited.** — Gaming is not *per se* an offense. The games prohibited and made penal, are divided into two classes: 1. Playing at cards in particular places; 2. Gaming tables and banks. Sheppard v. S. 1 App. 304. A third class might now be properly named, that is, games played with dice or dominoes. Post, § 592.

§574 — **Indictment.** — An indictment against two or more persons for playing cards, which charges them jointly, must allege that they played together. Lewellen v. S. 18 Tex. 538; S. v. Roderica, 35 Tex. 507; Galbreath v. S. 36 Tex. 200; Herron v. S. Id. 295; S. v. Homan, 41 Tex. 155. Unless the indictment, by its averments, clearly shows that the defendants are indicted for separate offenses. Parker v. S. 26 Tex. 204. If the indictment be against one person only, it need not allege with whom he played. Johnson v. S. 36 Tex. 198. Or that he played with any one. S. v. Shult, 41 Tex. 548. "Did play at a game of cards," is a sufficient allegation. S. v. Mausker, 36 Tex. 365; Johnson v. Id. 198; S. v. Shult, 41 Tex. 548. If the playing was in a house, it need not be alleged who owned or occupied the house. Prior v. S. 4 Tex. 383; Wilson v. S. 5 Tex. 21; Sublett v. S. 9 Tex. 58; Sheppard v. S. 1 App. 304. If the playing was in one of the houses specifically named in the statute, it is sufficient to use the designation used in the statute, as that the playing was at "a house for retailing spirituous liquors," or at "a store house," or "a tavern" or "an inn." Sheppard v. S. 1 App. 304; Watson v. S. 18 App. 160; Askay v. S. 15 App. 558; Bacchus v. S. 18 App. 15; Early v. S. 23 App. 364. But if the house be one not specifically named in the statute, the indictment must not only allege that it was a public house, but must further allege the facts which show that it was public. Tummins v. S. 18 App. 13; Jackson v. S. 16 App. 373; Fossett v. S. Id. 375; Bowman v. S. Id. 513; Elsberry v. S. 41 Tex. 158; S. v. Mausker, 36 Tex. 364; S. v. Albey, 26 Tex. 155. When a room of a house is designated as the place where the gaming occurred, the indictment must allege that the room was, at the time of the gaming, attached to one of the public houses named in the statute, or to some house commonly known as public. Tummins v. S. 18 App. 13; Bacchus v. S. Id. 15; Weiss v. S. 16 App. 431; O'Brien v. S. 10 App. 544; Early v. S. 23 App. 364. If the gaming was at a public place, designated as such by the statute, as a "street" or "highway," it is sufficient to so allege, but if at a public place, not specifically named as such in the statute, the facts which constitute the place a public one, must be averred. Elsberry v. S. 41 Tex. 158; S. v. Lopez, 18 Tex. 88; Cherry v. S. 30 Tex. 439; Rice v. S. 10 Tex. 545; Sheppard v. S. 1 App. 304; Jackson v. S. 16 App. 373; Fossett v. S. Id. 375; Bowman v. S. Id. 513. If the gaming was at an *out-house*, it is sufficient to so allege in the language of the statute, that is, that it was "at an out-house where people did then and there resort." S. v. Norton, 19 Tex. 102; S. v. Stewart, 35 Tex. 499.

§575 — **"House for retailing" — Decisions as to.** — It was formerly held that the whole house, from cellar to garret, regardless of approaches, was included. Cole v. S. 9 Tex. 42; Pierce v. S. 12 Tex. 210; Ridditt v. S. 17 Tex. 610. But such is not now the law. Holtzclaw v. S. 26 Tex. 682; Horan v. S. 24 Tex. 161; O'Brien v. S. 10 App. 544. If the house played in was on the same lot, but disconnected from the saloon, not controlled by the keeper of the sa-

loos, and accessible to the public otherwise than through the saloon, it is not a part of such saloon, or house for retailing spirituous liquors. *Harcrow v. S.* 2 App. 511. So a conviction for gaming in a house for retailing spirituous liquors, will not be sustained by proof that a portion of the house was used for retailing liquors, but that the portion in which the playing took place, was at the time, rented by another party, and was disconnected from the room where the liquor was sold. *Galbreath v. S.* 36 Tex. 200. So, where the indictment charged that the gaming was in a house for retailing spirituous liquors, and the proof showed that it was an upstairs room over a room used for retailing liquors, which upstairs room was used at the time as a private bed room, and was in no way used in connection with the business conducted in the lower room, and to which the only means of ingress or egress was by stairs outside the building, it was held that the evidence did sustain the charge. But if the upper room had been in any manner connected with, or used for the purposes of the establishment in the lower room, that is, so used as to give to it the character of a house for retailing spirituous liquors, it would have come within the inhibition of the statute. *Watson v. S.* 13 App. 160; *O'Brien v. S.* 10 App. 544; *Hasley v. S.* 14 App. 217.

§576 — "Public House" — Decisions as to. — The term "public house" signifies a house commonly open to the public, either for business, pleasure, religious worship, the gratification of curiosity and the like. *S. v. Alvey*, 26 Tex. 155; *Parker v. S.* Id. 204. It may be applied to a house either on account of its proprietorship or purpose. *Lockhart v. S.* 10 Tex. 275. Whether a house named in statute is public, is a question of law; but whether a house not named in statute is public is a question of fact. *Shihagan v. S.* 9 Tex. 430; *S. v. Alvey*, 26 Tex. 155; *Elisberry v. S.* 41 Tex. 158. Where the playing was done in a back room of a store-house, which room was used as a bed room, and to which customers had free access, it was held that such room was used for the purposes of the store, and was a part of the store-house. *Sheppard v. S.* 1 App. 304. The term "public house" is generic, and includes all houses made public by the occupation carried on in them. *S. v. Barnes*, 25 Tex. 654; *Shihagan v. S.* 9 Tex. 430. A common gambling house is a public house. *Rice v. S.* 10 Tex. 545. So, also, is a room kept as a common resort for persons desiring to play cards, although all who desire may not be permitted to have access to it. *Lockhart v. S.* 10 Tex. 275. A dwelling or business house, by being used as a common resort for gaming, becomes a public house. *Wheelock v. S.* 15 Tex. 257. A drug-store is a store-house, and the back room of a physician's office occupied as a bed room, his drugs being kept in the front room, was held to be a public house. *Redditt v. S.* 17 Tex. 611. This last cited decision, however, was under a former statute.

§577 — "Public place" — Decisions as to. — The term "public place" does not mean a place solely devoted to the public; but it means a place which is, in point of fact, public as distinguished from private. *Parker v. S.* 26 Tex. 204. A place in the woods so distant as not to be seen from any house or road is not a public place, without proof that persons generally resorted there for gaming or other purposes. *Bledsoe v. S.* 21 Tex. 223. A jury room in a court house is a public place, and the fact that it is occupied as a sleeping apartment will not make it a private place unless such occupancy is by permission of the commissioners' court of the county. *Wilcox v. S.* 26 Tex. 145. It has been held that a "jail house" is not necessarily a public place. *S. v. Alvey*, 26 Tex. 155. Nor a "quirt shop." *Tummins v. S.* 18 App. 13. Nor a "livery-stable." *Fossett v. S.* 16 App. 375. Where the indictment alleged that the playing was at a public place, to wit, a house where people commonly resorted for the purpose of gaming, and the proof established the playing of but a single game, and there was no other evidence that the place was public, it was held that the conviction was not sustained. *Fossett v. S.* 18 App. 330.

§578 — "Outhouse" — Decisions as to. — The term "outhouse" means any house standing out and apart from houses occupied and used as dwelling or business houses — an unoccupied house not used as a dwelling or as a business house. *Wheelock v. S.* 15 Tex. 253. To bring an outhouse within the inhibition of the statute it must be one to which people resort for gaming or other purposes. It must have been resorted to on more than one occasion, or by more persons than were actually engaged in the gaming. *Wheelock v. S.* 15 Tex. 260; *S. v. Norton*, 19 Tex. 102.

§579. — ART. 358. — Keeping or exhibiting table or bank. — If any person shall keep or exhibit for the purpose of gaming any gaming table or bank of any name or description whatever, or any table or bank used for gaming which has no name, any pigeon-hole table or jenny-lind table, or nine or ten pin alley, table or alley of any kind whatever regardless of the number of pins, balls, or rings used for gaming, — and such pigeon-hole table or jenny-lind table, or nine or ten pin alley, table or alley of any kind whatever regardless of the number of pins, balls, or rings used, shall be considered as used for gaming if the table fees, or alley fees, or money, or anything of value is bet thereon, — or shall be in any manner interested in keeping or exhibiting any such table or bank, or nine or ten pin alley, table or alley of any kind whatever regardless of the number of pins, balls, or rings used, at any place, he shall be punished by a fine of not less than twenty-five nor more than one hundred dollars and imprisonment in the county jail for not less

than ten nor more than ninety days. [O. C. 412, amended by Act March 26, 1887, p. 57.]

Indictment, Willson's Cr. Forms, 244.

§580 — **Former amendatory act declared unconstitutional.** — The preceding article is a re-enactment of the amendatory act of March 19, 1885, p. 34, which was held to be unconstitutional because the journals of the senate of the legislature which enacted it did not show that it had been signed in open session by the president of the senate. Hunt v. S. 22 App. 396; Wright v. S. 23 App. 313; Ford v. S. Id. 520.

§581 — **ART. 359. — Table or bank includes what.** — It being intended by the foregoing article to include every species of gaming device known by the name of table or bank of every kind whatever, this provision shall be construed to include any and all games which in common language are said to be *played, dealt, kept or exhibited*. [O. C. 413.]

§582 — **ART. 360. — Games specifically enumerated.** — Lest any misapprehension should arise as to whether certain games are included within the meaning of the foregoing articles, it is declared that the following games are within the meaning and intention of said articles, viz.: "*faro*," "*monte*," "*vingt-et-un*," "*rouge et noir*," "*roulette*," "*A B C*," "*chuck-a-luck*," "*keno*," "*pool*" and "*rondo*;" but the enumeration of these games specially shall not exclude any other properly within the meaning of the two preceding articles. Any game played for money upon a billiard table, or table resembling a billiard table, other than the game of billiards licensed by law, is punishable under the provisions of this chapter. [O. C. 414.]

§583 — **ART. 361. — Indictment.** — In any indictment or information for the class of offenses named in the three preceding articles, it is sufficient to state that the person accused kept a table or bank for gaming, or exhibited a table or bank for gaming, without giving the name or description thereof, and without stating that the table or bank, or gaming device, was without any name, or that the name was unknown. [O. C. 415.]

§584 — **ART. 362. — Proof.** — In prosecutions under articles 358, 359 and 360, it shall be sufficient to prove that any game therein mentioned was *played, dealt or exhibited*, without proving that money or other articles of value were won or lost thereon. [O. C. 416.]

§585 — **ART. 363. — "Played," "dealt" and "exhibited" defined.** — The words "*played*" and "*dealt*" have the meaning attached to them in common language. The word "*exhibited*" is intended to signify the act of displaying the bank or game, for the purpose of obtaining betters. [O. C. 417.]

§586 — **Gaming table or bank — Meaning of.** — The characteristic principle or element of the gaming table or banks specified in the Code is, that they have a keeper, dealer or exhibitor and operator, on the basis of one against the many; the keeper, dealer or exhibitor against betters, directly or indirectly; directly, as in *faro*, *vingt-et-un*, etc.; indirectly, as in pool and keno.

The leading elements of a gaming table or bank, as deduced by analogy from the specified games are: 1. It is a game according to the general definition. See Ante, § 572. 2. It has a keeper, dealer or exhibitor. 3. It is based on the principle of one against the many—the keeper, dealer or exhibitor against the betters, directly or indirectly. 4. It must be exhibited, that is played, for the purpose of obtaining betters. Any change, cover, disguise, or subterfuge in any such ingredients, or in relation to the structure upon which the game is exhibited, or the instruments by which the result is developed, for the purpose of evasion, will not change the character of the game. It is difficult to imagine any species of table or bank, or gaming device resembling either, that is kept for gaming, that would not be included in the clauses of the Code. Stearnes v. S. 21 Tex. 692. For a distinction between a gaming table and a bank see Webb v. S. 17 App. 205.

§587 — **Table or bank not named in the statute.** — The words of the statute must be given their intended effect; hence, an indictment will lie against any gaming table or bank, though it be not enumerated in the statute. Randolph v. S. 9 Tex. 521. And it matters not how the table or bank is constructed or operated, if it be kept or exhibited for gaming purposes. Doyle v. S. 19 App. 410. It is the character of the game, and not the table or structure, which is material. Estes v. S. 10 Tex. 300; Stearnes v. S. 21 Tex. 692. *Contra*, Whitney v. S. 10 App. 377; Smith v. S. 17 Tex. 191.

§588 — **Indictment — Decisions as to.** — Where the table or bank exhibited is one specifically named in the statute, it is not necessary to allege in the indictment that it was kept or exhibited for the purposes of gaming. Thus to allege that the defendant did unlawfully keep and exhibit a *faro* or *monte* bank, etc., is sufficient. *Wardlow v. S.* 18 App. 356; *Doyle v. S.* 19 App. 410; *Short v. S.* 23 App. 812. But if the table or bank be one not named specifically in the statute it must be alleged that it was kept and exhibited for gaming purposes. *Ben v. S.* 9 App. 107; *Anderson v. S.* Id. 177; *Blair v. S.* 41 Tex. 80; *Booth v. S.* 26 Tex. 203. *Doyle v. S.* 19 App. 410. It is sufficient in any case to allege that the defendant "did unlawfully keep and exhibit a gaming table and bank, for the purpose of gaming." *Campbell v. S.* 2 App. 187; *Parker v. S.* 13 App. 213; *Webb v. S.* 17 App. 205. The indictment need only follow the statute, and the latitude allowed the pleader by art. 361 is not intended to be exclusive, but other modes of description equally as certain may be adopted. *Estes v. S.* 10 Tex. 300; *S. v. Kelley*, 24 Tex. 182. When more than one join in the commission of the offense, all or any number of them may be jointly indicted for it, or each may be separately indicted. *Webb v. S.* 17 App. 205.

§589 — **"Exhibiting," etc. — Continuous offense.** — The offense of *exhibiting* a gaming table, or bank, for the purpose of gaming is not a continuous offense, but each act of exhibiting is a separate offense. It has not been decided, however, that *keeping* such table or bank is not a continuous offense. See the question discussed in the case cited. *Kain v. S.* 16 App. 282. "Keeping" a table or bank is holding the same in readiness for the purpose of obtaining betters. *Walz v. S.* 33 Tex. 331.

§590 — **Licensed games.** — The keeping or exhibiting a gaming table or bank for the purpose of gaming, notwithstanding the same may be licensed by law, and the license tax paid, is an offense against the law. *Reeves v. S.* 12 App. 199; *Parker v. S.* 13 App. 213. It was formerly held otherwise under different legislation. *Chiles v. S.* 1 App. 27; *Harris v. S.* 9 App. 308; *Houghton v. S.* 41 Tex. 136; *S. v. Johnson*, Id. 504; *Longworth v. S.* Id. 508.

§591 — **Province of the court.** — It is the province of the court to determine as matter of law, what games are within the inhibition of the statute. *Stearnes v. S.* 21 Tex. 692; *S. C.* 25 Tex. 229; *Post*, § 603.

§592 — **ART. 364. — Betting at table or bank, or certain games.** — If any person shall bet or wager at any gaming table, or bank, or pigeon hole or jenny-lind table, or nine or ten pin alley, such as are mentioned in the six preceding articles, or shall bet or wager any money or other thing of value at any of the games included in the six preceding articles, or at any of the following games, viz.: poker-dice, jack-pot, high-dice, high-die, low dice, low die, dominoes, euchre with dominoes, poker with dominoes, sett with dominoes, muggins, crack-loo, crack-or-loo, or at any game of any character whatever that can be played with dice or dominoes, or at any table, bank or alley, by whatsoever the name may be known, and without reference as to how the same may be constructed or operated, he shall be fined not less than ten dollars nor more than twenty-five dollars; *provided*, no person shall be indicted under this section for playing any of said games with dice or dominoes at a private residence. [O. C. 418, amended by Act March 5, 1881, p. 17.]

Indictment, Willson's Cr. Forms, 245-246.

§593 — **Indictment.** — When the table, bank or game at which the betting was done, is specifically named in the statute, it will be sufficient to allege that the betting was done at such table, bank or game, naming it, without further alleging that the same was kept, dealt or exhibited for the purpose of gaming. But if the betting be at a table, bank or game not so specifically named, the indictment must allege that it was kept, dealt or exhibited for the purpose of gaming. *Ante*, § 588, and cases there cited. If the indictment be for betting at a game played with dice or dominoes, the indictment must negative that the playing was at a private residence. *Colchell v. S.* 23 App. 584. An allegation that the defendant "bet" includes the averment that the betting was something of value, and it is not necessary that the indictment should allege what was bet, or that it was something of value. *Long v. S.* 22 App. 194.

§594 — **"Bet" — Meaning of.** — A bet, is the mutual agreement and tender of a gift of something valuable, which is to belong to the one or the other of the contending parties, according to the result of the trial of chance or skill, or both combined. *Stearns v. S.* 21 Tex. 692; *Long v. S.* 22 App. 194. The rules of the game constitute the terms of the agreement, and define the contingency upon which the one or the other is to receive the gift. The staking of money or property, besides being a tender is an ostensible adoption or sanction of the agreement. *Stearnes v. S.* 21 Tex. 692. Betting, of itself, is not a violation of law. It is the betting at games, tables or banks, which are inhibited that constitutes the offense denounced by the preceding article. *Houghton v. S.* 41 Tex. 136; *Chiles v. S.* 1 App. 28. Betting for drinks of liquor is in effect a betting of money. *Bachelor v. S.* 10 Tex. 258. So also is a betting of the table fees. *Tuttle v. S.* 1 App. 365; *Vanwey v. S.* 41 Tex. 639.

§595 — **Raffle — An offense, when.** — If a raffle is played with dice, unless at a private residence, it is within the inhibition of the preceding article, although it be played for less than \$500, and although it may be for religious or benevolent purposes. *Long v. S.* 22 App. 194.

§596 — **ART. 365. — Permitting house to be used for gaming.** — If any

person shall permit any game prohibited by the provisions of this chapter to be played in his house, or a house under his control, or upon his premises, or upon premises under his control, the said house being a public place, or the said premises being appurtenances to a public place, he shall be fined not less than twenty-five nor more than one hundred dollars. [O. C. 419, amended by act March 5, 1881, p. 17.] Indictment, Willson's Cr. Forms, 247-248.

§597 — **Indictment.** — In an indictment under the preceding article it is not necessary to aver that money or property was bet on the game, nor to name the persons that played. *McGaffey v. S.* 4 Tex. 156; *Buschard v. S.* 25 Tex. Supp. 207. Nor is it necessary to allege the particular game played. *S. v. Ake*, 9 Tex. 321; *Horan v. S.* 24 Tex. 161. But an indictment which charged that "the defendant did unlawfully and knowingly keep a room in the Star Hotel to be used for gambling, and did knowingly permit said room to be used for gambling," was held bad, because the word "gambling" is not used in the Code, as indicating any of the gaming prohibited, and is too general. *S. v. Bullion*, 42 Tex. 77. The house in which the gaming was permitted must be shown by the allegations to be one of those inhibited by the statute. *Wallace v. S.* 12 App. 479. Held otherwise, however, in *Nairn v. S.* 18 App. 260.

§598 — **ART. 366. — Renting house for same purpose.** — If any person shall rent to another a room or house for the purpose of being used as a place for playing, dealing or exhibiting any of the games prohibited by the provisions of this chapter, he shall be fined not less than twenty-five nor more than one hundred dollars. [O. C. 420.] Indict., Willson's Cr. Forms, 249.

§599 — **ART. 367. — Procedure in gaming cases.** — Any court, officer or tribunal having jurisdiction of the offenses enumerated in this chapter, or any district or county attorney, may subpoena persons and compel their attendance as witnesses to testify as to violations of any of the provisions of the foregoing articles. Any persons so summoned and examined shall not be liable to prosecution for any violation of said articles about which he may testify, and for any offense enumerated in this chapter a conviction may be had upon the unsupported evidence of an accomplice or participant. [O. C. 420a.]

§600 — **Offenders are not accomplices.** — A joint offender in betting or gaming is not exempt from testifying, but is exempt from punishment as to any such offenses about which he may testify. He is not an accomplice and his testimony needs no corroboration. *Stone v. S.* 3 App. 675; *Kane v. S.* 16 App. 282. The preceding article is constitutional. *Wright v. S.* 23 App. 313.

§601. — **Extent of protection to an offender who testifies.** — The protection from prosecution extended to an offender who testifies, by the preceding article, is limited to the identical acts about which he testified, and the burden is upon him, when claiming such protection to show that he testified about the very act for which he is being prosecuted. *Kane v. S.* 16 App. 282.

§602 — **Evidence.** — To warrant a conviction for permitting a banking game to be exhibited in defendants' house it is not necessary to prove an express authority or liberty given by defendant, but it is sufficient if the evidence show that he permitted it to be done, that is, knowing the game was being exhibited in his house, he tacitly acquiesced in it. *Robinson v. S.* 15 Tex. 311. But it is not sufficient to prove that the defendant owned the house and that the table or bank was exhibited in it; there must be further evidence, either positive or presumptive, that the defendant permitted it. *Harris v. S.* 5 Tex. 11; *Wells v. S.* 22 App. 405. The cases last cited are not in strict accord with *McGaffey v. S.* 4 Tex. 156; where it is held, that the presumption is, that what is done in a man's house, is done with his permission, and within his knowledge, and that if he did not forbid the act, his permission of it is implied. Though the lessor of a house restricts its use to a particular purpose, he does not thereby retain such control over it as to render it his duty to prevent its use for illegal gaming. It would be a question of fact in such case whether the lease was a sham or device to shelter the lessor from responsibility, while he really and substantially had control of the house. *Robinson v. S.* 24 Tex. 152. Where defendant was charged with permitting a game with dice to be played in a house under his control, the same being a public place commonly resorted to for the purpose of gaming, and there was no proof that the house was a public place, but merely that the one game was played there, it was held that the evidence did not sustain the conviction inasmuch as it did not show that the house was a public place. *Fossett v. S.* 18 App. 330. Permitting gaming, and renting to another a house to be used for gaming are distinct, separate offenses, and under an indictment for one the defendant cannot be convicted upon proof that he committed the other. *Nairn v. S.* 18 App. 260. When the State has proved that the defendant was the owner of the house at the time of the gaming, it devolves upon him to prove if such be his defense, that the house was not under his control. *Johnson v. S.* 36 Tex. 198. The State need not prove that defendant admitted every one, but only that he permitted persons to play there. *Lockhart v. S.* 10 Tex. 275. If the proof shows that the room played in adjoined the bar-room of the defendant, and belonged to him, though rented and under the control of another, and that defendant was in the habit of sending drinks into the room for the players, and did so on the occasion in issue, a conviction for permitting gaming will not be disturbed,

If the good faith of the lease was submitted to the jury. *Cherry v. S.* 30 Tex. 439. But if part of a house was rented by defendant as a retail grocery, and the room played in was rented by a different person, and was wholly disconnected with the other, a conviction cannot be sustained. *Galbreath v. S.* 36 Tex. 200; *Herron v. S.* Id. 285. Because a party rents one room of a house for a grocery, it cannot be presumed from that fact alone that he controls the whole house. *Holtzclaw v. S.* 26 Tex. 682. Where the prosecution is for betting at a game, proof that the defendant bet at the game in the county of the prosecution, and within the period of limitation, is sufficient. The evidence that he bet may be general, without specifying what he bet. *Ramey v. S.* 14 Tex. 409; *Walton v. S.* Id. 381; *Harrison v. S.* 15 Tex. 239. When an indictment alleged that the gaming occurred in "Stiff's saloon, in the city of Denton," it was held that the State must prove the allegation, it being descriptive of the offense. Proof that the gaming was over "Paschall's saloon, in Denton county" did not support the conviction. *Withers v. S.* 21 App. 210. Where the charge was playing cards in a house for retailing spirituous liquors, and the proof was that the playing was in the rear room of a building of which the front room was a drinking saloon, between which and the rear room there was a partition in which there was a sliding window through which the players in the rear room were supplied with drinks from the saloon room, when ordered by them, it was held that the charge in the indictment was sustained. *Stebbins v. S.* 22 App. 32. The indictment charged betting at a gaming bank; the proof showed that the keeper of the bank bet with a player that such player had made a bad bet against the bank. Held, the charge was not sustained by the evidence. It was a bet by the keeper of the bank against a player, and not against the bank. The keeper was guilty of exhibiting a bank, but not of betting against it, as charged in the indictment. *Askey v. S.* 20 App. 443. The venue of the offense must be proved. *Jenkins v. S.* 36 Tex. 345. And the State must prove that the act was committed within one year prior to the presentment of the indictment. *Manning v. S.* 35 Tex. 723.

§603 — **Charge of the court.** — The charge should be confined to the very act, and place of the act, as charged in the indictment. *O'Brien v. S.* 10 Tex. 544; *Askey v. S.* 15 App. 558; *Bacchus v. S.* 18 App. 15; *Nairn v. S.* Id. 260. What facts constitute the keeping or exhibiting a gaming table or bank is matter of law to be expounded by the court; whether the facts exist or not, is matter of fact for the jury. *Stearnes v. S.* 21 Tex. 692; *S. C.* 25 Tex. 229; *Ante*, § 591.

#### CH. 4. — NEGLECT OF OFFICERS TO ARREST OR PROSECUTE IN GAMING CASES.

ART.	SEC.	ART.	SEC.
368. Justice of the peace, etc., failure to prosecute.	604	370. "Offense against gaming laws," defined.	606
369. Peace officer failing to inform.	605		

§604 — **ART. 368. — Justice of the peace, etc., failing to prosecute.** — If any justice of the peace, mayor or recorder, shall know the fact that an offense against the gaming laws has been committed by any person, and shall fail or neglect to cause such person to be arrested and prosecuted for the same, he shall be punished by fine not less than twenty-five nor more than one hundred dollars. [O. C. 423a, added by Act Feb. 12, 1858, p. 167.]

Indictment, Willson's Cr. Forms, 250.

§605 — **ART. 369. — Peace officer failing to inform.** — If any peace officer shall know that any person has committed an offense against the gaming laws, and shall neglect or fail to give information thereof to some justice of the peace, mayor or recorder, having jurisdiction to try such offense, he shall be punished by fine not less than twenty-five nor more than one hundred dollars. [O. C. 423b, added by Act Feb. 12, 1858, p. 167.]

Indictment, Willson's Cr. Forms, 251.

§606 — **ART. 370. — "Offense against gaming laws" defined.** — By the term "offense against the gaming laws," as used in the two preceding articles, is meant any offense included within the provisions of chapter 3 of this title. [O. C. 423c, added by Act Feb. 12, 1858, p. 167.]

## CH. 5.—BETTING ON ELECTIONS.

ART.	SEC.	ART.	SEC.
371. Penalty.	607	372. "Public election" defined.	609
Indictment.	608	373. What "bet or wager" includes.	610

§607 — ART. 371. — **Penalty.** — If any person shall, whether before or after the happening of any public election, held within this State, wager or bet, in any manner whatever, upon the result of any such election, he shall be fined not less than twenty-five nor more than one thousand dollars. [O. C. 421, amended by Act Feb. 12, 1858, p. 167.]

Indictment, Willson's Cr. Forms, 252-253.

§608 — **Indictment.** — The day election was held or to be held must be alleged. If two or more are jointly indicted for betting together, it should be so alleged. If for jointly betting with some other person, so allege, naming the person, or alleging that his name is to the grand jurors unknown, if such be the fact. If it is intended to charge the defendants severally, and not jointly, the indictment should allege that they "did severally bet," etc. *Lewellen v. S.* 18 Tex. 538. It is sufficient to allege a bet, without alleging that anything of value was bet. *Long v. S.* 22 App. 194.

§609 — ART. 372. — **"Public election" defined.** — A public election, within the meaning of the preceding article, is any election for a public officer under the authority of the constitution and laws of the United States or of this State. [O. C. 422.]

§610 — ART. 373. — **What "bet or wager" includes.** — The bet or wager may be of money, or of any article of value; and any device in the form of purchase or sale, or in any other form, made for the purpose of concealing the true intention of the parties, is equally within the meaning of a bet or wager. [O. C. 423.]

Ante, § 594.

## CH. 6. — UNLAWFULLY SELLING INTOXICATING LIQUORS.

ART.	SEC.	ART.	SEC.
374. Selling liquor to wild Indians.	611	379. Sacramental wine and medicine ex-	624
375. Selling to Choctaws or Chickasaws.	612	cepted.	624
376. Selling to minors.	613	Preceding article superseded.	625
Indictment.	614	380. Evidence when persons are jointly	626
Knowledge of minority.	615	indicted.	626
377. Selling and permitting same drank	616	381. Member of firm liable, personally,	627
on premises.	616	etc.	627
Decisions under preceding article.	617	382. If owner is unknown, person sell-	628
378. Selling in prohibited districts.	618	ing is liable.	628
378a. Not applicable, when	619	383. Procedure in case of firm.	629
378b. Failure to cancel prescription —		Local option statutes from civil	630
Permitting liquor to be drank		code.	630
on premises.	620	Former penal statute.	631
378c. Giving prescription illegally.	621	Decisions under former statute.	632
378d. Blind Tiger "defined" — Penalty		Prohibition by special law.	633
for keeping — Procedure			
against.	622		
378e. Repeal of law does not exempt			
offender — Offender not an			
accomplice.	623		

§611 — ART. 374. — **Selling liquor to wild Indians.** — If any person shall sell, give or barter, or cause to be sold, given or bartered, any ardent spirits, or any spirituous or intoxicating liquors or fire-arms, or ammunition, to any Indian of the wild or unfriendly tribes, he shall be fined not less than ten nor more than one hundred dollars. [O. C. 408, amended by Act Oct. 31, 1866, p. 71.]

Indictment, Willson's Cr. Forms, 254.

§612 — ART. 375. — **Selling to Choctaws or Chickasaws.** — If any person shall sell, give or barter, or cause to be sold, given or bartered, any spirituous, vinous or intoxicating liquor to an Indian of the Choctaw or Chickasaw territory, he shall be fined not less than fifty nor more than one hundred dollars. [Act Feb. 12, 1858, pp. 197-198.]

Indictment, Willson's Cr. Forms, 255.

§613 — ART. 376. — **Selling to minors.** — Any person who shall knowingly sell or give, or cause to be sold or given, any spirituous, vinous or intoxicating liquor, to any other person under the age of twenty-one years, without the written consent of the parent or guardian of such minor, or some one standing in their place or stead, shall be fined not less than twenty-five nor more than one hundred dollars.

Indictment, Willson's Cr. Forms, 256.

§614 — **Indictment.** — It must be alleged that the defendant *knowingly* sold the liquor to a minor. Pressler v. S. 13 App. 95. And that he made such sale without the written consent of the parent or guardian of such minor, or some one standing in their place or stead. If the word "father." be used in the indictment in place of the word "parent," such indictment will be bad. Lantzner v. S. 19 App. 320. For an indictment for this offense held to be good, see Hunter v. S. 18 App. 444.

§615 — **Knowledge of minority.** — Knowledge on the part of the defendant that the person to whom he sold the liquor was, at the time of the sale, a minor, is an essential element of this offense and must be both alleged and proved by the State. Such knowledge may be proved by circumstances; but it must in some way be proved, before it can be said that the law has been violated. The rule which authorizes a court to take judicial cognizance of natural laws cannot be extended so as to permit an appellate court to assume that the defendant had knowledge of the minority of the person to whom he sold the liquor, from the physical appearance of such person, when there is nothing in the record showing such physical appearance. If the record should show that in size and physical appearance such person was not an adult, and that his nonage was reasonably apparent to the observation of an ordinarily prudent man, this would sufficiently establish defendant's knowledge of such nonage. Hunter v. S. 18 App. 444; Pressler v. S. 13 App. 95. For evidence offered by defendant upon the issue of knowledge, and held to be admissible, see the cases above cited.

§616 — ART. 377. — **Selling and permitting same drank on premises.** — If any person or firm shall sell, or be in any way concerned in selling spirituous, vinous or other intoxicating liquors in quantities of a quart or more, and shall permit the same to be drank at the place or establishment where sold, or at any other place provided by said person or firm for that purpose, he or they shall be punished by fine not less than fifty nor more than two hundred and fifty dollars. [O. C. 423e, added by Act Feb. 12, 1858, p. 168.]

Indictment, Willson's Cr. Forms, 256a.

§617 — **Decisions under preceding article.** — The gist of this offense is selling liquor in quantities of a quart or more and allowing it to be drank on the premises where sold. If the parties regarded the quantity sold as a quart, it is immaterial if it was not an exact quart if it approximated it. Scott v. S. 25 Tex. Supp. 168. When an act is done on a man's premises, and in his presence, without any effort on his part to prevent it, it must be inferred that it was with his consent. Cochran v. S. 26 Tex. 678. A hotel keeper is amenable to this law for selling liquor to his guest and permitting the same to be drank on the premises, unless, perhaps, where the liquor is drank in a room leased by such guest. Scott v. S. 25 Tex. Supp. 168. For a history of the legislation upon this subject, see Smith v. S. 7 App. 286.

§618 — ART. 378. — **Selling in prohibited districts.** — If any person shall sell any intoxicating liquor in any county, justices' precinct, city, or town in which the sale of intoxicating liquor has been prohibited under the laws of this State, or if any person shall give away any intoxicating liquor in any such county, justices' precinct, city, or town with the purpose of evading the pro-



visions of said laws, he shall be punished by fine of not less than twenty-five nor more than one hundred dollars, and by imprisonment in the county jail for not less than twenty nor more than sixty days. [Amended by Act March 30, 1887, p. 70.] Indictment, Willson's Add. Cr. Forms, No. 257½.

For old article 378 and decisions under it, see §§ 631, 632, Post.

§619 — ART. 378*a*. — **Not applicable, when.** — The preceding article shall not apply to the sale of wines for sacramental purposes, nor to alcoholic stimulants as medicines in cases of actual sickness, but such stimulants shall only be sold upon the prescription of a regular practicing physician, dated and signed by him and certified on his honor that he (the physician) has personally examined the applicant (naming him) and that he finds him actually sick and in need of the stimulant prescribed as a medicine; *provided*, that a physician who does not follow the profession of medicine as his principal and usual calling, or who is in any way directly or indirectly engaged in the sale of such stimulants, on his own account, or as the agent, employee, or partner of others, shall not be authorized to give the prescription provided for in this article; *and provided further*, that no person shall be permitted to sell more than once on the same prescription, or upon a prescription which has been cancelled, nor on a prescription which is not dated, signed, and certified as above required; *provided*, that every person selling such stimulants upon the prescription herein provided for, shall cancel such prescription by indorsing thereon the word "cancelled," and file the same away. [Added by Act March 30, 1887, pp. 70-71.]

§620 — ART. 378*b*. — **Failure to cancel prescription — Permitting liquor to be drank on premises.** — It shall be the duty of any person who sells any intoxicating liquor upon the prescription provided for in article 378*a*, to write across the face of the prescription, with ink, the word "cancelled," and for any failure to do so he shall be punished by a fine of not less than twenty-five nor more than one hundred dollars; and if any person shall sell any intoxicating liquor upon the prescription provided for in article 378*a*, and shall permit the same to be drank at the place or establishment where sold, or at any other place provided for that purpose by such person, he shall be punished by fine of not less than twenty-five nor more than one hundred dollars. [Added by Act March 30, 1887, p. 71.] Willson's Add. Cr. Forms, No. 258*a*.

§621 — ART. 378*c*. — **Giving prescription illegally.** — If any person who is not a regular practicing physician shall give a prescription to be used in obtaining any intoxicating liquor in any county, justice precinct, city or town, in which the sale of intoxicating liquor has been prohibited under the laws of this State; or if any practicing physician who is directly or indirectly, either for himself or as the agent or employee of another interested in the sale of intoxicating liquor, shall give a prescription to be used in obtaining any intoxicating liquor in any such county, justice precinct, city or town; or if any physician should give a prescription to be used in obtaining any intoxicating liquor in such county, justice's precinct, city or town, to any one who is not actually sick, and without a personal examination of such person, he shall be punished by a fine of not less than twenty-five nor more than one hundred dollars, and by imprisonment in the county jail not less than twenty nor more than sixty days. [Added by Act March 30, 1887, p. 71.] Form 258*b*.

§622 — ART. 378*d*. — **"Blind Tiger" defined — Penalty for keeping — Procedure against.** — If any person shall keep or run, or shall be in any manner interested in keeping or running, a blind tiger in any county, justice precinct, city or town, in which the sale of intoxicating liquor has been prohibited under the laws of this State, he shall be punished by confinement in the county jail not less than two nor more than twelve months, and by fine of not less

than one hundred nor more than five hundred dollars. Each and every day such blind tiger is run or kept shall be a separate offense. A "blind tiger," within the meaning of this article, is any place in which intoxicating liquors are sold by any device whereby the party selling or delivering the same is concealed from the person buying or to whom the same is delivered. Upon complaint being filed with any justice of the peace, describing the place where any "blind tiger" is kept or run, such justice shall issue his warrant directed, and commanding the sheriff or any constable of his county to search such place, and if the law is being violated to arrest the persons so violating it; and it shall be the duty of the officer to whom such warrant is delivered to search the place described in the warrant, and to arrest and bring before the justice who issued the writ all persons found by him therein; and if admission into said place is refused, the officer executing said warrant is hereby authorized to force open the same. In prosecutions under this article, where it is proven that there is posted up at the place where such blind tiger is kept or run, United States internal revenue liquor or malt license, to any one it shall be *prima facie* proof that the person to whom such license is issued is keeping and running such blind tiger.\* [Added by Act March 30, 1887, pp. 71-72.]

§623 — ART. 378e. — **Repeal of law does not exempt offender — Offender not an accomplice.** — When the sale of intoxicating liquor has been prohibited in any county, justice precinct, city or town, the repeal of such prohibition shall not exempt from punishment any person who may have offended against any of the provisions of the law while it was in force, and the fact that a person purchases intoxicating liquor from any one who sells it in violation of the provisions of this chapter shall not constitute such person an accomplice. [Added by Act March 30, 1887, p. 72.]

§624 — ART. 379. — **Sacramental wine and medicine excepted.** — The preceding article shall not apply to the sale of wine for sacramental purposes, nor to the sale of alcoholic stimulants as medicine, in cases of actual sickness, upon the written prescription of a regular practicing physician, certifying upon honor that the same is actually necessary as a medicine. [Act June 24, 1876, p. 26.]

§625 — **Preceding article superseded.** — The preceding article would seem to be superseded and repealed by the Act of March 30, 1877, pp. 71, 72, 73, ante, § 619; but it is not expressly repealed by that act. It was doubtless an oversight of the legislature that it was left in the Code.

§626 — ART. 380. — **Evidence when persons are jointly indicted.** — Where persons are jointly indicted, or otherwise prosecuted for selling liquor in violation of law, it shall be sufficient to show, by general reputation, that they are understood to be members of the firm. [O. C. 423f, added by Act Feb. 12, 1858, p. 168.]

§627 — ART. 381. — **Member of firm liable personally, etc.** — Any one member of a firm may be separately prosecuted for the offense of selling liquor in violation of law. [O. C. 423g, added by Act Feb. 12, 1858, p. 168.]

§628 — ART. 382. — **If owner is unknown, person selling is liable.** — Where any establishment for the sale of liquor is conducted without the name of the owner being known, any and all persons who may be found selling liquor in such establishment, in violation of law, shall be subject to prosecution as separate offenders. [O. C. 423h, added by Act Feb. 12, 1858, p. 168.]

§629 — ART. 383. — **Procedure in case of firm.** — When a firm is prosecuted for a violation of the law relating to the sale of liquor, the fine shall be assessed against the parties jointly, but each defendant shall be liable for the whole amount; and in cases of prosecution against a firm, if all the defendants be not arrested, a verdict and judgment for the full amount of the fine may be rendered against any one or more who may be tried. [O. C. 423i, added by Act Feb. 12, 1858, p. 168.]

\* Willson's Add. Cr. Forms, No. 258c. 118

§630 — **Local option statutes.** — The civil statute now in force providing for and regulating local option is the Act of April 1, 1887, General Laws, 20 Leg., pp. 96-97-98, amending and superseding Title 63 of the Revised Statutes.

For the sake of convenience the Act of April 1, 1887, is here inserted :—

**AN ACT** to amend Articles 3227, 3228, 3229, 3230, 3233, 3234, 3236, and 3238, of Title 63, of the Revised Civil Statutes of the State of Texas; and to add Article 3239a to said title, providing for contesting an election under the local option law.

**SECTION 1.** *Be it enacted by the Legislature of the State of Texas:* That Articles 3227, 3228, 3229, 3230, 3233, 3234, 3236, and 3238, of Title 63, of the Revised Civil Statutes of the State of Texas, be so amended as to read as follows; and that Title 63 of said Revised Statutes be amended by adding thereto Article 3239a, which shall read as follows :—

**Article 3227.** The commissioners court of each county in the State, whenever they deem it expedient, may order an election to be held by the qualified voters of said county, or of any justices precinct, town, or city therein, to determine whether or not the sale of intoxicating liquors shall be prohibited in such county, justices precinct, town, or city; *provided*, it shall be the duty of said commissioners court to order the election aforesaid whenever petitioned to do so by as many as two hundred voters in any county, or fifty voters in any justices precinct, town, or city, as the case may be.

**Article 3228.** The preceding article shall not be construed to prohibit the sale of wines for sacramental purposes, nor alcoholic stimulants as medicines, in cases of actual sickness, but such stimulants shall only be sold upon the prescription of a regular practicing physician, written in ink, dated, and signed by him, and certified on his honor that he (the physician) has personally examined the applicant (naming him), and that he finds him actually sick, and in need of the stimulant prescribed as a medicine; *provided*, that a physician who does not follow the profession of medicine as his principal and usual calling, or who is in any way, directly or indirectly, engaged or interested in the sale of such stimulants on his own account, or as the agent, employee or partner of others, shall not be authorized to give the prescription provided for in this article; *and provided further*, that no person shall be permitted to sell more than once on the same prescription, nor shall any person be permitted to sell at all on the prescription of a physician not herein authorized to give it, nor on a prescription which is not dated, signed and certified, as above required; *provided*, that every person selling such stimulants upon the prescription herein provided for shall cancel such prescription by indorsing thereon the word "cancelled," and file the same away.

**Article 3229.** When the commissioners court, of their own motion, or upon the petition provided for in Article 3227, shall order the election as herein provided for, it shall be the duty of said court to order such election to be held at the regular voting place, or places, within the proposed limits, upon a day not less than fifteen nor more than thirty days from the date of said order, and the order thus made shall express the object of such election, and shall be held to be *prima facie* evidence that all the provisions of law necessary to give it vitality, or to clothe the court with jurisdiction to make it, have been fully complied with.

**Article 3230.** The clerk of said court shall post, or cause to be posted, at least five copies of said order at different places within the proposed limits, for at least twelve days prior to the day of election, which election shall be held and the returns thereof made in conformity with the provisions of the general election laws of the State, and by the officers of election appointed and qualified under such laws.

Article 3233. Said court shall hold a special session on the eleventh day after the holding of said election, or as soon thereafter as practicable, for the purpose of opening the polls and counting the votes; and if a majority of the votes cast are "For Prohibition," said court shall immediately make an order declaring the result of said vote, and absolutely prohibiting the sale of intoxicating liquors within the prescribed limits, except for the purpose and under the regulations specified in this title, until such time as the qualified voters therein may at a legal election held for that purpose by a majority vote decide otherwise. And the order thus made shall be held to be *prima facie* evidence that all the provisions of law have been complied with in giving notice of and holding said election, and in counting and returning the votes and declaring the result thereof.

Article 3234. The order of court declaring the result, and prohibiting the sale of such liquors, shall be published for four successive weeks in some newspaper published in the county wherein such election has been held, which newspaper shall be selected by the county judge for that purpose. If there be no newspaper published in the county, then the county judge shall cause such publication to be made by posting copies of said order at three public places within the prescribed limits for the aforesaid length of time. The fact of publication in either mode shall be entered by the county judge on the minutes of the commissioners' court; and entry thus made, or a copy thereof certified under the hand and seal of the clerk of the county court, shall be held sufficient *prima facie* evidence of such fact of publication.

Article 3236. No election under the preceding articles shall be held within the same prescribed limits in less than two years after an election under this title has been held therein; but at the expiration of that time the commissioners' court of each county in the State, whenever they deem it expedient, may order another election to be held by the qualified voters of said county, or of any justices precinct, town, or city therein, for the same purpose; *provided*, it shall be the duty of such court to order the election aforesaid whenever petitioned to do so by as many as two hundred voters in any county, or fifty voters in any justices precinct, town, or city, as the case may be, to order an election for the same purpose, which election shall be ordered held, notice thereof given, the votes returned and counted, and the result declared and published, in all respects as provided by this title for a first election; and the order granting such other election, as well as that declaring the result, shall, if prohibition be carried, have the same force and effect, and the same conclusiveness, as are given to them in the case of a first election by the provisions of this title.

Article 3238. The failure to carry prohibition in a county shall not prevent an election for the same from being immediately thereafter held in a justices precinct, town, or city of said county; nor shall the failure to carry prohibition in a town or city prevent an election from being immediately thereafter held for the entire justices precinct or county in which said town or city is situated; nor shall the holding of an election in a justices precinct in any way prevent the holding of an election immediately thereafter for the entire county in which such justices precinct is situated; but when prohibition has been carried at an election ordered for the entire county, no election on the question of prohibition shall be thereafter ordered in any justices precinct, town, or city of said county until after prohibition has been defeated at a subsequent election for the same purpose, ordered and held for the entire county, in accordance with the provisions of this title; nor in any case where prohibition has been carried in any justices precinct shall an election on the question of prohibition be ordered thereafter in any town or city in such precinct until

after prohibition has been defeated at a subsequent election ordered and held for such entire precinct.

**Article 3239a.** At any time within thirty days after the result of the election has been declared, any qualified voter of the county, justice precinct, town, or city in which such election has been held, may contest the said election in any court of competent jurisdiction, in such manner as has been or may hereafter be provided; and should it appear from the evidence that the election was illegally or fraudulently conducted; or that by the action or want of action on the part of the officers to whom was intrusted the control of such election, such a number of legal voters were denied the privilege of voting, as had they been allowed to vote might have materially changed the result; or if it appears from the evidence that such irregularities existed as to render the true result of the election impossible to be arrived at, or very doubtful of ascertaining, the court shall adjudge such election to be void, and shall order the proper officer to order another election to be held, and shall cause a certified copy of such judgment and order of the court to be delivered to such officer upon whom is devolved by law the duty of ordering such election. [Approved April 1, 1887.]

§631—**Old art. 378. Former penal statute.**—If any person shall sell, exchange or give away any intoxicating liquor whatever, in any county, justice's precinct, city or town in this State, after the qualified voters of such county, justice's precinct, city or town have determined at an election held in accordance with the laws of this State, that the sale or exchange of intoxicating liquors shall be prohibited in such county, justice's precinct, city or town, and the commissioners' court has passed an order to that effect, which order has been duly published in accordance with law, he shall be fined in a sum not less than twenty-five nor more than two hundred dollars. [Act June 24, 1876, p. 26.]

§632—**Decisions under former statutes.**—The changes made in the statutes, both civil and criminal, with reference to local option, render many of the decisions made under previous statutes inapplicable and obsolete. The author, however, deems it advisable to state the substance of the decisions, leaving their applicability to be determined by the proper authority.

**CONSTITUTIONALITY OF THE LAW.**—The "local option" is a constitutional law, such as the legislature had full power to enact, under Sec. 20, art. XVI of the constitution of the State. It is not in violation of any provision of the constitution of this State, or of the constitution of the United States. *Ex parte Lynn*, 19 App. 293; *Steele v. S. Id.* 425; *Ex parte Kennedy*, 23 App. 77. But the legislature had no constitutional power to prohibit the *gift* of intoxicating liquors nor to empower localities to do so by means of the local option law, and under the former statute it was not an offense to *give* intoxicating liquors to another in a local option district, and to the extent that the local option law prohibited a *gift*, it was unconstitutional. *Stallworth v. S. 16 App.* 345; *Holley v. S. 14 App.* 505; *McMillan v. S. 13 App.* 375; *Steele v. S. 19 App.* 425.

**ACT OF JULY 24, 1879, NUGATORY.**—The act of July 24, 1879, amending Sec. 5 of the act of June 24, 1876, the original option act from which Art. 378 was framed, was held to be nugatory and inoperative, because the act which it amended had been repealed by the adoption of the Revised Code. *Robertson v. S. 12 App.* 541; *Pinckard v. S. 13 App.* 373; *Van Noy v. S. 14 App.* 69; *Akin v. S. Id.* 142.

**ELECTIONS—PREREQUISITES OF THE LAW MUST BE COMPLIED WITH.**—The action of the commissioner's court in ordering an election under the local option law, the election and all of its incidents must conform strictly to the requirements of the statute, or the election will be void. *Boone v. S. 10 App.* 418; *Prather v. S. 12 App.* 401; *Akin v. S. 14 App.* 142; *Donaldson v. S. 15 App.* 25; *Ex parte Kennedy*, 23 App. 77; *Phillips v. S. Id.* 304; *Ex parte Sublett*, *Id.* 309; *Ex parte Kramer*, 19 App. 123; *Smith v. S. Id.* 444. For the facts necessary to be proved by the State in a prosecution under Art. 378, see *Stallworth v. S. 18 App.* 378. But see changes made by Act of March 30, 1887. *Ante*, § 630.

**REVOCATION OF LIQUOR LICENSE.**—When prohibition has been declared, it operates a revocation of all licenses for the sale of intoxicating liquors within the locality adopting it, and a subsequent sale of such liquor within such locality, made under an unexpired license granted before the prohibition, is a violation of law. *Robertson v. S. 12 App.* 541; *Ex parte Lynn*, 19 App. 243.

**REPEAL OF OTHER LAWS.**—Where the local option law has been adopted and put in force, it operates a repeal within the particular locality of all laws and parts of laws in conflict with it, and exempts from punishment all previous offenders against the repealed laws. *Robertson v. S. 5 App.* 155; *Ex parte Lynn*, 19 App. 293; *Boone v. S. 12 App.* 184. The burden of proof of such repeal is upon the defendant. *Donaldson v. S. 15 App.* 25.

**REPEAL OF PROHIBITION.**—When by a subsequent election, prohibition has been repealed, prosecutions for violations of the law while it was in force cannot be maintained, and convictions had prior to such repeal cannot be enforced. *Halfin v. S. 5 App.* 212; *Monroe v. S. 8 App.* 343; *Fitze v. S. 13 App.* 372; *Pinckard v. S. Id.* 373; *Freeze v. S. 14 App.* 31; *Prather v. S. Id.* 453; *Mulkey v. S. 16 App.* 53. But such is not now the law. *Ante* § 623.

**INDICTMENT.**—For an indictment held sufficient, see *Sedberry v. S.* 14 App. 233. But this indictment was afterwards pronounced insufficient, because it did not allege the name of the person to whom the liquor was sold, or allege that such name was unknown to the grand jury. *Dixon v. S.* 21 App. 517. When a sham gift, but a real sale, is the offense, the indictment should charge that the gift was made "with the purpose of evading the law." *Stallworth v. S.* 16 App. 345; *Holly v. S.* 14 App. 505. But in a subsequent case it was held that it was not essential in any case to allege that the act was committed "with the purpose of evading the law." *McMillan v. S.* 18 App. 375. It is to be noted, however, that art. 378, as amended, Ante § 618, does not make it an offense to give liquor, unless the gift be "with the purpose of evading the laws of this State." The old law (Ante § 631) did not contain such qualification. In the case of a gift, it would perhaps be now held essential to allege that it was "with the purpose of evading the laws of this State." Willson's Cr. Form 257, for this offense having been drawn under art. 378 before it was amended, does not conform strictly to said article as amended. The words "and exchange" and "or exchange" should be omitted, and in the case of gift instead of a sale, it should be alleged that the gift was made "with the purpose of evading the laws of this State." With these suggested changes, Forms 257 and 257a would conform to the law as amended.

**PETITION FOR LOCAL OPTION ELECTION.**—A petition for a local option election is sufficient if it expresses in an intelligible manner the desire of the petitioners that an election under the provisions of such law be held within certain limits, stating such limits, and be signed by the requisite number of qualified voters. No particular allegations or statements are required in such petition. *Ex parte Lynn*, 19 App. 293; *Steele v. S.* Id. 425.

**ORDER FOR THE ELECTION.**—The authority of the commissioners' court is limited to ordering an election to determine as to the sale of intoxicating liquors. It has no authority to order it for the purpose of determining as to the gift or exchange of them. *Steele v. S.* 19 App. 425. The order for election must be made at the first regular session of the court after the petition is filed. If the petition be filed on the first day of the term, before the court has convened, the order may be made at said term. *Lipari v. S.* 19 App. 431. Such order cannot be made at any other time than at the first session of the court after the filing of the petition. *Ex parte Sublett*, 23 App. 309. The election must be ordered and held within the time prescribed by law, that is, not less than fifteen, nor more than thirty days after the date of the order. *Boone v. S.* 10 App. 418.

**NOTICE OF ELECTION.**—Proof that the notices of election were not posted as required by law will invalidate the election. *Smith v. S.* 19 App. 444. But it is not a valid objection that two of the notices were posted in a single precinct where the election was for the whole county. *Ex parte Kennedy*, 23 App. 77.

**ORDER DECLARING RESULT OF ELECTION.**—Where the order declaring the result of the election prohibits the sale, gift or exchange of intoxicating liquors, without making the exceptions embraced in the statute, it is a nullity. *Steele v. S.* 19 App. 425. It is sufficient for such order to declare that the election has resulted in favor of prohibition, and to prohibit the sale of intoxicating liquors within the limits for which the election was held, except for certain purposes specified in the statute. It is not essential that such order should declare that the prohibition should continue until such time as the qualified voters of the locality should, by a majority vote, at an election held therefor, decide otherwise. *Lipari v. S.* 19 App. 750. This order is sufficient *prima facie* evidence of every fact it recites, except jurisdictional ones arising upon the petition. *McMillan v. S.* 18 App. 375. Ante, § 630, art. 3233.

**PUBLICATION OF ORDER.**—The order declaring the result of election must be published in the manner and for the time required by law, before the law can take effect. *Akin v. S.* 14 App. 142; *Phillips v. S.* 23 App. 304.

**SIMULTANEOUS ELECTIONS.**—The fact that an election when held under the local option law was held in a justice's precinct, on the same day that a similar election was held for the whole county, did not invalidate the latter election. *Lipari v. S.* 19 App. 431.

**SUBSEQUENT ELECTION.**—After prohibition has been adopted another election thereon cannot be held until after the lapse of twelve months from the date of such adoption. The new law fixes the time at two years. Ante, § 630, art. 3236. After the lapse of that time any justices precinct, city or town, may by an election, held in accordance with law, annul or repeal prohibition within its limits, although it has been adopted and is not annulled or repealed by the county. *Whisenhunt v. S.* 18 App. 491.

§633 — **Prohibition by special law.**—An indictment for selling liquor within some locality where its sale is specially prohibited need only follow the statute. It need not designate the house where sold, or the person to whom sold, and it need not set out the special statute. *Ryan v. S.* 32 Tex. 280; *S. v. Heldt*, 41 Tex. 280. Willson's Cr. Forms, 258.

## CH. 7. — VAGRANCY.

ART.	SEC.	ART.	SEC.
384. Vagrancy punished.	634	Indictment.	636
385. Vagrancy defined.	635	Prostitutes.	638

§634 — ART. 384. — **Vagrancy punished.** — Every vagrant in this State shall, upon conviction, be fined in any sum not exceeding ten dollars.

Act Nov. 8, 1886, p. 102.

Indictment, Willson's Cr. Forms, 259.

§635 — ART. 385. — **"Vagrancy" defined.** — The following persons are vagrants within the meaning of the preceding article: 1. An idle person who lives without any means of support, and makes no exertions to obtain a livelihood by honest employment. 2. Any person who strolls idly about the streets of towns or cities, having no local habitation and no honest business or employment. 3. A person who strolls about to tell fortunes or to exhibit tricks not licensed by law. 4. A common prostitute. 5. A professional gambler. 6. Any person who goes about to beg alms who is not afflicted or disabled by a physical malady or misfortune. 7. An habitual drunkard, who abandons, neglects, or refuses to aid in the support of his family.

Act Nov. 8, 1886, p. 102.

§636 — **Indictment.** — It is not sufficient to charge that the accused is "a vagrant within the meaning of the law." Some one or more of the seven statutory constituents of the offense must be alleged. *Walton v. S.* 12 App. 117.

§637 — **Prostitutes.** — It is the *common* prostitute that is declared a vagrant. All prostitutes are not common prostitutes. A common prostitute is one who makes a business of selling the use of her person to the male sex for the purpose of illicit intercourse. A woman may be a prostitute, and yet have illicit connection with but one man; but to be a *common* prostitute, her lewdness must be more general and indiscriminate. *Springer v. S.* 16 App. 591.

## CH. 8. — MISCELLANEOUS OFFENSES.

ART.	SEC.	ART.	SEC.
386. Pawnbroker failing to comply with the law.	638	Decision under preceding article.	644
387. Insurance agent doing business without authority.	639	388c. Consolidation of railroad corporation rendered unlawful.	645
388. Any violation of insurance laws.	640	388d. Penalty — Officer, etc., not liable, when.	646
388a. Civil statutes.	641	388e. "Railroad corporation" defined.	647
388a. Who are insurance agents.	642	388f. Venue of offense — Duty of judge to give law in charge to grand jury.	648
388b. Penalty for acting as agent unlawfully.	643		

§638 — ART. 386. — **Pawnbroker failing to comply with the law.** — If any pawnbroker, or person doing any business as such, shall receive any article in pledge, or sell the same without complying with the laws regulating pawnbrokerage in this State, he shall be punished by fine not less than twenty-five nor more than one hundred dollars. [Act April 28, 1874, p. 154.]

Indictment, Willson's Cr. Forms, 260.

§639 — ART. 387. — **Insurance agent doing business without authority.** — If any person shall transact the business of life, fire, or marine insurance in this State, either as agent, solicitor or broker, without his, or the company or association he represents, first obtaining a certificate of authority therefor from the commissioner of insurance, statistics and history, he shall be punished by fine not less than five hundred nor more than one thousand dollars, and by imprisonment in the county jail not less than three nor more than six months. [Act Feb. 17, 1875, p. 44.]

§640 — ART. 388. — **Any violation of insurance laws.** — If any person shall violate any provision of the laws of this State regulating the business of life, fire, or marine insurance, he shall be punished by fine not less than five hundred nor more than one thousand dollars. [Acts May 2, 1874, p. 200; Feb. 17, 1875, p. 44.]

§641 — **Civil statutes.** — For the statutes regulating the business of life, fire and marine insurance companies, see Revised Statutes, Title 53, p. 421, and the Act of July 9, 1879, extra session, chap. 36. — Rev. Stat. Appendix, p. 44; Arts. 2910 *et seq.* of Sayle's New Statutes.

§642 — ART. 388a. — **Who are insurance agents.** — That any person who solicits insurance on behalf of any insurance company, whether incorporated under the laws of this or any other State, or foreign government, or who takes or transmits other than for himself, any application for insurance, or any policy of insurance, to or from such company, or who advertises or otherwise gives notice that he will receive or transmit the same, or who shall receive or deliver a policy of insurance of any such company, or who shall examine or inspect any risk, or receive or collect, or transmit any premium of insurance, or make or forward any diagram of any building or buildings, or do or perform any other act or thing in the making or consummating of any contract of insurance for or with any such insurance company other than for himself, or who shall examine into or adjust or aid in adjusting, any laws for or on behalf of any such insurance company, whether any of such acts shall be done at the instance or request, or by the employment of such insurance company, or of or by any broker or other person, shall be held to be the agent of the company for which the act is done, or the risk is taken as far as relates to all the liabilities, duties, requirements and penalties set forth in this act; *provided*, that the provisions of this act shall not apply to citizens of this State who arbitrate in the adjustment of losses between the insurers and assured, nor to the adjustment of particular or general average losses of vessels or cargoes, by marine adjusters, who have paid an occupation tax of two hundred dollars for the year in which the adjustment is made; *provided further*, that the provisions of this act shall not apply to practicing attorneys at law in the State of Texas, acting in the regular transaction of their business as such attorneys at law and who are not local agents nor acting as adjusters for any insurance company. [Act July 9, 1879, extra session, chap. 36, § 1.]

§643 — ART. 388b. — **Penalty for acting as agent unlawfully.** — That any person who shall do or perform any of the acts or things mentioned in the preceding section for any insurance company hereinbefore referred to, without such company having first complied with the requirements of the laws of this State, or having received the certificate of authority from the commissioner of insurance, statistics and history of the State of Texas, as required by law, shall be guilty of a misdemeanor, and, on conviction by any court of competent jurisdiction, for the first offense be fined five hundred dollars, and also a sum equal to the State, county and municipal licenses required to be paid by such insurance company for doing business in this State, and shall be imprisoned in the county jail, where the offense is committed,



for the period of three months, unless the fine assessed against him, and the sum of licenses herein mentioned and the cost of the court be sooner paid; and for any second or other offense such person shall be fined in the sum of one thousand dollars, and shall be imprisoned in the county jail for the period of six months, unless the fine assessed against him and the costs of the court be sooner paid. [Act July 9, 1879, extra session, chap. 36 § 2.]

§644 — **Decision under preceding article.** — See the case cited below for an indictment held to be sufficient. It is the intent and purpose of article 368a to make every person an "agent" who shall commit any of the inculpatory acts, whether or not he was an agent in fact. It is not incumbent on the State to prove that the insurance company had not complied with the laws of the State, and had not received the required certificate of authority. If such compliance and authority be relied upon as a defense, the burden is upon the defendant to prove the same. *Smith v. S.* 18 App. 69.

§645 — **ART. 388c. — Consolidation of railroad corporations declared unlawful.** — That it shall be unlawful for any railroad corporation, or other corporation or the lessees, purchasers, or managers of any railroad corporation, to consolidate the stocks, property, works, or franchises of such corporation with, or lease or purchase the stocks, property, works, or franchises of any other railroad corporation owning or having under its control or management a competing or parallel line; nor shall any officer, agent, manager, lessee, or purchaser of such railroad corporation act or become an officer, agent, manager, lessee, or purchaser of any other railroad corporation in leasing or purchasing any parallel or competing line. [Act April 4, 1887, p. 137, §1.]

§646 — **ART. 388d. — Penalty — Officer, etc., not liable, when.** — Any officer, director, manager, superintendent, agent, purchaser, or lessee of any such railroad corporation or other corporation, who shall violate or aid in violating any of the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one thousand dollars nor more than four thousand dollars; *provided*, that no person shall be liable to punishment under this act who has not, by virtue of his office, agency, or position, a voice in the management of the railway company, or who has not, by virtue of his office, agency, or position, some power to prevent a violation of this act. [Act Ap'l 4, 1887, pp. 137-138, §2.]

§647 — **ART. 388e. — "Railroad corporation" defined.** — Railroad corporation, or other corporation, as used in this act, is declared to mean any corporation, company, person, or association of persons who own or control, manage, or operate any line of railroad in this State. [Ap'l 4, 1887, p. 138, § 3.]

§648 — **ART. 388f. — Venue of offense — Duty of judges to give law in charge to grand juries.** — Indictments and prosecutions under the provisions of this act may be found and made in any county through or into which the line of railroad may run, and it shall be the duty of district judges to charge the grand juries upon this law the same as in other cases. [Act April 4, 1887, p. 138, § 4.]

## TITLE 12—OF OFFENSES AFFECTING PUBLIC HEALTH.

## CH. 1. OCCUPATIONS AND ACTS INJURIOUS TO HEALTH.

## 2. SALE OF UNWHOLESOME FOOD, DRINK OR MEDICINE.

CH. 3. UNLAWFUL PRACTICE OF MEDICINE.  
4. VIOLATION OF QUARANTINE.

## CH. 1.—OCCUPATION AND ACTS INJURIOUS TO HEALTH.

ART.	SEC.	ART.	SEC.
389. Offensive trades and nuisances.	649	391. Leaving dead animals in road etc.	651
390. Pollution or obstruction of water-courses.	650		

§649—ART. 389.—**Offensive trades and nuisances.**—If any person shall carry on any trade, business or occupation injurious to the health of those who reside in the vicinity, or shall suffer any substance which shall have that effect to remain on premises in his possession, he shall be punished by fine not less than ten nor more than one hundred dollars; and each separate day of carrying on such business, trade or occupation, or of permitting such substance to remain on the premises, shall be considered a separate offense. [O. C. 424.]

Indictment, Willson's Cr. Forms, 361-262.

§650—ART. 390.—**Pollution or obstruction of water-courses.**—If any person shall in any wise pollute or obstruct any water-course, lake, pond, marsh, or common sewer, or continue such obstruction or pollution, so as to render the same unwholesome or offensive to the inhabitants of the county, city, town, or neighborhood thereabout, he shall be fined in a sum not exceeding five hundred dollars. [O. C. 399*d*, Act. Feb. 11, 1869, p. 97.]

Indictment, Willson's Cr. Forms, 263.

§651—ART. 391.—**Leaving dead animal in road, etc.**—If any person shall leave the dead carcass or body of any horse, mule, ox, steer, cow, or other animal, which died in the actual possession of such person, in any public road or highway, or in any street or alley of any village, town or city in this State, or within fifty yards of such public road, highway, street or alley, he shall be fined not less than five nor more than one hundred dollars. [Act April 7, 1874, p. 69.]

Indictment, Willson's Cr. Forms, 264

## CH. 2.—SALE OF UNWHOLESOME FOOD, DRINK OR MEDICINE.

ART.	SEC.	ART.	SEC.
392. Selling corrupt or unwholesome substance.	652	395 <i>d</i> . Duty of State health officer.	659
393. Adulteration of food, liquor, etc.	653	395 <i>e</i> . Same subject.	660
394. Selling adulterated liquor.	654	395 <i>f</i> . Penalty for refusing to supply sample.	661
395. Adulteration of medicine.	655	395 <i>g</i> . Violation a misdemeanor—Hindering, etc., analyst, etc.	662
395 <i>a</i> . Manufacturing, etc., adulterated food, wines, etc.	656	395 <i>h</i> . Inconsistent laws repealed.	663
395 <i>b</i> . "Food" and "drug" defined.	657	395 <i>i</i> . Regulation, etc., of health officers, etc., to be printed, etc.	664
395 <i>c</i> . "Adulteration" defined.	658		

• §652 — ART. 392. — **Selling corrupted or unwholesome substance.** — If any person shall knowingly sell the flesh of any animal dying otherwise than by slaughter, or slaughtered, when diseased, or shall sell any kind of corrupted, diseased or unwholesome substance, whether for food or drink, without making the same fully known to the buyer, he shall be fined not less than twenty nor more than one hundred dollars. [O. C. 425.]

Indictment, Willson's Cr. Forms, 265-266.

§653 — ART. 393. — **Adulteration of liquor, food, etc.** — If any person shall fraudulently adulterate, for the purpose of sale, any substance intended for food, or any spirituous, vinous or malt liquor, intended for drink, with any substance injurious to health, he shall be punished by fine not less than fifty nor more than five hundred dollars. [O. C. 426.]

Indictment, Willson's Cr. Forms, 267.

§654 — ART. 394. — **Selling adulterated liquor.** — If any person shall sell any spirituous, vinous, or malt liquor intended for drink, knowing the same to be adulterated with any substance or liquid injurious to health, he shall be punished by fine not less than fifty nor more than five hundred dollars. [O. C. 426a, Act Feb. 11, 1860, p. 98.]

Indictment, Willson's Cr. Forms, 394.

§655 — ART. 395. — **Adulteration of medicine.** — If any person shall fraudulently adulterate, for the purpose of sale, any drug or medicine, in such manner as to change the operation of such drug or medicine, or render the same worthless, or injurious to health, he shall be punished by fine not less than fifty nor more than five hundred dollars. [O. C. 427.]

Indictment, Willson's Cr. Forms, 269.

§656 — ART. 395a. — **Manufacturing, etc., adulterated food, wines, etc.** — That no person shall within this State manufacture, offer for sale, or sell, any article of food, wines, beers, fermented or distilled liquors or drugs, which is by him known to be adulterated, within the meaning of this act. Any person violating this provision shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars. Act April 10, 1883, p. 73, sec. 1.

§657 — ART. 395b. — **"Food" and "drug" defined.** — The term food, as used in this act, shall include every article used for food or drink by man. The term drug, as used in this act, shall include all medicines for internal and external use.

Act April 10, 1883, p. 73, sec. 2.

§658 — ART. 395c. — **"Adulteration" defined.** — An article shall be deemed adulterated within the meaning of this act. (a) In the case of drugs: —

1. If, when sold, under or by a name recognized in the United States Pharmacopœia, it differs from the standard of strength, quality or purity laid down therein.

2. If, when sold under or by a name not recognized in the United States Pharmacopœia, but which is found in some other Pharmacopœia, or other standard work on materia medica, it differs materially from the standard of strength, quality or purity laid down in such work.

3. If its strength or purity fall below the professed standard under which it is sold.

(b.) In the case of food or drinks: —

1. If any substance or substances has or have been mixed with it so as to reduce or lower, or injuriously affect its quality or strength.

2. If any inferior or cheaper substance or substances have been substituted, wholly or in part, for the article.

3. If any valuable constituent of the article has been wholly or in part abstracted.

4. If it be an imitation of, or be sold under the name of another article.

5. If it consists wholly or in part, of a diseased, or decomposed, or putrid or rotten animal, or vegetable substance, whether manufactured or not; or in the case of milk, if it is the produce of a diseased animal.

6. If it be colored, or coated, or polished, or powdered, whereby damage is concealed, or it is made to appear better than it really is, or of greater value.

7. If it contains any added poisonous ingredient, or any ingredient which may render such article injurious to the health of a person consuming it; provided, that the State health officer may, with the approval of the Governor, from time to time, declare certain articles or preparations to be exempt from the provisions of this act; and provided further, that the provisions of this act shall not apply to mixtures or compounds recognized as ordinary articles of food; provided, that the same are not injurious to health, and that the articles are distinctly labeled as a mixture, stating the components of the mixture.

Act April 10, 1883, p. 73, sec. 3.

§659 — ART. 395*d*. — **Duty of State health officer.** — It shall be the duty of the State health officer to prepare and publish from time to time, lists of the articles, mixtures, or compounds declared to be exempt from the provisions of this act, in accordance with the preceding section. The State health officer shall also, from time to time, fix the limits of variability permissible in any article of food, or drug, or compound, the standard of which is not established by any national Pharmacopœia.

Act April 10, 1883, p. 73, sec. 4.

§660 — ART. 395*e*. — **Same subject.** — The State health officer shall take cognizance of the interests of the public health, as it relates to the sale of food and drugs, and the adulterations of the same, and make all necessary investigations and inquiries relating thereto. He shall also have the supervision of the appointment of public analysts and chemists, and upon his recommendation, whenever he shall deem any such officers incompetent, the appointment of any and every such officer shall be revoked, and be held to be void and of no effect. Within thirty days after the passage of this act the State health officer shall adopt such measures as may seem necessary to facilitate the enforcement of this act, and prepare rules and regulations with regard to the proper method of collecting and examining articles of food or drugs, and for the appointment of the necessary inspector and analysts, and the said health officer shall be authorized to expend an amount not exceeding two thousand dollars, for the purpose of carrying out the provisions of this act; and the sum of two thousand dollars is hereby appropriated out of any money in the treasury not otherwise appropriated, for the purpose in this section provided.

Act April 10, 1883, p. 73, sec. 5.

§661 — ART. 395*f*. — **Penalty for refusing to supply sample.** — Every person selling, or offering, or exposing any article of food or drug for sale, or delivering any article to purchasers, shall be required to serve or supply any public analyst or other agent of the State, or local health officer appointed under this act, who shall apply to him for that purpose, and on tendering the value of the same, with a sample sufficient for the purpose of analysis of any article which is included in this act, and which is in the possession of the person selling, under a penalty not exceeding fifty dollars for a first offense, and one hundred dollars for each subsequent offense.

Act April 10, 1883, p. 73, sec 6.

§662—ART. 395*g*.—**Violation a misdemeanor—Hindering, etc., analyst, etc.**—Any violations of the provisions of this act shall be treated and punished as a misdemeanor; and who ever shall impede, obstruct, hinder, or otherwise prevent any analyst, inspector or prosecuting officer in the performance of his duty, shall be guilty of a misdemeanor, and shall be fined in any sum not less than fifty dollars, nor more than five hundred dollars.

Act April 10, 1883, p. 73, sec. 7.

§663—ART. 395*h*.—**Inconsistent laws repealed.**—Any acts, or parts of acts inconsistent with the provisions of this act, are hereby repealed.

Act April 10, 1883, p. 73, sec. 8.

§664—ART. 395*i*.—**Regulations, etc., of health officer to be printed, etc.**—All the regulations and declarations of the State health officer, made under this act, from time to time and promulgated, shall be printed for general distribution.

Act April 10, 1883, p. 73, sec. 9.

### CH. 3.—UNLAWFUL PRACTICE OF MEDICINE.

ART.	SEC.	ART.	SEC.
396. Practicing without certificate of qualification.	665	399. Decision under preceding article.	668
397. What constitutes separate offense.	666	399. Not applicable to what cases.	669
398. Practicing without filing certificate for record.	667	Constitutionality of preceding article.	670
		Civil statutes and decisions.	671

§665—ART. 396.—**Practicing without certificate of qualification.**—If any person shall practice for pay, or as a regular practitioner, medicine, in this State, in any of its branches or departments, or offer or attempt to practice without first having obtained a certificate of professional qualification from some authorized board of medical examiners, or without having a diploma from some accredited medical college, chartered by the legislature of the State or its authority, in which the same is situated, he shall be punished by fine not less than fifty nor more than five hundred dollars.

Act March 26, 1879, p. 67; Indictment, Willson's Cr. Forms, 270.

§666—ART. 397.—**What constitutes separate offense.**—Each patient visited or prescribed for, or each day's offer to practice, shall constitute a separate offense under the preceding article.

Added in revising.

§667—ART. 398.—**Practicing without filing certificate for record.**—If any person shall hereafter engage in the practice of medicine in any of its branches or departments for pay, or as a regular practitioner, without having first filed for record with the clerk of the district court in the county in which such person may reside, or sojourn, a certificate from some authorized board of medical examiners, or a diploma from some accredited medical college, he shall be punished as prescribed in article 396.

Act March 26, 1879, p. 67.

§668 — **Decision under preceding article.**— In *French v. S.* 14 App. 76, it was held that the preceding article was irreconcilably in conflict with art. 3635 of the Revised Statutes, and must, therefore, be held to be inoperative. The preceding article requires the certificate to be recorded with the clerk of the district court, while art. 3635 of the Revised Statutes required it to be recorded with the clerk of the county court. Said article 3635, however, has been amended so as to harmonize with the preceding article 398, thus rendering said last named article operative. Act March 23, 1887, p. 35.

§669 — **ART. 399.**— **Not applicable to what cases.**— The provisions of this chapter shall not apply to any person who has been regularly engaged in the general practice of medicine, in any of its branches or departments, in this State, for five consecutive years prior to January 1, 1875; nor to any person who may have legally qualified himself to practice medicine under the provisions of an act entitled "an act to regulate the practice of medicine," passed May 16, 1873; nor to any female who may follow the practice of midwifery strictly as such.

Added in revising.

§670 — **Constitutionality of preceding articles.**— A statute similar to the preceding articles was held to be constitutional. *Logan v. S.* 5 App. 306. Such legislation is now expressly authorized by sec. 31, art. 16 of the constitution.

§671 — **Civil statutes and decisions.**— For the civil statute regulating the practice of medicine, see Revised Statutes, chap. 73, p. 515, Act March 23, 1887, p. 35. The object of these statutes regulating the practice of medicine is to protect the people against quack doctors and medical charlatans, and they are to be construed in harmony with such purpose and policy. *Antle v. S.* 6 App. 202; *Hilliard v. S.* 7 App. 69. All medical practitioners, except those practicing regularly for five years prior to January 1, 1875, and except those who qualified under the Act of 1873, must have a certificate of qualification, and before engaging in practice must have recorded it; and one who qualified under the Act of 1873, but afterwards removed to another county, must have his certificate also recorded in the latter county. *Hilliard v. S.* 7 App. 69. For the requisites of an indictment for this offense under the Act of 1873, see *Carribene v. S.* 3 App. 262; *S. v. Goldman*, 44 Tex. 104. The exceptions contained in article 399 need not be negatived in the indictment. They are matters of defense and provable under the plea of not guilty. *Blasdel v. S.* 5 App. 263; *Logan v. S.* Id. 306. Nor need the indictment allege the particular branch or department of medicine in which the defendant practiced, and it is sufficient to prove a single act of engaging in the practice, in connection with proof that he held himself out to the public as a practicing physician, and it is competent for the State to prove the professional capacity in which he held himself out to the public. *Antle v. S.* 6 App. 202. The Act of May 16, 1873, the original act upon this subject, was repealed by the act of August 21, 1876, which latter act is the one from which the preceding articles were framed in revising. *Ellison v. S.* 6 App. 248.

#### CH. 4. — VIOLATIONS OF QUARANTINE.

ART.	SEC.	ART.	SEC.
400. Vessel landing from infected port.	672	403a. Leaving quarantine station.	676
401. Passing station without permission.	673	403b. Officer, etc., disobeying, etc., quar-	
402. Going ashore without permission.	674	antine law.	677
403. Landing goods without permission.	675	403c. Evading quarantine guard, etc.	678

§672 — **ART. 400.**— **Vessel landing from infected port.**— After the legal establishment of any quarantine station on the coast of this State, if any vessel shall land or arrive at such station from an infected port, without a clean bill of health from the proper officer of said port, the master or commanding officer of such vessel shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than five hundred nor more than five thousand dollars. [Act Aug. 13, 1870, p. 75.]

Indictment, Willson's Cr. Forms, 271.

§673 — ART. 401. — **Passing station without permission.** — Any master or commanding officer of a vessel that passes or attempts to pass any quarantine station on the coast of this State during the continuance of the quarantine, without having first obtained permission from the health officer of such station so to do, shall be punished by imprisonment in the penitentiary not less than two nor more than five years, or by fine not less than five hundred nor more than ten thousand dollars. [Act Aug. 13, 1870, p. 75.]

Indictment, Willson's Cr. Forms, 272.

§674 — ART. 402. — **Going ashore without permission.** — Any person belonging to or on board of a vessel placed under quarantine, who shall go ashore without the written permission of the health officer of the station, shall be fined not less than fifty nor more than five hundred dollars. [Act Aug. 3, 1870, p. 75.]

Indictment, Willson's Cr. Forms, 273.

§675 — ART. 403. — **Landing goods without permission.** — Any master or officer of a vessel placed under quarantine, who shall land or permit to be landed from said vessel any goods, wares, merchandise, or article whatsoever, while the same is under quarantine, without the written permission of the health officer of the quarantine station, shall be fined not less than fifty nor more than one thousand dollars for each article so landed. [Act Aug. 13, 1870, p. 75.]

Indictment, Willson's Cr. Forms, 274.

§676 — ART. 403a. — **Leaving quarantine station.** — Any person detained at any quarantine station, who shall willfully absent himself without leave of the officer having charge thereof, shall be deemed guilty of a misdemeanor, and on conviction thereof by any court of competent jurisdiction, shall be punished by a fine of not less than ten dollars nor more than one thousand dollars. [Act April 12, 1883, p. 81]

Indictment, Willson's Cr. Forms, 275.

§677 — ART. 403b. — **Officer, etc., disobeying, etc., quarantine law.** — Any health officer, guard or other employee who shall knowingly and willfully disobey or in any manner knowingly neglect or fail to perform any duty imposed upon him by the provisions of quarantine laws, rules and regulations of this State, or who shall disobey knowingly an order emanating from superior authority, shall be fined upon conviction by a court of competent jurisdiction in a sum not exceeding one thousand dollars; provided, that in the meaning of this article the Governor and State health officer shall alone be deemed superior authority. [Act April 12, 1883, p. 81; Quarantine Law, Act 18th Leg., p. 17.]

Indictment, Willson's Cr. Forms, 276-277.

§678 — ART. 403c. — **Evading quarantine guard, etc.** — Any person coming from any port or district infected with yellow fever, or any other infectious or contagious disease, who shall knowingly evade any guard or pass through any cordon of quarantine duly established, shall be deemed guilty of a misdemeanor, and upon conviction by any court of competent jurisdiction be punished by fine not exceeding one thousand dollars. [Act April 11, 1883, p. 81.]

Willson's Cr. Forms, 278. For false swearing to evade quarantine see ante, §§ 271-321.

## TITLE 13—OF OFFENSES AFFECTING PROPERTY HELD IN COMMON FOR THE USE OF THE PUBLIC.

- CH. 1. OBSTRUCTION OF NAVIGABLE STREAMS,  
ROADS, STREETS AND BRIDGES.  
2. OFFENSES PERTAINING TO PUBLIC  
ROADS AND IRRIGATION.  
3. OFFENSES RELATING TO FERRIES.

- CH. 4. OFFENSES RELATING TO PUBLIC  
GROUNDS AND BUILDINGS.  
5. OFFENSES RELATING TO THE PROTEC-  
TION OF FISH, BIRDS AND GAME.

### CH. 1.—OBSTRUCTION OF NAVIGABLE STREAMS, ROADS, STREETS AND BRIDGES.

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Compensation to owner of land.	686		

§679—ART. 404.—**Obstruction of navigable stream.**—If any person shall obstruct the navigation of any stream which can be navigated by steam, keel or flat-boats, by cutting and felling trees, or by building on or across the same any dyke, mill-dam, bridge or other obstruction, he shall be fined not less than fifty nor more than five hundred dollars. [O. C. 428]

Indictment, Willson's Cr. Forms, 279.

§680—ART. 405.—**Of roads, streets or bridges.**—If any person shall willfully obstruct or injure, or cause to be obstructed or injured in any manner whatsoever, any public road or highway, or any street or alley in any incorporated town or city, or any public bridge or causeway, he shall be fined in a sum not exceeding five hundred dollars. [O. C. 399d, Act Feb. 11, 1860, p. 97.]

Indictment, Willson's Cr. Forms, 280-281.

§681—ART. 406.—**Not applicable, when.**—No person shall be punished under the preceding article who places obstructions in the streets or alleys of an incorporated city or town for purposes of building or improvement, under the sanction of the corporate authorities of such city or town. [O. C. 399d, Act Feb. 11, 1860, p. 97.]

§682—ART. 407.—**Commissioners' court may also regulate.**—Nothing in this chapter contained shall be so construed as to prevent the commissioners' court of the several counties or the municipal authorities of towns or cities from adopting such regulations as they may deem proper relative to the removal of obstructions from public roads, streets or bridges, and to enforce the same by due process of law. [O. C. 430.]

§683—**Indictment.**—Willson's Cr. Forms, 280, approved. *Conner v. S.* 21 App. 176. The indictment must allege that the road obstructed was a *public* one; or if a street or alley, that the same was in an incorporated town or city. It is no offense to obstruct a road that is not a public one, or a street or alley that is not in an incorporated city or town. *McClannahan v. S.* 21 App. 429. Under a different statute it was held otherwise. *S. v. Junker*, 37 Tex. 478. It need not allege the materiality of the obstruction, or that the road had been duly laid off, or negative the right to obstruct. *S. v. Collins*, 38 Tex. 189. It need not allege the class of the road, but if it does, the allegation is descriptive and must be proved. *Menly v. S.* 3 App. 382. It may be charged that the defendant "did unlawfully and willfully obstruct and cause to be



obstructed a public road." Where a statute, as this one does, makes it penal to do this; or that, mentioning several things disjunctively, all the prohibited acts may be embraced conjunctively in the same count. *Day v. S. 14 App. 26.*

§684—**Act must be willful.**—Intent is a constituent element of this offense, and it must appear that the obstruction was willful on the part of the accused. Such intent is not to be presumed from the act of obstruction; but it must be proved as a fact, as such fact is proved in other offenses where it is an element of the offense. *Brinkoeter v. S. 14 App. 67; S. C. 16 App. 72; Shubert v. S. 16 App. 645; Trice v. S. 17 App. 43; Loyd v. S. 19 App. 321; Sanborn v. S. 21 App. 155; Conner v. S. Id. 176; Baker v. S. Id. 264; Murphy v. S. 23 App. 333; Guthrie v. S. Id. 339.*

§685—**"Willful" defined.**—The word "willful," when used in a penal statute, means more than its import in common parlance. It means with evil intent, or legal malice, or without reasonable ground to believe the act to be lawful. *Thomas v. S. 14 App. 200; Rose v. S. 19 App. 470; Loyd v. S. Id. 321; Shubert v. S. 16 App. 645; Trice v. S. 17 App. 43; Yoakum v. S. 21 App. 260.*

§686—**Compensation to owner of land.**—A condition precedent to the authority of the commissioners' court to take a person's land for a public road, is, that said court, in the manner provided by law, shall ascertain the damage thereby accruing to such owner, and make compensation to him for the same. And changing a public road of the third class to one of the first class is taking the owner's land over which the road passes. *Thompson v. S. 22 App. 328.* And so is changing the road from a second to a third class one. *Bradley v. S. 19 App. 330.*

§687—**What constitutes a public road—Evidence.**—A public road is one established as such by order of the commissioners' court in accordance with law. For the law regulating the establishment, etc., of public roads see Revised Statutes, title 87, and Amendatory Act of 18 Leg., special session, p. 19. Act of 19 Leg. p. 25 and p. 92. In order to condemn private property to public uses, the law authorizing and directing it must be strictly observed and pursued, and the performance of what the law requires is a condition precedent to the authority to condemn. A public road cannot be laid out and established without the requirements of the law in such cases having first been complied with. *Davidson v. S. 16 App. 336.* To constitute a road ordered to be laid out by the commissioners' court, a public road, the designation of its locality by reference to natural objects, if from the nature of the country, that can be done, and the adoption thereof by the county court, is sufficient; and is as effectual as if made by passing over the ground, marking trees or setting up mounds. *Floyd v. S. 25 Tex. 277.* The public character of the road may be established not only by the order of the commissioners' court, but also by proof that it has long been used as a public road, and that the commissioners' court has recognized it as such by assigning hands to work it, or by an order declaring it to be a road of a certain class. *Michel v. S. 12 App. 108; Berry v. S. Id. 249; Tally v. S. 19 App. 76; McWhorter v. S. 43 Tex. 666.* But mere travel over a road for a short period does not make it a public road. *Hale v. S. 13 App. 269.* Where the jury of review reported the road laid out followed a certain boundary line; but the road actually laid out was two hundred yards from the reported route—that the reported route was never laid out or marked upon the ground, and had never been used or worked as a public road, but that the road as actually laid out and marked has been used by the public, and worked by the road overseer, it was held that the true public road was that actually used by the public, and recognized by the county authorities, and not the route reported by the jury of review. *Day v. S. 14 App. 26.*

§688—**Obstruction of street by authority of an ordinance.**—Where the prosecution is for obstructing a public street in an incorporated city or town, an ordinance of such city or town permitting such obstruction is admissible in evidence in behalf of defendant, and is a complete defense to the prosecution. *Echols v. S. 12 App. 615.*

§689—**Third class road—Right to erect gates across.**—Where a third class road is established, the owner of the land upon which it is located, who has consented to such location, without compensation therefor, may erect gates across such road, such as are described in the statute. But if the land has been condemned in accordance with law, he has no right to erect such gates. *Conner v. S. 21 App. 176; Jolly v. S. 19 App. 752.*

§690—**ART. 407a.—Commissioners' court may control streets, etc. when.**—That in all cities and incorporated towns in the State of Texas in which from any cause there is not a de facto municipal government in the active discharge of their official duties, the commissioners' court of the county in which such city or incorporated town is situated shall assume and have control of the streets and alleys thereof, and shall have the same worked under the law and regulations for the working of public roads, and such streets and alleys for the purposes of this act shall be held and denominated public roads, provided, that all residents of any city or town, having no de facto city government, not otherwise exempt from road duty, shall be liable to road service as in other cases. [Act March 4, 1885, p. 25.]

## CH. 2 — OFFENSES PERTAINING TO PUBLIC ROADS AND IRRIGATION.

ART.		SEC.	ART.		SEC.
408.	Refusal to serve as overseer.	691	411.	Failure to attend when summoned,	698
409.	Failure of duty as overseer.	692		etc.	
410.	Same subject continued.	693		Payment of money in lieu of attendance, etc.	699
	Indictment under preceding articles.	694	412.	Failure to open boundary lines.	700
	Evidence.	695	413.	Leaving gate open on third class road, etc.	701
	Duty of overseer to remove obstructions.	696	414.	Violation of irrigation laws.	702
	Overseer not responsible for streets, etc.	697			

§691 — ART. 408. — **Refusal to serve as overseer.** — If any person, subject to public road duty under the laws of this state, shall willfully fail or refuse to serve as overseer of any road in his road district or precinct, when duly appointed as such overseer by the commissioners' court of his county, he shall be fined not less than ten nor more than fifty dollars. [Act July 29, 1876, p. 67.]

Indictment, Willson's Cr. Forms, 282.

§692 — ART. 409. — **Failure of duty as overseer.** — If any overseer of a public road in this State shall willfully fail, neglect or refuse to perform any duty imposed upon him by law; or shall so fail, neglect or refuse to keep the road, bridges and causeways in his precinct or district, clear of obstructions and in good order; or shall willfully suffer such road, bridges or causeways to remain uncleared and out of repair for twenty days at any one time, he shall be fined not less than ten nor more than twenty-five dollars. [Act July 29, 1876, p. 68.]

Indictment, Willson's Cr. Forms, 283.

§693. — ART. 410. — **Same subject continued.** — If any overseer of a public road in this State shall fail, within six months after his appointment as such, to measure the road or roads in his precinct or district and set up posts of lasting timber at the end of each mile leading from the court-house or some other noted place or town, and to mark on such posts, in legible words and figures, the distance in miles to such court-house or other noted place; or shall fail, when any such post is destroyed or removed, to replace the same with another marked as the original; or shall fail to affix or set up at the forks of all public roads in his district or precinct, index boards with directions pointing toward the most noted places to which they lead, he shall be fined in the sum of five dollars. [Act July 29, 1876, p. 67.]

Indictment, Willson's Cr. Forms, 284.

§694 — **Indictments under preceding articles.** — Indictment need not allege specifically the county in which the road is situated, if it designates said road as leading from the county seat of the county, naming the county, to the line of said county. *S. v. Lea*, 15 Tex. 252. After verdict, the indictment is sufficient, if it describes the road and the breach of duty with such certainty as to notify the defendant of the precise facts constituting the offense of which he is charged. *Sennett v. S.* 17 Tex. 308. But on exception, the omission to allege the road precinct, by number or otherwise, with sufficient certainty to identify the road assigned, is fatal. Thus to allege, that it was "road number seven in said county," is insufficient. *S. v. Hail*, 21 Tex. 587; *Hardeman v. S.* 25 Tex. 179. Where the indictment is for failure to put up mile posts, etc., under Art. 410, it must be alleged that such failure was within six months after his appointment as overseer. *Hardeman v. S.* 25 Tex. 179; *S. v. Smith*, 25 Tex. Supp. 64; *S. v. Chinn*, 29 Tex. 497. It should, in such case, negative the fact that there is any other "noted place or town" between the termini of the precinct. *S. v. Mathis*, 30 Tex. 506. An indictment under art. 409 for failure to keep the road in repair, is sufficient when it charges that the defendant was overseer of a certain specific precinct of a certain designated public road in the county, and that he willfully suffered such road of which he was overseer to remain uncleared and out of repair for twenty days at one time. *S. v. Forrest*, 30 Tex. 503. It would, perhaps, be better pleading, to designate the twenty days time during which the road was suffered to remain out of repair.

§695 — **Evidence.** — Proof that the defendant acted as overseer of the road is sufficient evidence of his appointment as such, and that he had been notified of such appointment. *Sigler*

v. S. 17 Tex. 804. A formal acceptance of such appointment by him need not be shown. *S. v. Chinn*, 29 Tex. 497. It is not necessary to prove that the road has been classified. *Sigler v. S. 17 Tex. 304*. But if the class of the road be alleged, it should be proved. *Morely v. S. 3 App. 382*. A variance in the description of the road in the indictment, and that described in the order establishing such road, is immaterial if it be proved to be the same road, and the description of it in the indictment is appropriate. *Sigler v. S. 17 Tex. 804*. Where a breach of duty has been established, it devolves upon the defendant to show justification or excuse. *Sennett v. S. 17 Tex. 308*; *Sigler v. S. Id. 304*. For an order appointing an overseer held sufficient, see *Tincher v. S. 19 Tex. 156*.

§696 — **Duty of overseer to remove obstructions.** — An overseer of a public road is not only authorized, but it is made his duty to remove from such road all unauthorized obstructions, and in performing such duty he is justified by the law in removing a fence which has been erected across such road. *Schott v. S. 7 App. 616*.

§697 — **Overseer not responsible for streets, etc.** — An indictment will not lie against an overseer for failing to keep a road in repair within the limits of an incorporated city or town, for the reason that the commissioners' court has no jurisdiction over the subject-matter. *S. v. Jones*, 18 Tex. 874. But where there is not a *de facto* municipal government, the commissioners' court has jurisdiction to control the streets and alleys of the city or town, and in such case the overseer would be liable. *Ante*, § 690

§698 — **ART. 411. — Failure to attend when summoned, etc.** — If any person liable under the law to work upon the public roads shall willfully fail or refuse to attend, either in person or by substitute, at the time and place designated by the road overseer of his district or precinct, after being legally summoned; or shall fail, on or before the day for which he is summoned to attend, to pay to such overseer the sum of one dollar per day for each day he may have been notified to work on the road; or having attended, shall fail to perform any duty required of him by law and such overseer, he shall be fined in any sum not exceeding ten dollars. [Act July 29, 1876, p. 66.]

Indictment, Willson's Cr. Forms, 287-288.

699 — **Payment of money in lieu of attendance, etc.** — The payment of money in lieu of attendance and work must be made to the overseer. A tender or payment made to an unauthorized person is no defense to a prosecution under the preceding article. *Gross v. S. 4 App. 249*.

§700 — **ART. 412. — Failure to open boundary lines.** — Whenever the commissioners' court of any county in this State shall duly declare the boundary lines between the lands of different persons or owners a public highway, in accordance with law, if any such person or owner shall fail, neglect or refuse, for twelve months after legal notice thereof, to leave open his land, free from all obstructions, for ten feet on his side of the line so designated, he shall be fined not more than twenty dollars for each month after the twelve months aforesaid in which he may so fail, neglect or refuse. [Act July 29, 1876, p. 69.]

Indictment, Willson's Cr. Forms, 289.

§701 — **ART. 413. — Leaving gate open on third class road, etc.** — Any person or persons placing a gate on or across any third class road, or on or across any road such as is designated in article 412 of the Penal Code shall be required to keep said gate and the approaches to the same in good order, and the gate shall be ten feet wide and so constructed as to cause no unnecessary delay to the traveling public in opening and shutting the same; and provide a fastening to hold said gate open till the passengers go through and such person or persons shall place a permanent hitching post and stile block on each side of and within sixty feet of such gate. Any person or persons, who may hereafter place a gate on or across a third class road, or on or across any road such as is designated in article 412, who shall willfully or negligently fail to comply with the requirements of this article shall be deemed guilty of a misdemeanor, and on conviction may be fined in any sum not less than five nor more than twenty dollars for each offense, and each week of such failure shall constitute a separate offense. Any person or persons, who shall willfully or negligently leave open any gate on or across any third class road or on or across any road such as is designated in article 412, shall be deemed guilty of

a misdemeanor, and on conviction may be fined in any sum as above provided for. [P. C. 413, amended by Act Feb. 2, 1884, Spec. Session, p. 18.]

Cited in Jolly v. S. 19 App. 76; Indictment, for leaving gate open, Willson's Cr. Forms, 290.

§702 — ART. 414. — **Violation of irrigation laws.** — If any person, amenable to the laws governing irrigation, shall fail or refuse to work on any ditch or aqueduct, when summoned so to do by the proper authority, he shall be fined not less than one nor more than five dollars. [Act Dec. 20, 1861, p. 8.]

See Rev. Stat. Title 55, p. 434, for Irrigation Laws; Indictment, Willson's Cr. Forms, 291.

### CH. 3.— OFFENSES RELATING TO FERRIES.

ART.	SEC.	ART.	SEC.
415. Keeping ferry without license.	703	416. Failure to keep good boats, etc.	704

§703 — ART. 415. — **Keeping ferry without license.** — If any person or firm shall keep any ferry over any water-course, navigable stream, lake or bay in this State, and shall charge or receive any money, property or other valuable thing for crossing passengers or property at such ferry, without first obtaining license, as is now or as may hereafter be required by law, such person or firm shall be punished by fine not less than fifty nor more than two hundred dollars. [P. C. 403a, Act Feb. 11, 1860, p. 98.]

See chap. 6, Title 87, Rev. Stat., for law regulating ferries; Indictment, Willson's Cr. Forms, 292.

§704 — ART. 416. — **Failure to keep good boats, etc.** — If the owner of any licensed ferry in this State shall fail to keep at all times good, safe and substantial boats, sufficient in number for the ready accommodation of the public; or shall fail to keep the banks on each side of the ferry in good repair, and so graded that the ascent shall not exceed one foot in every seven feet from the water's edge to the top of the bank; or shall fail to give ready attendance on all passengers desiring to cross with their animals, wagons or other property; or shall charge higher rates of ferriage than those fixed by the proper authority, he shall be fined not less than ten nor more than one hundred dollars. [Act March 4, 1875, pp. 58-59.]

Indictment, Willson's Cr. Forms, 293-294-295-296.

## CH. 4.—OFFENSES RELATING TO PUBLIC GROUNDS AND BUILDINGS.

ART.	SEC.	ART.	SEC.
417. Injuring or defacing a public building.	705	422a. Unlawfully fencing, using, etc., public land.	712
418. "Public building," defined. Indictment.	706	422b. Not applicable, when.	713
419. All officers to report violations.	707	422c. Purchaser turning loose too many stock upon leasehold land.	714
420. Driving in capitol grounds, etc.	708	422d. Failure to provide gateways.	715
421. Hitching in same.	709	Other statutes relating to public lands.	716
422. Taking property from public grounds.	710		
	711		

§705 — ART. 417. — **Injuring or defacing a public building.** — If any person shall willfully injure or deface any public building in this State, he shall be fined not less than five nor more than five hundred dollars. [Act Jan. 4, 1862, p. 51.]

Indictment, Willson's Cr. Forms, 297.

§706 — ART. 418. — **"Public building" defined.** — The term "public building," as used in the preceding article, means the capitol and all other buildings in the capitol grounds at the seat of government, including the general land office and the executive mansion, the various State asylums and all buildings belonging to either; all college or university buildings erected by the State, all court-houses and jails, and all other buildings held for public use by any department or branch of government, State, county or municipal; and the specific enumeration of the above shall not exclude other buildings not named properly coming within the meaning of and description of a public building. [Added in revising.]

§707 — **Indictment.** — When the offense is injuring or defacing a public building other than one that is specifically named in the preceding article, the indictment must allege that the building was "a public one held for public use." *Brown v. S.* 16 App. 245; *Pratt v. S.* 19 App. 276.

§708 — ART. 419. — **All officers to report violations.** — It is the especial duty of all executive officers of the State and the county officers of the various counties, to aid in the execution of the two preceding articles, and to report all violations thereof to the proper authorities for immediate prosecution. [Act Jan. 4, 1862, p. 51.]

§709 — ART. 420. — **Driving in capitol grounds, etc., without consent.** — If any person shall drive, ride or lead, or cause to be driven, ridden or lead, any horse or other animal into the capitol grounds at the seat of government, or into the inclosure of the State cemetery, without the consent of the keeper or superintendent of said grounds or cemetery, he shall be fined not exceeding twenty-five dollars. [Act April 29, 1874, p. 165.]

Indictment, Willson's Cr. Forms, 298-299.

§710 — ART. 421. — **Hitching in same.** — If any person shall hitch any animal to any tree or shrub in the capitol grounds or State cemetery, he shall be punished as prescribed in the preceding article. [Act April 29, 1874, p. 165.]

Indictment, Willson's Cr. Forms, 300.

§711 — ART. 422. — **Taking property from public grounds.** — If any person shall take, remove, injure or destroy any species of public property pertaining to any public building, as defined in article 418, or to the grounds belonging to such building, he shall be fined not less than twenty-five nor more than one hundred dollars. [Added in revising.]

Indictment, Willson's Cr. Forms, 301.

§712 — ART. 422a. — **Unlawfully fencing, using, etc., public land.** — It shall be unlawful for any person to fence, use, occupy or appropriate, by herding or line-riding, any portion of the public lands of the State, or of the lands belonging to any particular fund specified in this act, without having first obtained a lease of such lands in accordance with the provisions of this act. Any person, whether owner of stock, manager, agent, employee, or servant, who shall fence, use, occupy, or appropriate, by herding or line-riding, any portion of such lands without a lease thereof, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be fined not less than one hundred nor more than one thousand dollars, and in addition thereto shall be imprisoned in the county jail for a period of not less than three months nor more than two years. Each day of such fencing, using, occupying, or appropriating, by herding or line-riding, shall be deemed a separate offense, and any person so offending may be prosecuted, by indictment or information, in the proper court of the county where any portion of the land lies or to which it may be attached for judicial purposes, or in the county of Travis, and jurisdiction of such offenses is hereby vested in said courts; and in case any indictment or information is preferred or filed against a non-resident of this State for a violation of this section, it shall be the duty of the governor to demand the extradition of the defendant from the proper officer of any State or Territory where he may be found, in order that he may be brought to trial. "Fencing," within the meaning of this act, is the erection of any structure of wood, wire, or both, or any other material intended to prevent the passage of cattle, horses, mules, asses, sheep, goats, or hogs, whether the same shall enclose lands on all sides or be erected on one or more sides. Any appropriation of land belonging to any particular fund specified in this act, or of the public lands of this State, without first having obtained a lease thereof, by fencing of any kind, or by enclosures consisting partly of fenced and partly of natural obstacles, or impediments to the passage of live stock, shall be deemed an unlawful appropriation, punishable as provided in this section for appropriating such lands, and each day said land is so appropriated shall be deemed a separate offense. [Act April 1, 1887, p. 83, § 18.]

§713 — ART. 422b. — **Not applicable, when.** — The provisions of this act, as set forth in the preceding section, shall not apply to persons who are moving, or gathering, or holding for shipment any stock mentioned in said article; *provided*, the said persons have not erected any fence on such lands, or continue on said lands longer than one week. [Act April 1, 1887, p. 83, § 19.]

§714 — ART. 422c. — **Purchaser turning loose too many stock upon leasehold land.** — Any person desiring to lease any portion of the public lands, or the lands belonging to the several funds mentioned in this act, shall make application in writing to the commissioner of the general land office, specifying and describing the particular lands he desires to lease; and thereupon the commissioner, if satisfied that the lands applied for are not in immediate demand for purposes of actual settlement, and that such lands can be leased without detriment to the public interest, shall notify the applicant in writing that his proposition to lease is accepted; and thereupon he shall execute and deliver to the lessee, and in the name and by the authority of the State, a lease of said land for such term as may be agreed upon, and deliver the same to such lessee, when satisfied that the lessee has paid to the treasurer of the State the rent for one year in advance. No lands classified as grazing land under this act shall be subject to sale during the existence of such lease, and the possession thereof by the lessee shall not be disturbed during the term of such lease so long as the rents are paid promptly in advance each year as required

by this act. The lands classified as agricultural lands which may be leased under this act, shall be leased subject to sale as provided by this act, and whenever such leased lands may be purchased the lessee shall give immediate possession to such purchaser; *provided*, that the lessee shall have a *pro rata* credit upon his next year's rent, or the money refunded to him by the treasurer, as he may elect; *provided*, that no such sale shall be permitted where such lessee shall have previously placed improvements of the value of one hundred dollars upon such section of land so sought to be purchased; *and provided further*, that no actual settler who shall purchase land within any leasehold shall be permitted to turn loose more than one head of cattle or horses for every ten acres of land purchased by him and unenclosed, or, in lieu thereof, four head of sheep or goats to every ten acres of land so purchased and unenclosed. Each violation of the provisions of this act which restricts the number of stock which may be turned loose on lands leased from the State shall be an offense, and the offender on conviction shall be punished by fine of not less than one dollar for each head of stock he may so turn loose, and each thirty days' violation of the provisions of this section shall constitute a separate offense. [Act April 1, 1887, p. 83, § 15.]

§715 — ART. 422d. — **Failure to provide gateways.** — It shall be unlawful for any person or corporation who may have used any of the lands, by joining fences or otherwise, to build or maintain more than three miles lineal measure of fence, running in the same general direction, without a gateway in same, which gateway must be at least ten feet wide, and shall not be locked or kept closed so as to obstruct free ingress and egress; *provided*, that all persons who have fences already constructed in violation of the provisions of this act shall have two months from the time this act takes effect within which to conform with the provisions hereof; *provided further*, if any person or persons shall build or maintain more than three miles lineal measure running in the same direction, without providing such gateway, he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than two hundred dollars nor more than one thousand dollars, and each day that such fence remains without such gateway shall constitute and be punished as a separate offense; *provided further*, that the construction of gates as provided for in this section shall apply only to pasture lands; *provided further*, when herds of cattle, horses, sheep, or goats are driven through this State from one place to another place in this State, and it becomes necessary for such stock to pass through any enclosed pasture of any person who has leased any of the aforesaid lands, such lessee of such enclosure shall permit such stock to pass through such pasture; *provided*, the owner of such stock so driven through any such enclosure shall move the same as expeditiously and with as little delay as practicable through such enclosure. [Act April 1, 1887, p. 83, § 21.] (*Also see Art. 817c.*)

§716 — **Other statutes relating to public lands.** — The following acts relating to public lands, have not been expressly repealed, but many of their provisions, if not all of them, appear to have been superseded by the preceding Act of April 1, 1887. They are here inserted because they are still in force if they have not been repealed by implication.

*The Act of April 17, 1879, pp. 101-102, is as follows:—*

§1. That each and every person who shall have enclosed by fencing or otherwise any of the public free school land belonging to the State, and shall use the same to the exclusion of the public, shall pay an annual rental value therefor of the sum of twenty-five dollars for each section so enclosed.

§2. And it shall be the duty of the surveyor of each county to make a report to the county commissioners' court on the first Monday in June each year of the number of sections of public school lands in his county enclosed

during the past year, and the names of the person or persons controlling such enclosed lands, and the number of sections controlled by him or them respectively.

§3. And the said court at the first regular term thereafter, shall make a list of the names of the persons controlling such public free school lands, the number of sections so controlled by each person and the aggregate amount due from each person, at the rate of twenty-five dollars for each section so enclosed and controlled; which list shall be recorded by the clerk of said court and a certified copy thereof forwarded by him to the comptroller of public accounts, and a like copy delivered to the collector of taxes for said county.

§4. The collector of taxes on the receipt of such list shall proceed to collect the same under the same provisions and penalties as is imposed by law for the collection of taxes.

§5. That all moneys collected under the provisions of this act shall be paid by the collector into the State treasury and constitute a part of the available school fund; *provided*, that the State may resume control of said land at any time.

§6. Any person who shall control enclosed lands belonging to the public free schools and fail to pay the rental value as specified under the provisions of this act upon the demand of the collector, shall be subject to prosecution upon complaint, information or indictment, and fined in the sum of one hundred dollars for each section so enclosed.

*The Act of February 7, 1884, pp. 68-69, is as follows:—*

§1. If any person or corporation shall knowingly make, or permit to remain standing, any fence on or around the land of another, or the public, public school, university or asylum lands of this State, without the written consent of the owner thereof, duly acknowledged, or a duly executed lease of such land from the proper authority, in a case of public, public school, university or asylum lands, as the case may be, duly recorded in the county where the land lies, or to which it is attached for judicial purposes, he shall be deemed guilty of a misdemeanor, and upon conviction therefor fined in any sum not less than fifty cents nor more than one dollar per acre per month for each month so inclosed, or fined and imprisoned in the county jail for any period not over two years. Within the meaning of person, as used in this act, is included every man managing or controlling for a corporation, firm or joint stock company, and any and every individual or person who shall aid, assist or direct in the violation of this act. Half of all fines collected under the provisions of this act shall be paid to the person or persons informing on the person or corporation, who shall unlawfully inclose any land; *provided*, that each three months said land is so inclosed shall constitute a separate offense. A fence within the meaning of this act is any structure of wood, wire, or both, or any other material, intended to prevent the passage of cattle, horses, mules, asses, sheep, goats or hogs. Where persons or corporations have unlawfully fenced land belonging to the State, or public school, university, or asylum lands, it shall be the duty of the attorney-general, either in person or by proxy, to institute proceedings in the name of the State against any person or corporation so unlawfully inclosing said lands; and the expense incurred in employing counsel to prosecute such cases shall be deducted from the fine or fines collected from any person or corporation violating the provisions of this act, the balance to be paid to the fund to which it belongs.

§2. All persons or corporations who have already fenced lands within the prohibition of this act shall have six months from and after the time that this



act goes into effect to conform to the provisions thereof; *provided*, that the provisions of this act shall not apply to any person or corporation who has heretofore or may hereafter, in good faith, fence land not their own.

§3. In all prosecutions under this act, the provisions of articles 699 and 700 of the Penal Code of the State of Texas shall apply.

§4. This act shall not apply to persons who have heretofore settled upon lands not their own, where the inclosure is two hundred acres or less, and where the principal pursuit of such person upon the land is that of agriculture.

§5. That any person who owns or controls land surrounding land of another, may fence his own land, by fencing the inner boundaries of his survey and leaving a way or lane sixty feet wide (unobstructed by gates or otherwise), to the outer boundaries of the surrounding land, as such place as the owner or agent of the inner survey may demand; and providing two gates at such places on the inner and outer fences, as the owner of the inner survey shall demand; and they shall be kept in condition convenient for opening and closing by the owner of the fence; or if no demand is made, the opening and gates shall be at such place as the owner of the outer survey may select. When the way or lane and gates are once located they shall not be changed, except by consent of the owners of both the inner and outer surveys.

§6. It shall be unlawful for any person, firm or corporation to herd, or aid in herding, or cause to be herded, loose herded or detained for grazing by line riding any cattle, horses, mules, asses, sheep or goats on any vacant public domain, school, university or asylum lands within this State, unless the same shall have been leased from the proper authority; *provided*, that this section of this act shall not apply to persons herding such stock, in gathering for, or carrying to and from market, or in moving the same from one section of the country to another.

§7. Any person who shall knowingly violate any of the provisions in section 6 of this act shall be guilty of a misdemeanor, and, upon conviction, shall be fined one hundred dollars for each year or part of a year, for each section, or part of a section (meaning six hundred and forty acres of land or less, whether surveyed in sections or not), which shall be used contrary to the provisions of this act.

§8. The owner of the cattle, horses or sheep shall be liable to the State in the sum of one hundred dollars for each year, or part of a year, for each six hundred and forty acres of land, or tract of less size, that may be used contrary to the provisions of this act, which may be recovered in a civil action, without affecting the criminal prosecutions prescribed herein.

§9. Where such unleased land is now herded upon contrary to the provisions of this act, belongs to the unappropriated domain, public school, university or asylum lands, it shall be a bar to the criminal and civil prosecution hereinbefore provided for, for any violation prior to January 1, 1885, if the violator of this act, or the owner of the cattle, horses or sheep shall, prior to the first day of September, A. D. 1884, pay into the State treasury thirty-two dollars for each section of 640 acres (or tract of less size) used contrary to this act, for the benefit of the fund to which the land belongs.

§10. That all laws and parts of laws in conflict herewith be and the same are hereby repealed.

## CH. 5.—OFFENSES RELATING TO THE PROTECTION OF FISH, BIRDS AND GAME.

ART.	SEC.	ART.	SEC.
423. Trapping fish out of season.	717	428. Killing quail, etc., in certain months.	728
424. Setting fixed net, trap, etc.	718	429. Killing certain harmless birds.	729
425. Taking fish by poison.	719	430. Certain counties exempt.	730
425a. Failing to construct fish ladders, etc.	720	430a. Regulating tide water fishing.	731
Former statute.	721	430b. Pre-empting oyster beds.	732
Is the preceding article now operative.	722	430c. Oyster fishing in certain months, etc., prohibited.	733
426. Killing wild deer in certain months.	723	430d. Crab and shrimp fishing regulated.	734
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426½. Killing wild turkey in certain months.	726		
427. Killing prairie chickens in certain months.	727		

§717—ART. 423.—**Trapping fish out of season.**—No person shall throw, drag or haul any fish net, seine or other contrivance for the purpose of catching fish (except the ordinary pole, line and hook, or trot line) in any stream, lake or pool of water within the State, not his own, above tide water, between the first day of February and the first day of July of each year; and at no time of the year in such waters shall any one be permitted to drag or haul any fish net or seine with meshes less than two and a half inches square; and any one violating the provisions of this article shall, upon conviction, be fined in a sum of not less than five nor more than fifty dollars. [Act March 15, 1881, pp. 28-29.]

§718—ART. 424.—**Setting fixed net, trap, etc.**—For the purpose of thoroughly protecting the fish now being propagated in our brooks, tanks, ponds, lakes, creeks, rivulets and rivers, not private and individual property, no person shall be permitted to set, place or use any fixed net, trap, or other contrivances for trapping fish in said waters; and any one violating the provisions of this article shall be deemed guilty of a misdemeanor, and, upon conviction thereof before any justice of the peace or other court of competent jurisdiction, he shall be fined in a sum of not less than fifteen dollars nor more than seventy-five dollars, together with all costs in the case accruing, which fine shall go to the common school fund; and each day that any fixed net, trap, or contrivance for trapping fish, as contemplated by this article, shall remain set or placed shall constitute a separate offense under this article; *provided*, that nothing in this bill shall be construed as to prohibit the fish commissioner of this State from taking any and all fish at any time and by any means for breeding and scientific purposes, and for stocking other waters. [Act March 15, 1881, p. 29.]

§719—ART. 425.—**Taking fish by poison.**—Whoever shall catch or take, or attempt to catch or take, any fish in this State, by the use of lime, China berries, India berries, or other poisonous substances placed in the water, or by the exploding of dynamite, giant powder, nitro-glycerine or other compounds of an explosive nature in the form of a cartridge or other forms, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than fifty nor more than one hundred and fifty dollars. And any court, officer, or tribunal having jurisdiction of the offense set forth in this article, or any district or county attorney, may subpoena persons and compel their attendance as witnesses to testify as to violations of any of the provisions of this article; and any person so

summoned and examined shall not be liable to prosecution for any of the violations of this article about which he may testify, and a conviction for said offense may be had upon the unsupported evidence of an accomplice or participant. [Act March 15, 1887, p. 24.]

Indictment, Willson's Cr. Forms, 303.

**§720 — ART. 425a. — Failing to construct fish ladders, etc.** — That it shall be the duty of all persons, firms or corporations, who have erected, or who may hereafter erect, any mill-dam, water-weir, or other obstructions or weirs, on streams within the waters of this State, within six months after the passage of this act, to construct and keep in repair fish-ways or fish-ladders, at such mill-dam, water-weirs or obstructions, so that at all seasons of the year fish may ascend above such dam, weirs or obstructions, to deposit their spawn. Any firm, corporation or person, owning such mill-dam or obstructions, who shall fail or refuse to construct or keep in repair such fish-ways or fish-ladders, after having been notified and required by the fish commissioner to do so, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding one hundred dollars, nor less than twenty-five dollars, for every such neglect or refusal. [Act March 31, 1881, p. 83.]

**§721 — Former statute.** — The preceding article is substantially a re-enactment of the act of April 17, 1879, p. 100, sec. 1. But it does not expressly repeal said act. In the act of 1879 there is a provision which is not contained in the preceding article as follows :

"All prosecutions under this act shall be commenced within two months from the time when such offense was committed, and the same shall be upon complaint under oath before any justice of the peace, recorder or mayor of any city in the county where the offense was committed or where the defendant may reside or be found; and all fines imposed and collected under this act shall be paid one-half to the complainant."

**§722 — Is the preceding article now operative?** — It is to be observed that the offense created by the preceding article consists in failing to construct and keep in repair fish-ways or fish-ladders, *after having been notified by the fish commissioner to do so.* There is no longer such an officer as fish commissioner, said office having been abolished by Act of March 20, 1885, p. 34. It seems to be a question, therefore, whether the preceding article is any longer operative.

**§723 — ART. 426. — Killing wild deer in certain months.** — It shall hereafter be unlawful for any person to kill, ensnare or trap, or in any way destroy any wild deer in the period of time embraced between the 20th day of January and the first day of August in each year; and any violation of this provision shall be considered a misdemeanor, and upon conviction before any court of competent jurisdiction shall be fined in any sum of not less than twenty-five dollars, nor more than fifty dollars together with the costs of suit, which fine shall go to the common school fund, and upon conviction of said offense, as well as those provided against in articles 424 and 425 of this chapter, the person so offending and convicted shall stand committed to jail until such fine and costs are paid; and any butcher, huckster, marketer, carrier or express agent, or any person found in possession of fresh killed venison one day before the above specified open season begins, or ten days after the open season is closed, shall be deemed equally guilty of the violations of the provisions of this article, and liable to the same proceedings and penalties herein provided, or provided in articles 424 and 425. [Act April 11, 1883, p. 79.]

**§724 — Old art. 426 former statute.** — The preceding article before being amended, read as follows : —

"If any person shall, by shooting or otherwise, knowingly kill any female deer in this State, in the months of March, April, May, June or July of any year, he shall be fined not less than five nor more than twenty dollars."

**§725 — Indictment.** — Form 304 of Willson's Cr. Forms was prepared with reference to the article before it was amended. It would be insufficient under the amended article. The indictment now should allege that the defendant killed, etc., a *wild* deer between the 20th day of January and the first day of August of some year, naming the year.

**§726 — ART. 426<sup>1</sup>. — Killing wild turkeys in certain months.** — It shall be unlawful for any person to kill, or to trap for immediate use or for market,

any wild turkey in the period of time of each year between the fifteenth day of May and the first day of September, and any one so offending shall be proceeded against as provided in article 426 of this act, and, upon conviction, fined in the sum of twenty-five dollars, the same to be used in accordance with the provisions of that article. [Act March 15, 1881, p. 29.]

§727 — ART. 427. — **Killing prairie chickens in certain months.** — If any person shall in any manner catch or kill any pinnated grouse (prairie chickens) in this State in the months of March, April, May, June and July he shall be deemed guilty of a misdemeanor, and, upon conviction thereof before any justice of the peace or other court of competent jurisdiction, shall be fined in the sum of ten dollars, together with the cost of the suit, the fine to be disposed of in accordance with the provisions on that subject in article 426 of this act. [Act March 15, 1881, pp. 29-30.]

Indictment, Willson's Cr. Forms, 305. Change as to months.

§728 — ART. 428. — **Killing quail, etc., in certain months.** — If any person shall in any manner catch or kill any quail or partridges in this State, in the months of April, May, June, July, August, and September of any year, he shall be deemed guilty of a misdemeanor, and upon conviction thereof before any justice of the peace, or other court of competent jurisdiction, shall be fined the sum of ten dollars, together with all costs of suit, which fine shall go to the common school fund, and the person so convicted shall stand committed to jail until such fine and costs are paid; and the netting of partridges and quail is hereby entirely prohibited, under a like penalty for the infraction of this provision and under the proceedings governing this article. [Act March 25, 1887, p. 42.]

Indictment, Willson's Cr. Forms, 305. Change as to months.

§729 — ART. 429. — **Killing certain harmless birds.** — If any person shall willfully kill, or in any manner injure, any mocking-bird, whippoorwill, night hawk, blue bird, red bird, finch, thrush, linnet, wren, martin, swallow, bobolink, cat bird, nonpareil, scissor-tail, sparrow, buzzard or carrion crow he shall be deemed guilty of a misdemeanor, and, upon conviction before a justice of the peace, or other court of competent jurisdiction, he shall be fined a sum of not less than five nor more than fifteen dollars. [Act March 15, 1881, p. 30.]

The same act repeals art. 430 of the Penal Code, which excepts aquatic fowls, wild turkeys, and wild pigeons from protection; Indictment, Willson's Cr. Forms, 306.

§730 — ART. 430. — **Certain counties exempt.** — That the following counties are hereby exempted from the provisions of articles 426, 426½, 427, 428, and 429 of this chapter, to wit: Nacogdoches, Hood, Bosque, Somervell, Sabin, San Augustine, Shelby, Titus, Franklin, Hunt, Rockwall, Hopkins, Montgomery, Brazos, Rains, Wood, Coryell, Hamilton, Brown, Runnels, Cooke, Wise, Montague, Clay, Parker, Jack, and the unorganized counties attached to the same for judicial purposes, Ellis, Anderson, Freestone, Cherokee, Stephens, Eastland, Erath, Comanche, Palo Pinto, Polk, Guadalupe, Throckmorton, Shackelford, Callahan, Taylor, Jones, Nolan, Mitchell, Haskell, Stonewall, Kent, Garza, Lynn, Terry, Yoakum, Gaines, Dawson, Borden, Scurry, Fisher, Howard, Martin, Andrews, Archer, Wichita, Baylor, Wheeler, Oldham, Knox, King, Dickson, Crosby, Wilbarger, Childress, Lubbock, Hockley, Cochran, Bailey, Lamb, Hale, Floyd, Motley, Cottle, Hall, Briscoe, Swisher, Castro, Parmer, Greer, Deaf Smith, Randall, Armstrong, Donley, Collingsworth, Gray, Carson, Potter, Hutchinson, Hartley, Moore, Roberts, Hemphill, Lipscomb, Ochiltree, Hansford, Sherman, Hardeman, Dallam, Smith, Upshur, Cass, San Jacinto, Camp, Frio, Dimmit, Maverick, Kinney, Cameron, Jackson, and the unorganized county of Zavala; *pro-*

*vided*, that the exemption from the operation of this law shall not apply to article 425; *and provided*, that the counties of Grimes, Angelina, Van Zandt, Walker, Trinity, Parker, Jack, Young, and Bell are hereby exempted from articles 425, 426, 426½, 427, 428, and 429; *and provided*, that the county of Houston is hereby exempted from the provisions of articles 426, 426½, 427, and 429 of this act; *and provided*, that the counties of Fannin and Hopkins are hereby exempted from the provisions of articles 426 and 426½; *and provided*, that the counties of Lee and Fayette are hereby exempted from the provisions of articles 426 and 429; *and provided*, that the counties of Bastrop and Brazoria are hereby exempted from the provisions of article 429; *and provided*, that the county of Kaufman is hereby exempted from the provisions of articles 428 and 429; *and provided*, that the counties of Collin and Robertson are hereby exempted from the provisions of articles 426, 426½, 427, 428, and 429; *and provided*, that the counties of Gonzales, Karnes, Wilson, Atascosa, and Morris are hereby exempted from the provisions of articles 426, 426½, 427, and 428; *and provided*, that the county of Bowie is hereby exempted from the provisions of articles 427, 428, and 429; *provided further*, that the counties of Franklin, Titus, and Wood shall be exempt from the provisions of article 423.

Act April 2, 1887, p. 117. This act also repeals § 2 of the Act of March 15, 1881, which was article 430a, exempting certain counties, and the preceding article takes the place of article 430 of the Code, which was repealed by the last cited act.

For the Act of July 24, 1879, not expressly repealed by Act of April 2, 1887, see § 736, post.

§731 — ART. 430a. — **Regulating tide water fishing.** — That it shall not be lawful for any person or persons, who take, capture, or catch fish in the waters of any of the bays or any of the tributaries of tide water within the limits of Texas, or from the waters of the Gulf of Mexico along the coast of Texas, by seines, drag-nets, set-nets, fish-baskets, fish-pots, weirs, pound-nets, fykes, or any other means or contrivance whatsoever, which is now known or used in the capturing or destroying of fish, or which may hereafter be invented for that purpose, to empty their seines, drag-nets, set-nets, fish-baskets, fish-pots, weirs, pound-nets, fykes, or any other means or contrivance used, or which may hereafter be used, for capturing and catching fish, on the beach or shores, at any time whilst so fishing, as to leave the smaller fish to perish, but to empty the same in water of sufficient depth that the smaller fish may live and grow; *provided*, that all fish not over eight inches in length shall be emptied back into water of sufficient depth to live and grow, croakers excepted. [Act April 2, 1887, p. 117, § 1.]

§732 — ART. 430b. — **Pre-empting oyster beds.** — That any person who is an actual *bona fide* citizen of the State may pre-empt, within any of the bays, bayous, and tide water tributaries situated in this State, five hundred and thirty-eight yards square, and fence off or stake off the same for the purpose of planting oyster beds; and such person so staking off or fencing as aforesaid shall be protected in his possession thereof against trespass thereon in like manner as freeholders are protected in their rights, and shall have ownership for twelve years after so staking or fencing off, and filing with the county clerk his pre-emption; *provided*, that no person, firm, or corporation shall pre-empt within the waters of this State under this act nearer than the extreme low water mark in front of the shore or water front of another without the consent of the owner of such shore or water front; *and provided further*, that this act shall not in any manner whatever affect or interfere with the riparian property right of land owners. [Act April 2, 1887, p. 117, § 2.]

§733 — ART. 430c. — **Oyster fishing in certain months, etc., prohibited.** — That it shall not be lawful for any person or persons, to take, capture, or catch oysters within any of the waters that are free within the limits of this State,

by any means whatever, from the first day of May to the twenty-fifth day of August; *and provided*, that no oyster less than one and one-half inches in length "net" shall be caught or offered for sale. [Act April 2, 1887, p. 117, § 3.]

§734—ART. 430*d*.—Crab and shrimp fishing regulated.—That it shall not be lawful for any person or persons to take, capture, or catch, by any means whatever, within any of the waters of this State, and offer them for sale, either crab or shrimp, except those that are grown; and whenever, in capturing or catching crabs and shrimps, any caught not grown shall be emptied back into water of sufficient depth that they may live and grow. [Act April 2, 1887, p. 117, § 4.]

§735—ART. 430*e*.—Penalty.—That any person or persons who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanors and upon conviction thereof shall be fined not less than twenty-five dollar, nor more than one hundred dollars; *provided*, that all fines so collected shall be paid into the common school fund in each county where such conviction is had. [Act April 2, 1887, p. 117, § 5.]

§736—Former statute regulating oyster fishing, etc.—The Act of April 2, 1887, embracing the six preceding articles does not expressly repeal the Act of July 24, 1879, though it seems to embrace the whole subject-matter of the former. Some of the provisions of the last named act may be held to be still in force, and it is therefore here inserted.

§1. That oyster beds shall be public or private; all those not designated as private shall be public. No person shall take or catch oysters from any public beds for market or sale, or planting, from the first day of May to the first day of September in any year. Any person offending against the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined for each offense not less than ten nor more than fifty dollars.

§2. When oysters are culled or selected from public beds, those not wanted for market or sale, or for family use, shall be planted while alive, or caused to be planted while alive, by the person or persons taking them, on the bed from which they were taken, or on some other bed, public or private, and any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined for each offense not less than ten nor more than fifty dollars.

§3. If any creek, bayou, lake or cove, not made a navigable stream by the laws of this State, runs through the lands of any person, such person, or other lawful occupant, shall have the exclusive right to use said creek, bayou, lake or cove for sowing or planting oysters within the boundaries of said lands; but if said creek, bayou, lake or cove is not included in the survey of said lands, then the owner or lawful occupant of the shores thereof shall have the exclusive right to use said creek, bayou, or lake for the sowing or planting of oysters to the center or middle thereof respectively.

§4. Any person shall have the right of obtaining a location for planting oysters and making private oyster beds within any public navigable waters of this State, other than those mentioned in section three of this act, by designating a square space, not exceeding two hundred yards square, intended by him for such purpose, by not less than four stakes, firmly and permanently planted, one at each corner of such location, and by establishing posted notices of the same on one or more of said corner stakes; said stakes shall project at least four feet above ordinary tides, and shall not be less than six inches in diameter; *provided*, that no person shall have the right to locate any of the public oyster beds within public navigable waters as they now exist; *and pro-*

*vided furtner*, that no person shall locate any private oyster bed in the public navigable waters of this State, within one hundred yards of low water mark, without the consent of the riparian owner, said owner only having that right, nor shall any one be permitted in anywise to interfere with navigation by inclosures of said oyster beds.

§5. That all oyster beds planted, created or established, in accordance with sections three and four of this act, shall be private oyster beds, and the owners of the same be entitled to all the privileges and protection guaranteed by this act, after they have given due notice (of the same having been staked off) to the county clerk for record in his office.

§6. That it shall not be lawful for any person to plant, or purchase oysters for planting, bedding or depositing them, from the first day of May to the first day of September in any year; and if any person shall violate this provision he shall be deemed guilty of a misdemeanor, and, on conviction thereof, he shall be fined for each offense not less than ten nor more than one hundred dollars.

§7. If any person shall take oysters from a private bed, or shall take oysters deposited by one making up a cargo for market or for family use, without the permission of the owner thereof, he shall be deemed guilty of theft, and, upon conviction thereof, shall be punished in accordance with existing law.

§8. All prosecutions for misdemeanors under this act shall be had before any justice of the peace of the precinct where the offense is committed; one-half of the fines collected for violations of the provisions of this act shall go to the informer, and the other half to the common school fund of the county. All prosecutions for theft under this act shall be had in courts having jurisdiction thereof.

# TITLE 14—OF OFFENSES AGAINST TRADE, COMMERCE AND THE CURRENT COIN.

CH. 1. OF FORGERY AND OTHER OFFENSES AFFECTING WRITTEN INSTRUMENTS.
2. FORGERY OF LAND TITLES, ETC.
3. OF COUNTERFEITING AND DIMINISHING THE VALUE OF CURRENT COIN.

CH. 4. OF OFFENSES WHICH AFFECT FOREIGN COMMERCE.
5. FALSE WEIGHTS AND MEASURES.
6. OF OFFENSES BY PUBLIC WEIGHTERS.
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## CH. 1. — OF FORGERY AND OTHER OFFENSES AFFECTING WRITTEN INSTRUMENTS

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§ 738 — ART. 431. — "Forgery" defined. — He is guilty of forgery who without *lawful authority*, and with intent to *injure* or *defraud*, shall make a false *instrument in writing* purporting to be the act of *another*, in such manner that the false instrument so made, would (if the same were true) have created, increased, diminished, discharged, or defeated any *pecuniary obligation*, or would have transferred, or in any manner have affected any *property* whatever. [O. C. 431.]

Indictment, Willson's Cr. Forms, 307.

§ 739 — Common law definition. — The common law definition of forgery is, "the fraudulent making or alteration of a writing to the prejudice of another's right." This definition is sufficiently comprehensive to include official as well as private writings, but has not been adopted in the Code of this State. Rogers v. S. 8 App. 401.

§ 740 — Indictment. — It is sufficient to charge the *gravamen* of the offense in the language of the Code, and set out the forged instrument in *haec verba*. Labbait v. S. 6 App. 257. But the purport and tenor clauses of the indictment must not be repugnant, and if so, setting out the instrument in *haec verba* will not cure such defect. Thus where the purport clause described the instrument as a "check for money on the City Bank of Dallas," and instrument set out in *haec verba* was a check on a "City Bank," without designation of place, the indictment was held bad. Roberts v. S. 2 App. 4; Westbrook v. S. 23 App. 401. An indictment for forgery to be sufficient, must purport to, and must set out the alleged false instrument by its tenor; that is, in *haec verba*, — unless it be impracticable to do so, in which case it must specifically allege the reason for not so setting it out, and then allege its substance and so describe it as to identify it with reasonable certainty. Smith v. S. 18 App. 399; Thomas v. S. Id. 213; Baker v. S. 14 App. 332; White v. S. 8 App. 605; S. v. Baggerly, 21 Tex. 757. In setting out the instrument, any writing placed upon it subsequent to the forgery, is not required to be noticed. Hennessy v. S. 23 App. 340. The indictment need not set out the forged instrument both by its purport and its tenor, but if it does any repugnancy between the two allegations is fatal. It is sufficient if the instrument is set out in *haec verba*. Westbrook v. S. 23 App. 401. It must be alleged that the instrument charged to be a forgery, was made without lawful authority. Shanks v. S. 25 Tex. Supp. 326. It is not necessary to name the person intended to be defrauded. Labbait v. S. 6 App. 257; Johnson v. S. 1 App. 146, Post § 773. Where the forged instrument is set out in *haec verba* it is not necessary to allege that it would, if true, have created, discharged or affected



any pecuniary liability; but it is advisable to so allege. *Labbaite v. S.* 6 App. 257; *Horton v. S.* 32 Tex. 79; *Morris v. S.* 17 App. 660. If the forged instrument purport to be the act of a partnership, the name of such partnership, and of each individual member thereof, should be averred. *Labbaite v. S.* 6 App. 483. The instrument must purport to be the act of another, and the indictment must so allege and must name the person whose act it purports to be. *Anderson v. S.* 20 App. 595. But in *Westbrook v. S.* 23 App. 401, it is held that the name of the person whose act the instrument purports to be, need not be averred, where the instrument is set out in *haec verba*. Where the indictment designated the instrument as "a school voucher or check," it was held that such alternative designation did not vitiate, inasmuch as it sufficiently appeared that "voucher" and "check" related to and meant the same instrument which was set out in *haec verba*. And when it was alleged that said voucher or check purported to be signed by three persons designated by their names, and that it purported to be their act as trustees of a certain school community, it was held that this was a sufficient allegation that said three persons were trustees of said school community, and that said voucher or check purported to be their official act as such. *Thomas v. S.* 18 App. 213. An indictment may, in separate counts, charge forgery, and the uttering of a forged instrument knowing it to be forged. *Boles v. S.* 13 App. 650; *Barnwell v. S.* 1 App. 745; *Bell v. S.* 21 App. 270; *Keeler v. S.* 15 App. 111; *Dovalina v. S.* 14 App. 812; *Chester v. S.* 23 App. 577.

§741 — ART. 432. — **Alteration also forgery.** — He is also guilty of forgery who, without lawful authority, and with intent to injure or defraud, shall alter an instrument in writing, then already in existence, by whomsoever made, in such manner that the alteration would (if it had been legally made) have created, increased, diminished, discharged, or defeated any pecuniary obligation, or would have transferred, or in any manner have affected any property whatever. [O. C. 432.] Indictment *Wilson's Cr. Forms*, 308.

§742 — **Indictment.** — The indictment must set forth what was done. It must be alleged in what the alteration consisted, so as to advise the defendant of the very words he is alleged to have changed. It must be alleged whether it was by changing, obliterating, adding to or erasing words and figures, so as to leave no uncertainty of what is intended to be charged. *Knippa v. S.* 29 Tex. 295; *Hennessy v. S.* 23 App. 340. As to further requisites of the indictment, see *Ante* §740.

§743 — ART. 433. — **Intent to injure, etc., necessary.** — The false making, or alteration, to constitute forgery, must be done with intent to injure or defraud, and the injury must be such as affects one pecuniarily or in relation to his property. [O. C. 442.]

§744 — **Decisions as to intent.** — It is not required of the State to prove that the intention of the accused in committing the forgery was to injure or defraud any particular person, or that any particular person was injured or defrauded by the forgery. It is sufficient if it appears that by possibility some one might be injured or defrauded thereby. And the fact of the forgery being established will be sufficient to imply an intention to injure or defraud, if it can be fairly inferred that there was an intention to utter the forged instrument. *Henderson v. S.* 14 Tex. 503. Upon the issue of criminal intent, it is competent for the State to prove that about the time of the offense charged, the accused possessed or uttered other forged instruments of the same description. *Ham v. S.* 4 App. 645; *Francis v. S.* 7 App. 501; *Heard v. S.* 9 App. 1. And, when the object is to show system, subsequent as well as prior offenses, when tending to establish identity or intent can be put in evidence. Thus certain receipts made by the defendant, and which the evidence tended to show had been altered by him, were held admissible in evidence against him as tending to prove his criminal intent in committing the forgery with which he was charged, although said receipts were not contemporaneous with the instrument charged to have been forged — the purpose of the State being to show a system of frauds and forgeries committed by the defendant. *Hennessy v. S.* 23 App. 340.

§745 — ART. 434. — **"Instrument in writing" defined.** — The words "instrument in writing," as used in articles 431 and 432, and elsewhere in this chapter, include every writing purporting to make known or declare the will or intention of the party whose act it purports to be, whether the same be of record, or under seal or private signature, or whatever other form it may have. It must be upon paper or parchment, or some substance made to resemble either of them. The words may be written, printed, stamped, or made in any other way, or by any other device. And the words "in writing," "write," "written," include all these modes of making. An instrument, partly printed or stamped, and partly written, is an instrument in writing. In order to come within the definition of forgery, the signature, when made otherwise than by writing, must be made to resemble manuscript. [O. C. 434.]

§746. — ART. 435. — “Alter” defined. — The word “alter,” in the definition of forgery, means to erase or obliterate any word, letter or figure, to extract the writing altogether, or to substitute other words, letters, or figures for those erased, obliterated or extracted, to add any other word, letter or figure to the original instrument; or to make any other change whatever, which shall have the effect to create, increase, diminish, discharge or defeat a pecuniary obligation, or to transfer, or in any other way affect any property whatever. [O. C. 438.]

§747 — ART. 436. — “Another” includes, what. — The instrument must purport to be the act of “another,” and within the meaning of this word, as used in defining forgery, are included this State, the United States, or either of the States or territories of the Union; all the several branches of the government of either of them; all public and private bodies, politic and corporate; all courts; all officers, public or private, in their official capacity; all partnerships in professions or trades; and all other persons, whether real or fictitious, except the person engaged in the forgery. [O. C. 439.]

§748 — ART. 437. — “Pecuniary obligation” defined. — “Pecuniary obligation” means every instrument having money for its object, and every obligation for the breach of which a civil action for damages may be lawfully brought. [O. C. 440.]

§749 — ART. 438. — “Transferred or in any manner have affected” defined. — By an instrument, which would “have transferred or in any manner have affected” property, is meant every species of conveyance, or undertaking in writing, which supposes a right in the person purporting to execute it, to dispose of, or change the character of property of every kind, and which can have such effect when genuine. [O. C. 441.]

§750 — Subjects of forgery — Decisions as to. — A written instrument, to be the subject of forgery, must be valid, if genuine, for the purpose intended. If void or invalid on its face, and it cannot be made good by averment, the crime of forgery cannot be predicated upon it. It must be an instrument which, if it were true, would create, increase, diminish, discharge or defeat a pecuniary obligation, or would transfer, or in some manner affect property. *Anderson v. S. 20 App. 595*; *Henderson v. S. 14 Tex. 503*; *Howell v. S. 87 Tex. 591*; *Rollins v. S. 22 App. 548*. A date is not indispensable to an instrument creating a pecuniary obligation. *Boles v. S. 13 App. 650*. It is not essential that the forged instrument, if true, should actually discharge or defeat an obligation. It will be the subject of forgery if it even tends to do so. *Fonville v. S. 17 App. 368*. A bail bond is a pecuniary obligation, and is the subject of forgery, notwithstanding it had not been forfeited. An instrument falsely made with intent to defraud is a forgery, although, if it had been genuine, other steps must have been taken before the instrument would have been perfected, and these steps are not taken. *Costley v. S. 14 App. 156*. A forged order in writing for money or goods, though neither accepted nor filled, is the subject of forgery. *Keeler v. S. 15 App. 111*. A telegram requesting a bank to honor a draft upon the sender, is the subject of forgery. *Morris v. S. 17 App. 660*. So is a “school voucher, or check.” *Thomas v. S. 18 App. 218*. So is a telegram requesting a remittance of money to the sender. *Dooley v. S. 21 App. 549*. So is a receipt for money. *Hennessey v. S. 23 App. 340*. If the validity of the instrument upon its face be doubtful, it may, nevertheless, be the subject of forgery, if its validity can be made to appear by proper allegations and proof. *Rollins v. S. 22 App. 548*.

§751 — ART. 439. — All participants guilty. — He is guilty of making or altering, as the case may be, under articles 431 and 432, who, knowing the illegal purpose intended, shall write, or cause to be written, the signature, or the whole or any part of a forged instrument. All persons engaged in the illegal act are deemed guilty of forgery. [O. C. 435.]

§752 — ART. 440. — Filling up over signature. — It is forgery to make, with intent to defraud or injure, a written instrument, by filling up over a genuine signature, or by writing on the opposite side of a paper so as to make the signature appear as an indorsement. [O. C. 436.]

Indictment, Willson's Cr. Forms, 309-310.

§753 — ART. 441. — Person not guilty, when. — When the person making, or altering an instrument in writing, acts under an authority which he has good reason to believe, and actually does believe, to be sufficient, he is not guilty

of forgery, though the authority be in fact insufficient and void. [O. C. 437.]

**§754 — ART. 442. — Penalty.** — If any person be guilty of forgery, he shall be punished by confinement in the penitentiary not less than two nor more than seven years. [O. C. 433.]

**§755 — ART. 443. — Passing forged instrument.** — If any person shall knowingly pass as true, or attempt to pass as true, any such forged instrument in writing, as is mentioned and defined in the preceding articles of this chapter, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years. [O. C. 443.]

Indictment, Willson's Cr. Forms, 311.

**§756 — Decisions under preceding article.** — Under the preceding article it is an offense to knowingly utter as true a forged instrument, though such instrument at the time it was forged was not the subject of forgery, but was thereafter, and before it was so uttered made the subject of forgery. *Johnson v. S.* 9 App. 249. This offense, and the offense of forgery, may be charged in the same indictment, in separate counts. *Boles v. S.* 13 App. 650; *Keeler v. S.* 15 App. 111; *Davalina v. S.* 14 App. 312; *Bell v. S.* 21 App. 270; *Chester v. S.* 23 App. 577. The indictment must charge that the uttering was *knowingly* done. *Henderson v. S.* 14 Tex. 503; *Morris v. S.* 17 App. 660. An instrument which cannot be made the basis of a prosecution for forgery, cannot be made the basis for this offense. *Anderson v. S.* 20 App. 598. To prove a criminal intent in uttering, it is competent to prove that the accused had, about the same time, uttered, or attempted to utter other forged instruments of the same description; or that he had such other forged instruments, or instruments for manufacturing them in his possession. *Ham v. S.* 4 App. 645; *Heard v. S.* 9 App. 1. Having a forged deed placed on record is a sufficient uttering. *Henderson v. S.* 14 Tex. 503. Article 439, ante, is not pertinent to this offense. *Hatch v. S.* 8 App. 416.

**§757 — ART. 444. — Preparing implements for forgery.** — Whoever shall prepare, in this State, any implements or materials, or engrave any plate for the purpose of being used in forging the notes of any bank, whether within this State or out of it, and whether the same be incorporated or not; or who shall have in his possession, in this State, any such implements, materials or engraved plate, with intent to be used for the purpose above mentioned, shall be imprisoned in the penitentiary not less than two nor more than five years. [O. C. 444.]

Indictment, Willson's Cr. Forms, 312.

**§758 — ART. 445. — Possession of forged instrument with intent to pass.** — If any person shall knowingly have in his possession any instrument of writing, the making of which is by law an offense, with intent to use or pass the same as true, he shall be punished by confinement in the penitentiary not less than two nor more than five years. [O. C. 445, Act Feb. 12, 1858, p. 169.] Indictment, Willson's Cr. Forms, 313.

**§759 — ART. 446. — Evidence in case of bank bills.** — Upon the trial of any indictment for the forgery of any bank bill, or for passing, or attempting to pass, any such bill as true, or for knowingly having in possession any such forged bank bill, evidence that bills or notes, purporting to be issued by any bank, are commonly received as currency, or proof of the existence of such bank by parol testimony, shall be deemed sufficient to show its legal establishment and existence. [O. C. 446.]

**§760 — ART. 447. — Falsely reading instrument.** — If any one with intent to defraud shall, either by falsely reading or falsely interpreting any pecuniary obligation or instrument in writing which would in any manner affect property, or by misrepresenting its contents, induce any one to sign such instrument as his act, or give assent to it in such manner as would make it his act, if not done under mistake, the person so offending shall be imprisoned in the penitentiary not less than two nor more than five years. [O. C. 447.] Indictment, Willson's Cr. Forms, 315.

**§761 — ART. 448. — Substituting one instrument for another.** — If any person, with intent to defraud, shall substitute one instrument of writing for

another, and by this means induce any person to sign an instrument materially different from that which he intended to sign, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years. [O. C. 448.]

Indictment, Willson's Cr. Forms, 316.

§762 — ART. 449. — **Falsely personating another.** — If any one shall falsely personate another, whether bearing the same name or not, and, in such assumed character, shall give authority to any person to sign such assumed name to any instrument of writing which, if genuine, would create, increase, diminish or discharge any pecuniary obligation, or would transfer or in any way affect any property, he shall be imprisoned in the penitentiary not less than two nor more than seven years. [O. C. 449.]

Indictment, Willson's Cr. Forms, 317.

§763 — ART. 450. — **Same in acknowledgments.** — If any person shall falsely personate another, whether bearing the same name or not, and in such assumed character shall, before any officer authorized by law to authenticate instruments of writing for registration, acknowledge the execution of any instrument of writing purporting to convey or in any manner affect an interest in property, such instrument purporting to be the act of the person whose name is so assumed, and the acknowledgment thereof being such as would entitle the instrument to be registered, he shall be punished by confinement in the penitentiary not less than two nor more than ten years. [O. C. 450.]

Indictment, Willson's Cr. Forms, 318.

§764 — **Decisions under preceding article.** — This offense is nearly allied to forgery, and the indictment should be framed with an equal degree of certainty as in that offense. The falsely authenticated instrument should be set out; or cause be shown for not setting it out; the property to be affected by it should be sufficiently described; the purpose of the acknowledgment should be averred, and the authority of the accused to make it should be negatived. *Martin v. S.* 1 App. 586. But the indictment need not allege the whereabouts, or the residence of the person falsely personated. 318 of Willson's Cr. Forms, approved. *Freeman v. S.* 20 App. 558.

§765. **Evidence.** — WHERE THE UTTERER OF A FORGED note, made payable to himself, represented the maker as at a particular place and engaged in a particular business, evidence that it is not that person's note is sufficient *prima facie* proof of the forgery; for the accused, being the payee of the note, must have known who was the maker. *Barnwell v. S.* 1 App. 745. For the purpose of establishing the defendant's knowledge of the vicious character of a forged paper he is charged with uttering, it is competent for the State to show his contemporaneous connection with other papers of like vicious character. *Heard v. S.* 9 App. 1. And it may be shown also for the purpose of proving a criminal intent, that the accused had about the time of the uttering charged, uttered or attempted to utter, other forged instruments of the same description, or that he had such others, or instruments for manufacturing them in his possession. *Ham v. S.* 4 App. 645; *Francis v. S.* 7 App. 501. And collateral offenses of the same nature may be proved although not contemporaneous with the offense charged, when the object is to show a system of forgeries, such evidence being admissible to prove criminal intent. *Hennessy v. S.* 23 App. 340. The alleged forged instrument is an indispensable part of the criminative evidence, and must be produced and put in evidence on the trial, or its non-production must be satisfactorily accounted for. *Dovalina v. S.* 14 App. 312. That the instrument was made without lawful authority must be proved, and without such proof the case is not made out. *Shanks v. S.* 25 Tex. Sup. 326. The fact of forgery, itself will be sufficient to show an intention to defraud. *Henderson v. S.* 14 Tex. 503. In proving handwriting, a signature offered as a standard of comparison must be an admitted signature, or first be established as genuine by competent and undoubted evidence. *Phillips v. S.* 6 App. 364; *Hatch v. S.* Id. 384; *Heard v. S.* 9 App. 1; *Watson v. S.* 9 App. 237; *Heacock v. S.* 13 App. 97; *Walker v. S.* 14 App. 609; *Long v. S.* 10 App. 186; *C. C. P. Art.* 754.

ALTHOUGH PROOF OF HANDWRITING by comparison is authorized it has always been deemed feeble and unsatisfactory. *Jones v. S.* 7 App. 457. It was held error to permit an expert witness in behalf of the State to make a *fac simile* of one of the signatures in question, and then exhibit it together with the genuine signature to the jury for the purpose of showing how easily the genuine signature could be counterfeited. *Thomas v. S.* 18 App. 213. Where the theory of the defense was, that the alleged forged instrument was made by the daughter of the party whose act it purported to be, the State was permitted over the objections of the defendant to prove by the father of the lady, that the instrument was not in her handwriting. Held error, because not the best evidence attainable, and because the witness had not qualified as an expert. *Hann v. S.* 13 App. 383. Where the prosecution was for the forgery of a deed purporting to have been signed by one Gritten, it was not error to permit the State to put in

evidence for comparison, certain signatures which purported to be those of said Gritten to documents shown to be archives of the general land office. Nor was it error to a limit in evidence when offered by the State an original entry in a record-book of the general land office showing that defendant's land-agency firm, prior to the alleged date of the forgery, had made application for a copy of the original title granted to said Gritten. *Rogers v. S.* 11 App. 608.

THOUGH THE INDICTMENT DOES NOT ALLEGE A CONSPIRACY, yet if the evidence shows that, though widely separated, the defendant and another, not under indictment, concerted and co-operated in the transaction, the acts of the other in pursuance of the common design are evidence against the defendant. *Heard v. S.* 9 App. 1.

It is not error to allow the jury to use a magnifying glass in inspecting documentary evidence. *Hatch v. S.* 6 App. 384. Where the indictment alleged that an entire deed was a forgery, and set out the deed, including the certificate of acknowledgment *in hæc verba*, it was not error to allow the State to prove the certificate, as well as the deed to be a forgery. *Ham v. S.* 4 App. 645. Where the indictment set out the alleged forged note, ignoring an indorsement on the back thereof, such omission was held immaterial, and the note was admissible in evidence. *Labbaite v. S.* 6 App. 257; *May v. S.* 15 App. 430. Where the indictment alleged that the forged instrument purported to be the act of Abraham Barnes, but the signature to the instrument was A. Barnes, it was held there was no variance. *Ham v. S.* 4 App. 645. If the alleged forged instrument be set out *in hæc verba*, a variance, otherwise than by misspelling, between the words of the instrument as set out, and those of the instrument put in evidence, will be fatal to the prosecution. *Thomas v. S.* 18 App. 213. But the mere misplacement of a dot belonging to the letter "i" in setting out a proper name, does not constitute a variance. *Hennessy v. S.* 23 App. 340. Where the indictment charged that the forged instrument was signed "Pat Whelan," proof that it was signed "P" Whelan or "D" Whelan, did not support the allegation. *Murphy v. S.* 6 App. 554. When the forged instrument cannot be produced, secondary evidence of it is admissible. If it be in the defendant's possession he must be notified to produce it before such secondary evidence will be admissible. Unless the indictment charges him with its possession. *Henderson v. S.* 14 Tex. 503; *Rollins v. S.* 21 App. 148. Where the forgery of a deed is charged; it must be proved that the person whose name was forged owned the land. *Horton v. S.* 32 Tex. 79.

FOR EVIDENCE HELD SUFFICIENT TO SUSTAIN THE CONVICTION see *Barnwell v. S.* 1 App. 745; *Costley v. S.* 14 App. 156; *Fonville v. S.* 17 App. 368; *Hennessy v. S.* 23 App. 340. For evidence held insufficient, see *Horton v. S.* 32 Tex. 79; *Montgomery v. S.* 12 App. 323; *S. C.* 13 App. 74; *Dovalina v. S.* 14 App. 312; *Smith v. S.* 18 App. 399; *Murphy v. S.* 6 App. 554.

§766 — Charge of the court. — In a trial for uttering a forged instrument it is incumbent on the court to give in charge to the jury the statutory definition of forgery, or to explain the constituents of that offense. *Ham v. S.* 4 App. 645. It is error to charge that the mere making the forged instrument constitutes the offense without proof that it was made without lawful authority. *Shanks v. S.* 25 Tex. Sup. 326. Where evidence of collateral facts, or of a distinct offense is admitted to prove guilty knowledge or a criminal intent, the charge should apprise the jury of the purpose and scope of such evidence, and instruct them to not consider it as proof of the commission of the offense, but only as evidence bearing upon the issues of guilty knowledge or criminal intent. *Fraucis v. S.* 7 App. 501; *Hennessy v. S.* 23 App. 340.

## CH. 2. — FORGERY OF LAND TITLES, Etc.

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§767 — ART. 451. — “**Forgery of patents,**” etc., defined. — Every person who falsely makes, alters, forges or counterfeits, or causes or procures to be falsely made, altered, forged or counterfeited, or in any way aids, assists, advises or encourages the false making, altering, forging or counterfeiting any certificate, field-notes, returns, survey, map, plat, report, order, decree, record, patent, deed, power of attorney, transfer, assignment, release, conveyance or title paper, or acknowledgment, or proof for record, or certificate of record belonging or pertaining to any instrument or paper, or any seal official or private stamp, scroll, mark, date, signature, or any paper, or any evidence of any right, title or claim of any character, or any instrument in writing, document, paper or memorandum, or file of any character whatsoever in relation to or affecting lands, or any interest in lands in this State, with the intent to make money or other valuable thing thereby, or with intent to set up a claim or title, or aid or assist any one else in setting up a claim or title to lands or any interest in lands, or to prosecute or defend a suit, or aid or assist any one else in prosecuting or defending a suit with respect to lands, or to cast a cloud upon the title, or in any way injure, obtain the advantage of, or prejudice the rights or interests of the true owners of lands, or with any fraudulent intent whatever, shall be deemed guilty of forgery and be punished by imprisonment in the State penitentiary at hard labor not less than five nor more than twenty years. [Act July 28, 1876, p. 59.]

Indictment, Willson's Cr. Forms, 319.

§768 — ART. 452. — **False certificate by officers, forgery.** — If any person authorized by law to take the proof or acknowledgment of any instrument, document or paper whatsoever, affecting or relating to the title to lands in this State, willfully and falsely certify that such proof or acknowledgment was duly made; or if any person fraudulently affixes a fictitious or pretended signature purporting to be that of an officer or any other person, though such person never was an officer or never existed, he shall be deemed guilty of forgery and punished as provided in article 451 of this chapter. [Act July 28, 1876, p. 59.]

Indictment, Willson's Cr. Forms, 320-321.

§769 — ART. 453. — **Knowingly uttering forged instruments.** — Every person who knowingly utters, publishes, passes or uses, or who in any way aids, assists in, or advises the uttering, publishing, passing or using, as true and genuine, any false, forged, altered or counterfeited certificate, field-notes, returns, survey, map, plat, report, order, decree, record, patent, deed, power of attorney, transfer, assignment, release, conveyance, title papers, acknowledgment or proof for record, or certificate of record belonging or pertaining to any instrument or paper, or any evidence of any right, title or claim of any character whatsoever, or any instrument in writing, document, paper, memorandum or file, or any official or private seal, or any scroll, mark, date or signature in any way relating to or having any connection with land, or any interest in land in this State, with the intent mentioned in article 451 of this chapter, or with any other fraudulent intent whatsoever, shall be deemed guilty and be punished in like manner as is provided in article 451 of this chapter. And the filing, or causing or directing to be filed, or causing or directing to be recorded in the general land office of the State, or in any office of record or in any court in this State, or the sending through the mails or by express, or in any other way, for the purpose of filing or record of any such false, altered, forged or counterfeited matter, documents, conveyances, papers or things, knowing the same to be false, altered, forged or counterfeited, shall be an uttering, publishing and using within the meaning of this article. [Act July 28, 1876, p. 59.] Indictment, Willson's Cr. Forms, 322.

**§770 — ART. 454. — Non-residents may commit — Venue.** — Persons out the State may commit, and be liable to indictment and conviction for committing, any of the offenses enumerated in this chapter, which do not in their commission necessarily require a personal presence in this State — the object of this chapter being to reach and punish all persons offending against its provisions, whether within or without the State; an indictment, under this chapter, may be presented by the grand jury of Travis county, in this State, or in the county where the offense was committed, or in the county where the land lies, about which the offenses named in this chapter were committed. [Act July 28, 1876, p. 59.]

**§771 — Constitutionality of this statute.** — The preceding articles, and all the other provisions of this chapter are constitutional. *Ham v. S.* 4 App. 646; *Francis v. S.* 7 App. 501; *Johnson v. S.* 9 App. 249; *Hanks v. S.* 13 App. 289.

**§772 — Jurisdiction.** — When it appears that a conspiracy to fabricate titles to lands in this State, was entered into in this State, and that one or more of the overt acts was perpetrated in this State, the courts of this State have jurisdiction independent of the preceding article, to try the case, although it be shown that the actual fabrication was committed in another State by an agent, or co-conspirator of the defendant. And the statutes in force prior to the enactment of the preceding article in 1876, conferred such jurisdiction upon the courts of this State. *Ex parte Rogers*, 10 App. 555; *Rogers v. S.* 11 App. 608; *Hanks v. S.* 13 App. 289.

**§773 — ART. 455. — Proof and allegations necessary in indictments — Proof of intent to defraud United States, etc. — No variance.** — Upon indictment, under this chapter, to warrant a conviction, it shall only be necessary to prove that the person charged took any one step, or did any one act or thing in the commission of the offense, if from such step, act or thing, any of the intentions hereinbefore mentioned, or any other fraudulent intention may be reasonably inferred; nor shall it be any defense to a prosecution, under this chapter, that the matter, act, deed, instrument or thing was in law, either as to substance or form, void, or that the same was not in fact used for the purpose for which it was made or designed; and it shall only be necessary, in any indictment under this chapter, to state with reasonable certainty the act constituting the offense, and charge, in connection therewith, in general terms, the intention to defraud, without naming the person or persons it was intended to defraud; and, on trial of such indictment, it shall be sufficient and shall not be deemed a variance if there appears to be an intent to defraud the United States, or any State, territory, county, city, town or village, or any body corporate, or any public officer in his official capacity, or any copartnership, or member thereof, or any particular person. [Act July 28, 1876, p. 59.]

**§774 — Decisions.** — It is an offense to do any act or thing in the progress of the forgery from which an intent to defraud may be inferred. *Phillips v. S.* 6 App. 364. Prior to the act of 1876, instruments in the nature of official acts, such as the certificate of a notary public authenticating a conveyance, were not within the purview of said act, and their fabrication was not an offense. *Rogers v. S.* 8 App. 401. Under this chapter a person may be convicted of the forgery of an instrument, though the name of the transferee therein is left blank. It is no defense under the preceding article that the instrument was void in law either as to substance or form, or that the same was not, in fact, used for the purposes for which it was made or designed. *Phillips v. S.* 6 App. 364. For other decisions relating to the indictment pertinent to this chapter, see *Ante*, § 740; and relating to evidence, see *Ante*, § 765; and to the charge of the court, see *Ante*, § 766.

**§775 — ART. 456. — Venue.** — Indictments under this chapter may be presented and the offenses prosecuted in any of the counties prescribed in this chapter of the Code of Criminal Procedure. [Act July 28, 1876, p. 59. See *Ante*, § 770.]

**§776 — ART. 457. — Rules in forgery applicable.** — The rules prescribed in chapter 1 of this title, relative to the offense of forgery, so far as the same are applicable, shall apply to the various offenses enumerated in this chapter. [Act July 28, 1876, p. 59.]

**ART. 458** disappeared in the revising.

## CH. 3. — OF COUNTERFEITING AND DIMINISHING VALUE OF CURRENT COIN.

ART.	SEC.	ART.	SEC.
459. "Counterfeiting" defined.	777	464. Making dies, etc., and having them in possession.	783
460. "Altering" also counterfeiting	778	465. Passing coin of diminished value.	784
461. Resemblance need not be perfect.	779	466. "Gold and silver coin" defined.	785
462. Punishment.	780	467. What sufficient to constitute passing.	786
463. Passing counterfeit coin.	781		

§777 — ART. 459. — "**Counterfeiting**" defined. — He is guilty of counterfeiting who makes, in the semblance of true gold or silver coin, any coin of whatever denomination, having in its composition a less proportion of the precious metal of which the true coin intended to be imitated is composed, than is contained in such true coin, with intent that the same should be passed in this State or elsewhere. [O. C. 451.] Willson's Cr. Forms, 323.

§778. — **Jurisdiction.** — Our Code creates and defines the offense of counterfeiting, and it is therefore an offense against the laws of this State, and the courts of this State have jurisdiction to try and punish parties guilty of violating the provisions of this chapter. *Martin v. S.* 18 App. 224.

§779 — ART. 460. — "**Altering**" also counterfeiting. — He is also guilty of counterfeiting who, with like intent, alters any coin of lower value so as to make it resemble coin of higher value. [O. C. 452.] Willson's Cr. Forms, 324.

§780 — ART. 461. — **Resemblance need not be perfect.** — The resemblance between the true and the false coin need not be perfect to constitute the offense of counterfeiting. [O. C. 453.]

§781 — ART. 462. — **Punishment.** — Any person who shall counterfeit any gold or silver coin shall be punished by imprisonment in the penitentiary not less than five nor more than ten years. [O. C. 454.]

§782 — ART. 463. — **Passing counterfeit coin.** — If any person, with intent to defraud, shall pass, or offer to pass, as true, or bring into this State, or have in his possession, with intent to pass as true, any counterfeit coin, knowing the same to be counterfeit, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years. [O. C. 455.]

Indictment, Willson's Cr. Forms, 325.

§783 — ART. 464. — **Making dies, etc., and having them in possession.** — If any person, with the intention of committing the offense of counterfeiting or of aiding therein, shall make or repair, or shall have in his possession any die, mould or other instrument whatever, designed or adapted, or usually employed for making coin, or shall prepare, or have in his possession, any base metal prepared for coinage, with intent that the same may be used for the purpose of counterfeiting, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years. [O. C. 456.]

Indictment, Willson's Cr. Forms, 326.

§784 — ART. 465. — **Passing coin of diminished value.** — If any person shall, with intent to profit thereby, diminish the weight of any gold or silver coin, and shall afterward pass it for the value it would have had before it was so diminished, or send it to any place, whether in the State or out of it, with the intent that the same may be passed, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years. [O. C. 457; Act Feb. 12, 1858, p. 169.] Willson's Cr. Forms, 325.

§785 — ART. 466. — "**Gold and silver coin**" defined. — By the gold or silver coin mentioned in this chapter, is meant any piece of gold or silver of which one of those metals is the principal component part, and which passes as money in the United States, either by law or usage, whether the same be of the coinage of the United States or of any foreign country. [O. C. 458.]



§786 — ART. 467. — **What sufficient to constitute passing.** — It is sufficient to constitute the offense of passing, or attempting to pass, under the provisions of this chapter, if the counterfeit coin be delivered or offered to another, with the intention of defrauding, or enabling such other person to defraud, although such counterfeit coin be not delivered or offered at the full value which it would bear if genuine. [O. C. 459.]

#### CH. 4. — OF OFFENSES WHICH AFFECT FOREIGN COMMERCE.

ART.	SEC.	ART.	SEC.
468. Shipping articles without inspection.	787	471. Decisions under two preceding articles.	791
469. Altering marks, etc.	788	472. Fraudulent insurance.	792
470. False packing.	789	473. Harboring deserting seamen.	793
471. Same subject.	790		

§787 — ART. 468. — **Shipping articles without inspection.** — If any person shall export from this State, or ship, for the purpose of exportation to any one of the United States, or to any foreign port, any article of commerce, which, by any law of the State, may be required to be inspected by a public inspector, without having caused such inspection to be made according to law, he shall be fined not exceeding one hundred dollars. [O. C. 460.]

Indictment, Willson's Cr. Forms, 328. See Rev. Stat. Art. 4611, et seq.

§788 — ART. 469. — **Altering marks, etc.** — If any person shall counterfeit, or alter the mark, brand or stamp, directed by any law of the State to be put on any article of commerce, or on the box, cask or package containing the same, he shall be punished by fine not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding one year. [O. C. 461.]

See Rev. Stat., art. 4084, Act April 19, 1879, p. 116, sec. 3.

§789 — ART. 470. — **False packing.** — If any person shall, with intent to defraud, put into any hogshead, barrel, cask or keg, or into any bale, box or package, containing merchandise or other commodity usually sold by weight, any article whatever of less value than the merchandise with which such bale, box, package, hogshead, barrel, cask or keg is apparently filled, or, with intent to defraud, shall sell or barter, give in payment, or expose to sale, or ship for exportation, any such hogshead, barrel, cask, keg, box, bale or package of merchandise, or other commodity, with any such article of inferior value concealed therein, he shall be punished by confinement in the county jail not exceeding one year, or by fine not exceeding one thousand dollars. [O. C. 462.]

Indictment, Willson's Cr. Forms, 329-330.

§790 — ART. 471. — **Same subject.** — If any person shall, with intent to deceive and defraud, conceal within any hogshead, cask, barrel, box, bale, keg or package, containing merchandise or other commodity, any merchandise or commodity of a quality inferior to that which such hogshead, cask, barrel, bale, keg or package is apparently filled, or any substance of less value, he shall be fined not exceeding five hundred dollars. [O. C. 463, Act Feb. 12, 1858, p. 170.] Indictment, Willson's Cr. Forms, 330a.

§791 — **Decisions under two preceding articles.** — The preceding article, 470, defines two separate and distinct offenses which cannot be joined in the same count in an indictment. In charging either offense it is not necessary to name the party intended to be defrauded, but the specific intent to defraud must be alleged. See this case for a sufficient indictment under article 470, and for evidence sufficient to sustain a conviction. *Holden v. S.* 18 App. 91. When the indictment charges but one of the offenses named in article 470, the charge of the court must be confined to that offense, and it is error in such case to give in charge the whole of said article. Where the prosecution was for falsely packing a bale of cotton, it was held that it matters not at what time the sand or dirt was put into the cotton, provided it was done by the defendant, and for the purpose, and with the intent to defraud, and in a manner calculated to accomplish such purpose at the time. It is not necessary to constitute the offense of false packing that the defendant should have been present at the time of packing, and at that very time should have put the sand and dirt into the cotton. If the sand and dirt were mingled by him with the cotton, while the said cotton was in the seed, and by his act it went into the bale of cotton when the cotton was packed, the offense was as complete as if he had put the sand and dirt into the cotton while it was being packed. See this case for an erroneous charge of the court. *Jones v. S.* 22 App. 680.

§792 — **ART. 472. — Fraudulent insurance.** — If any person shall cause insurance to be made in this State upon any merchandise or other commodity represented to be already shipped, or about to be shipped, at any place, whether within this State or out of it, and shall, with the intent to defraud the insurer, ship articles of value less than one-half the represented value of those insured, or of a different kind from those insured, he shall be punished by fine in a sum not exceeding the amount for which such merchandise or commodity may be insured. [O. C. 464.]

Indictment, *Willson's Cr. Forms*, 331.

§793 — **ART. 473. — Harboring deserting seamen.** — The municipal authorities of incorporated towns and cities being shipping ports, may make such regulations as are deemed proper for the punishment of keepers of boarding houses and others, who knowingly lodge, entertain or conceal seamen who have deserted from any merchant vessel in their respective ports; but they shall not affix a higher penalty for such offense than a fine of fifty dollars, or imprisonment in jail for thirty days. [O. C. 465.]

## CH. 5. — FALSE WEIGHTS AND MEASURES.

ART.  
474. Penalty for using.  
475. Definition.

SEC.  
794  
795

ART.  
476. Destruction of, on conviction.

SEC.  
796

§794 — **ART. 474. — Penalty for using.** — If any person shall use a false balance, weight or measure, in weighing or measuring anything whatever, purchased or sold by himself, or bartered, shipped or delivered by him for sale, or bartered, or pledged, or given in payment, knowing the same to be false, and with intent to defraud, he shall be punished by fine not exceeding three hundred dollars. [O. C. 466.]

Indictment, *Willson's Cr. Forms*, 332-333.

§795 — **ART. 475. — Definition.** — A false weight or measure is such as is not in conformity with the standard which is or may be established by a law of this State. [O. C. 467.]

§796 — **ART. 476. — Destruction of, on conviction.** — When a warrant of arrest is issued in case of offenses under this chapter, the magistrate shall direct the false balances, weights or measures to be seized and kept by the sheriff until the trial of defendant, and, in case of conviction, the same shall be destroyed. [O. C. 468.]

## CH. 6. — OF OFFENSES BY PUBLIC WEIGHERS.

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477. Use of false balances.	797	478b. Factor, etc., shall not employ pri-	800
478. Giving false certificate.	798	vate weigher.	
478a. Other than public weigher shall not weigh, etc.	799	478c. Person may weigh his own produce.	801

§797 — ART. 477. — **Use of false balance.** — If any person, appointed public weigher by authority of any law of this State, shall fraudulently use any false balance or instrument for weighing, or shall, in exercise of his official duties, fraudulently give the wrong weight of any article weighed by him, he shall be punished by fine not less than one hundred nor more than five hundred dollars, or by imprisonment in the county jail not exceeding one year. [O. C. 469.]

Indictment, Willson's Cr. Forms, 334-335.

§798 — ART. 478. — **Giving false certificate.** — If any public weigher in this State, or his deputy, shall willfully certify to any false weight of cotton, sugar, wool or hides, he shall be punished by confinement in the penitentiary not less than two nor more than three years. [Act March 15, 1875, p. 164.]

Indictment, Willson's Cr. Forms, 336.

§799 — ART. 478a. — **Other than public weigher shall not weigh, etc.** — It shall not be lawful for any person other than a regularly appointed weigher or his deputy to weigh any cotton, wool, sugar or hides required to be weighed, sold or offered for sale in any city having a public weigher duly qualified. Any person or persons so offending shall be deemed guilty of a misdemeanor, and, upon conviction before any court of competent jurisdiction, shall suffer a fine of five dollars for each and every bale of cotton, bale or sack of wool, hogshead or barrel of sugar, bale or loose hide so weighed. [Act April 19, 1879, p. 116, § 7.]

§800 — ART. 478b. — **Factor, etc., shall not employ private weigher.** — It shall not be lawful for any factor, commission merchant or any other person or persons to employ any one other than a regularly appointed and qualified public weigher or his deputy to weigh any cotton, wool, sugar or hides required to be weighed, sold or offered for sale in any city having a public weigher duly qualified, and any person or persons violating this provision shall be liable, at the suit of the public weigher of such city, or either of such public weighers, to damages in any sum not less than five dollars for each bale of cotton, bale or sack of wool, hogshead or barrel of sugar, or bale of hides so unlawfully weighed, to be recovered in any court of such county having jurisdiction thereof; *provided*, any owner shipping any produce named in this act to any town or city having a public weigher may, by written instructions, authorize his factor, commission merchant or agent to have such produce weighed by private weighers, if he prefers so to do, and in all such cases the prohibitions and penalties embraced in this section and in the preceding section shall not apply. [Act April 19, 1879, p. 116, § 8.]

§801 — ART. 478c. — **Person may weigh his own produce.** — Nothing in this act shall be construed to prevent any person from weighing his cotton, wool, hides or sugar in person without being compelled to call upon a public weigher to weigh the same. [Act April 19, 1879, p. 116, § 10.]

## CH. 7. — MISCELLANEOUS OFFENSES.

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479. False certificate by notary public.	802	482a. Throwing ballast into the sea near bar, etc.	806
480. False declaration or protest by.	803	482b. Penalty.	807
481. Preceding articles embrace what.	804	483. False entry in book of accounts.	808
482. False declaration by master of vessel.	805		

§802 — ART. 479. — **False certificate by notary public.** — If any notary public shall make any false certificate as to the proof or acknowledgment of any instrument of writing relating to commerce or navigation, to which, by law, he is authorized to certify; or shall make any false certificate as to the proof or acknowledgment of any letter of attorney, or other instrument of writing relating to commerce or navigation, to which he may by law certify, he shall be punished by confinement in the penitentiary not less than two nor more than five years. [O. C. 470.]

Indictment, Willson's Cr. Forms, 338.

§803 — ART. 480. — **False declaration or protest by.** — If any notary public shall make any false declaration or protest respecting any matter or thing relating to commerce or navigation, or to commercial instruments where, by law, he is authorized to make such declaration or protest, he shall be punished as prescribed in the preceding article. [O. C. 471.]

Indictment, Willson's Cr. Forms, 339.

§804 — ART. 481. — **Preceding articles embrace what.** — The provisions of the two preceding articles are intended to embrace all acts of a notary public done in his official capacity within the proper sphere of his duties, and which arise out of transactions respecting navigation or commerce. [O. C. 472.]

§805 — ART. 482. — **False declaration by master of vessel.** — If any master or other officer of a vessel, with intent to defraud, shall make a false declaration or protest as to the loss or damage of any vessel or cargo, he shall be punished by confinement in the penitentiary not less than two nor more than five years. [O. C. 473.]

Indictment, Willson's Cr. Forms, 340.

§806 — ART. 482a. — **Throwing ballast into the sea near bar, etc.** — That from and after the passage of this act, it shall be unlawful to throw into the sea any part of the ballast of any vessel within six miles of any bar or harbor in this State. [Act April 23, 1879, p. 153, § 1.]

§807 — ART. 482b. — **Penalty.** — That if any ballast shall be thrown into the sea within the limits forbidden by this act from any vessel, the master or other officer in charge thereof at the time, shall be guilty of a misdemeanor; and upon conviction thereof shall be fined not less than one hundred dollars, nor more than two hundred dollars. [Act April 23, 1879, p. 153, § 2.]

Indictment, Willson's Cr. Forms, 341.

§808 — ART. 483. — **False entry in book of account.** — If any person, with intent to defraud, shall make, or cause to be made, any false entry in any book kept as a book of accounts; or shall, with like intent, alter or cause to be altered any item of an account kept or entered in such book, he shall be fined not less than one hundred nor more than one thousand dollars, or be punished by confinement in the penitentiary not less than two nor more than five years.

Indictment, Willson's Cr. Forms, 342.

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## TITLE 15—OF OFFENSES AGAINST THE PERSON.

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## CH. 1.—ASSAULT AND ASSAULT AND BATTERY.

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§809 — ART. 484. — "Assault and battery" defined. — The use of any unlawful violence upon the person of another, with intent to injure him, whatever be the means or the degree of violence used, is an assault and battery. Any attempt to commit a battery, or any threatening gesture showing in itself or by words accompanying it, an immediate intention, coupled with an ability to commit a battery, is an assault. [O. C. 475.]

Indictment, Willson's Cr. Forms, 344-345.

§810 — Indictment. — Notwithstanding the general rule that an indictment to be sufficient must allege the acts or omissions which constitute the offense, it is not necessary in charging an assault that the particular acts of violence constituting the assault should be averred. The means by which the offense was committed need not be stated. *Roberson v. S. 15 App. 317*; *Martin v. S. 40 Tex. 19*. An "intent to injure," or "unlawful violence" need not be alleged. *Milstead v. S. 19 App. 490*; *S. v. Hartman, 41 Tex. 562*; *S. v. Hays, Id. 526*; *S. v. Allen, 80 Tex. 59*; *Evans v. S. 25 Tex. Supp. 303*; *S. v. Lutterlough, 22 Tex. 210*. Nor need it be alleged that the defendant had the ability to commit a battery. *Greenwood v. S. 35 Tex. 587*. It may charge an assault upon two or more persons. *S. v. Bradley, 34 Tex. 95*. If the name of the assaulted party is unknown to the grand jury, it may so charge. *S. v. Snow, 41 Tex. 596*; *S. v. Elmore, 44 Tex. 102*. But unless the name of the assaulted person be alleged, there must be an allegation that such name was to the grand jurors unknown. *Rauch v. S. 5 App. 363*; *Rutherford v. S. 13 App. 92*.

The middle initial name of the assaulted party is immaterial, and in case of a mistake therein, it is only necessary that it be shown that the person named in the indictment, and the person assaulted, are identical. *Stockton v. S. 25 Tex. 772*. A battery need not be charged, if there was only an assault. *S. v. Johnston, 11 Tex. 22*. The indictment may charge both the higher and lower degrees of the offense, and if bad for the higher, may be good for the lower. *S. v. Bradley, 84 Tex. 95*; *Wilks v. S. 3 App. 34*. And an indictment which imperfectly charges an aggravated assault may be good for a simple assault. *Nelson v. S. 2 App. 227*; *Marshall v. S. 13 App. 492*, overruling *Pierce v. S. 26 Tex. 114*. And so it may be bad for an assault with intent to murder and good for a simple assault. *S. v. Archer, 34 Tex. 646*; *Wilks v. S. 3 App. 34*. And under an indictment charging an assault with intent to murder, or an aggravated assault, a conviction for a simple assault may be had. *Harrison v. S. 10 App. 93*; *Kennedy v. S. 11*

• App. 73; *Bolding v. S.* 23 App. 172; *Davis v. S.* 20 App. 302; *Peterson v. S.* 12 App. 650; *Bit-tick v. S.* 40 Tex. 117; *James v. S.* 36 Tex. 645; *Gardenheir v. S.* 6 Tex. 348; *Givens v. S.* Id. 344; *Johnson v. S.* 17 Tex. 515.

§811 — **Constituents of the offense.** — A common assault and battery is the unlawful assaulting and beating of another; and the least touching of another willfully, or in anger, is a battery; and every battery includes an assault; so that every unlawful touching of another person is an assault and battery. *Norton v. S.* 14 Tex. 387; *Johnson v. S.* 17 Tex. 515. In the definition of this offense our Code follows the common law. *Evans v. S.* 25 Tex. Supp. 303. To constitute an assault and battery the intent to injure must concur with the use of unlawful violence upon the person of the assaulted party, but the slightest degree of force suffices to constitute the violence, and the intended injury may be to the feelings or mind of the latter as well as to the corporeal person. *Donaldson v. S.* 10 App. 307. The law has established no particular criterion in determining the exact stage in any series of acts which must be reached in an attempt to commit a battery. It is sufficient that an act be done indicating an intention to immediately commit a battery, coupled with the ability to do it. Thus the mere act of taking a gun from the rack, coupled with other *indicia*, will sometimes suffice. *Higginbotham v. S.* 23 Tex. 574; *Johnson v. S.* 14 App. 306. So also will the flourish of a knife in a threatening manner, sometimes constitute an assault. *Stockton v. S.* 25 Tex. 772. But in every assault there must be an intent to injure, coupled with an act which must at least be the beginning of the attempt to injure at once, and not a mere act of preparation for some contemplated injury that may afterwards be inflicted. *Johnson v. S.* 43 Tex. 576; *Fondren v. S.* 16 App. 48; *Rutherford v. S.* 13 App. 92. An assault and battery does not consist of every violent act against another, but only of "an unlawful violence upon the person of another with intent to injure him," etc. *Souther v. S.* 18 App. 352. An assault may be committed though the party announces that he has no intention to do immediate injury. The test is, was there in fact a present purpose of doing an injury? If so, the acts will amount to an assault; otherwise they will not. *Bell v. S.* 29 Tex. 492; *Rainbolt v. S.* 34 Tex. 286; *Hill v. S.* Id. 623; *Aglitone v. S.* 41 Tex. 501; *Walker v. S.* 7 App. 627. An assault may be committed by one or more persons at the same time, by the same act. *S. v. Bradley*, 34 Tex. 95. Pointing a gun or pistol at a person, within carrying distance of the weapon, with intent to injure such person, is an assault, unless it appear that the weapon was unloaded; and the burden of proving that it was unloaded is on the defendant. *Forrest v. S.* 3 App. 232; *Crow v. S.* 41 Tex. 468; *Caldwell v. S.* 5 Tex. 20; *Benton v. S.* 3 App. 408. No words, of themselves, will constitute an assault. *Jarnigan v. S.* 6 App. 465.

§812 — **ART. 485. — Intent presumed and "injury" defined.** — When an injury is caused by violence to the person, the intent to injure is presumed, and it rests with the person inflicting the injury to show the accident or innocent intention. The injury intended may be either bodily pain, constraint, a sense of shame or other disagreeable emotion of the mind. [O. C. 476.]

See *Atkins v. S.* 11 App. 8; *Dowlen v. S.* 14 App. 61.

§813 — **ART. 486. — May be committed on person not intended.** — An assault, or an assault and battery, may be committed, though the person actually injured thereby was not the person intended to be injured. [O. C. 477.]

§814 — **ART. 487. — How it may be committed.** — An assault, or assault and battery, may be committed by the use of any part of the body of the person committing the offense, as of the hand, foot, head, or by the use of any inanimate object as a stick, knife, or anything else capable of inflicting the slightest injury, or by the use of any animate object, as by throwing one person against another, or driving a horse or other animal against the person. [O. C. 478.]

§815 — **ART. 488. — Any means capable of injury sufficient.** — Any means used by the person assaulting, as by spitting in the face, or otherwise, which is capable of inflicting an injury, comes within the definition of an assault, or an assault and battery, as the case may be. [O. C. 479.]

§816 — **ART. 489. — "Coupled with an ability to commit" defined.** — By the terms "coupled with an ability to commit," as used in article 484, is meant —

1. That the person making the assault must be in such a position that, if not prevented, he may inflict a battery upon the person assailed.

2. That he must be within such distance of the person so assailed as to make it within his power to commit the battery by the use of the means with which he attempts it.



3. It follows, that one who is, at the time of making an attempt to commit a battery, under such restraint as to deprive him of the power to act, or who is at so great a distance from the person assailed as that he cannot reach his person by the use of the means with which he makes the attempt, is not guilty of an assault. But the use of any dangerous weapon, or the semblance thereof, in an angry or threatening manner, with intent to alarm another, and under circumstances calculated to effect that object, comes within the meaning of an assault. [O. C. 482, amended in revising.]

§817 — **Original article.** — Article 482 of the original Code before being revised and made to constitute article 489 was as follows: —

"ART 482. By the terms 'coupled with an ability to commit,' as used in article 475, is meant, —

"1. That the person making the assault must be in such a position that, if not prevented, he may inflict a battery upon the person assailed.

"2. That he must be within such distance of the person so assailed as to make it within his power to commit the battery by the use of the means with which he attempts it.

"It follows, that one who is, at the time of making an attempt to commit a battery, under such restraint as to deprive him of the power to act, or who is at so great a distance from the person assailed, as that he cannot reach his person by the use of the means with which he makes the attempt, is not guilty of an assault. Pointing an unloaded gun, or the use of any like means with which no injury can be inflicted, cannot constitute an assault."

§818 — **Decisions under original article.** — Under the preceding article before it was revised, it was held that mere threatening gestures, and accompanying words did not constitute an assault, unless coupled with an ability to commit battery, no matter what the intention was. *McKay v. S.* 44 Tex. 43; *Smith v. S.* 32 Tex. 593; *Spears v. S.* 2 App. 244; *Jarnigan v. S.* 6 App. 465.

§819 — **Decisions under revised article.** — The use of any dangerous weapon, or the semblance thereof, in an angry or threatening manner with intent to alarm another, under circumstances calculated to effect that object, now comes within the meaning of an assault. Under the present law, the ability to commit a battery, which was before absolutely necessary, is now in some cases not necessary. The assault may be complete without such ability. *Kief v. S.* 10 App. 286, and although the assaulted party was not in fact alarmed. *Coker v. S.* 22 App. 20. Presenting a fire-arm in a condition for immediate use accompanied by an avowal of an intention to kill the party assaulted, is an assault. *Johnson v. S.* 19 App. 545.

§820 — **ART. 490. — When violence does not amount to.** — Violence used to the person does not amount to an assault or battery in the following cases: —

1. In the exercise of the right of moderate restraint or correction given by law to the parent over the child, the guardian over the ward, the master over his apprentice, the teacher over the scholar.

2. For the preservation of order in a meeting for religious, political or other lawful purposes.

3. The preservation of the peace, or to prevent the commission of offenses.

4. In preventing or interrupting an intrusion upon the lawful possession of property.

5. In making a lawful arrest and detaining the party arrested, in obedience to the lawful order of a magistrate or court, and in overcoming resistance to such lawful order.

6. In self-defense, or the defense of another, against unlawful violence offered to his person or property. [O. C. 483.]

§821 — **Moderate restraint.** — The right to give moderate correction to a child by a parent cannot be invoked to shield one for whipping a female inmate of the family, who seemed to have occupied the position of servant in the family. The master has no right to chastise his servant. *Davis v. S.* 6 App. 133. But the right of moderate restraint applies not only to the parent, but also to a person who stands *in loco parentis*. Thus a brother of a fifteen year old girl, who provided her with board, lodging, clothing and schooling, might be considered as standing *in loco parentis* to her. *Snowden v. S.* 12 App. 104. And a step-father stands *in loco parentis* to the step-child, and may exercise this right. *Gorman v. S.* 42 Tex. 221. The law confides to teachers a discretionary power to punish their pupils, and exonerates them from responsibility unless the punishment be excessive or malicious. Moderate restraint and correction of a pupil by his teacher is not an offense, but is authorized by law; and the authority of the teacher is not limited to the time the pupil is at the school-room; or under the actual control of the teacher. *Bolding v. S.* 23 App. 172; *Hutton v. S.* Id. 386; *Stanfield v. S.* 43 Tex. 167; *Dowlen v. S.* 14 App. 61. In all such cases the law presumes, from the relation of the parties an entire absence of any criminal intent to injure, and it does not devolve upon the defendant

to show accident or innocent intention, unless it be shown that the force used was excessive. Whether the violence used was moderate or excessive, must necessarily depend upon the age, sex, condition and disposition of the pupil, with all the attending circumstances. *Dowlen v. S.* 14 App. 61; *Stanfield v. S.* 43 Tex. 167. The burden is upon the defendant to show the relation and circumstances which justify the violence. *S. v. Stephenson*, 20 Tex. 151. If the chastisement be with an instrument likely to produce death, or be cruelly inflicted and death result, it will be murder. Post, § 988.

§822 — **In preventing, etc., intrusion upon property.** — When a guest is guilty of improper conduct in a private house, the owner has the right to use sufficient force to eject him if he refuses to leave when requested. *Hinton v. S.* 24 Tex. 454. A party cannot justify an assault committed in attempting to take forcible possession of a house belonging to him. He cannot even use his title to the house in mitigation of the offense. *Terrill v. S.* 37 Tex. 442. See, also, *Lilly v. S.* 20 App. 1; *Souther v. S.* 18 App. 352.

§822 — **In making an arrest, etc.** — An officer in making an arrest, is guilty of an assault, if he uses greater force than is reasonably necessary. *Beaverts v. S.* 4 App. 175; *Skidmore v. S.* 2 App. 20; *S. C.* 43 Tex. 93; *Rasberry v. S.* 1 App. 665. For other decisions relating to officers, see Post, § 957.

§824 — **In self-defense, etc.** — In all cases of self-defense the means must be proportioned to the aggression. *Stockton v. S.* 25 Tex. 772; *Burch v. S.* 43 Tex. 376. The right of self-defense is founded on the law of nature, and is not superseded by any law of society. *West v. S.* 2 App. 460. But self-defense is a defensive, not an offensive act. *Blake v. S.* 3 App. 581. A person assailed is not bound to retreat. Post, art. 473. He may act upon a reasonable apprehension of danger. *Munden v. S.* 37 Tex. 353; *Moore v. S.* 15 App. 1. For a collocation of all the decisions upon self-defense — the defense of another, and the defense of property. See Post, §§ 969 *et seq.*

§825 — **ART. 491. — Degree of force permissible.** — In all the cases mentioned in the preceding article, where violence is permitted to effect a lawful purpose, only that degree of force must be used which is necessary to effect such purpose. [O. C. 484.]

§826 — **Degree of force — How determined.** — Whether the degree of force used was necessary, or excessive, is a question which must be determined from the facts of each particular case as the law does not furnish the measure. *Souther v. S.* 18 App. 352; *Stanfield v. S.* 43 Tex. 167. A person in exercising his legal right of self-defense will be guilty of an assault if he resort to extreme means, or use violence excessively beyond the degree of force necessary to repel the aggression. *Stockton v. S.* 25 Tex. 772; *Cotton v. S.* 4 Tex. 260. See, also, *Rasberry v. S.* 1 App. 665; *Skidmore v. S.* 2 App. 20.

§827 — **ART. 492. — Verbal provocation no justification.** — No verbal provocation justifies an assault and battery, but insulting and abusive words may be given in evidence in mitigation of the punishment affixed to the offense. [O. C. 485.]

§828 — **Evidence.** — The name of the assaulted party must be proved as alleged. *Good v. S.* 2 App. 520; *Osborne v. S.* 14 App. 225; *Hardin v. S.* 26 Tex. 113. The character of the assaulted party as a quarrelsome, pugnacious man, it was held could not be proved by the defendant, when the defense was that the assault was committed while such party was in the act of committing arson in the night time, and was not recognized by the defendant until the assault had been committed. *Henderson v. S.* 12 Tex. 526. If the intent imputed to the accused is to injure the mind or feelings of the assaulted party, the evidence germane to the existence of such intent may well involve the character of the assailed party, and in such case would be admissible. See this case for an instance, where such evidence was held admissible. *Donaldson v. S.* 10 App. 307. Acts which *prima facie* and unexplained, are undoubtedly assaults, may be shown to be, in truth, different from what they purport to be; that they are not attempts or offers to do harm, but merely annoying gestures without any accompanying purpose of mischief, or that they are merely reasonable preparations to repel anticipated violence. *Young v. S.* 7 App. 75; *Bell v. S.* 29 Tex. 492. For other decisions relating to evidence in prosecutions for assault, see Post, §§ 846, 861, 868.

§829 — **ART. 493. — "Battery," how used.** — The word battery is used in this Code in the same sense as "*assault and battery.*" [O. C. 486.]

§830 — **ART. 494. — Degrees of assault.** — An assault is either a simple assault, an aggravated assault, or an assault with intent to commit some other offense. [O. C. 480.]

§831 — **ART. 495. — Punishment for simple assault, etc.** — The punishment for a simple assault, or for assault and battery, unattended with circumstances of aggravation, shall be a fine not less than five nor more than twenty-five dollars. [O. C. 487. Penalty changed in revising, the former penalty being a fine not exceeding \$100.00.]

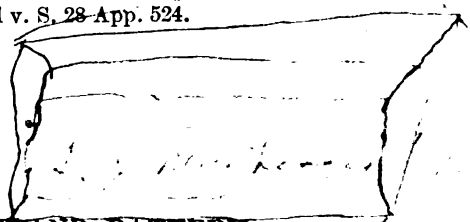
§832 — **Does not include an aggravated assault.** — In the preceding article the terms "simple assault" and "assault and battery" are used synonymously, and the latter term does not include an aggravated assault. *Foster v. S.* 27 Tex. 236.

§833 — ART. 495a. — **Abusive language an offense.** — That if any person shall, in the presence or hearing of another, curse or abuse such person, or use any violently abusive language to such person concerning him or any of his female relatives, under circumstances reasonably calculated to provoke a breach of the peace, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not less than five nor more than one hundred dollars. [Act March 8, 1887, pp. 13-14.]

Indictment, Willson's Add. Cr. Forms, No. 199a.

§834 — ART. 495b. — **Intimidation of another.** — That any person who shall, by threatening words, or by acts of violence or intimidation, prevent or attempt to prevent another from engaging or remaining in or from performing the duties of any lawful employment, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by fine of not less than twenty-five nor more than five hundred dollars, or by confinement not less than one nor more than six months in the county jail. [Act March 8, 1887, p. 13.]

Indictment, Willson's Add. Cr. Forms, No. 542a; Boyd v. S. 28 App. 524.



## CH. 2. — AGGRAVATED ASSAULT AND BATTERY.

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§835 — ART. 496. — **Definition.** — An assault or battery becomes aggravated when committed under any of the following circumstances:

1. When committed upon an officer in the lawful discharge of the duties of his office, if it was known or declared to the offender that the person assaulted was an officer discharging an official duty.

2. When committed in a court of justice, or in any place of religious worship, or in any place where persons are assembled for the purpose of innocent amusement.

3. When the person committing the offense goes into the house of a private family and is there guilty of an assault and battery.

4. When committed by a person of robust health or strength upon one who is aged or decrepit.

5. When committed by an adult male upon the person of a female or child or by an adult female upon the person of a child.

6. When the instrument or means used is such as inflicts disgrace upon the person assaulted, as an assault or battery with a whip or cowhide.

7. When a serious bodily injury is inflicted upon the person assaulted

8. When committed with deadly weapons under circumstances not amounting to an intent to murder or maim.

9. When committed with premeditated design, and by the use of means calculated to inflict great bodily injury.

10. When committed by any person or persons in disguise. [O. C. 488, Act Nov. 6, 1871, p. 20.]

Indictments, Willson's Cr. Forms, 846-847.

**§836 — Indictment in general.** — The indictment need not charge in words that the assault is aggravated, but may set out the particular facts and circumstances which constitute the offense. *Pinson v. S.* 23 Tex. 579; *Meier v. S.* 10 App. 39. To charge that the defendant "did make an aggravated assault," upon a person, naming such person, without stating the fact or ground of aggravation, is insufficient. *Marshall v. S.* 13 App. 492; *Allen v. S.* Id. 28; *Key v. S.* 12 App. 506; *Browning v. S.* 2 App. 47. But such an indictment will be good for a simple assault. *Marshall v. S.* 13 App. 492; *Nelson v. S.* 2 App. 227, overruling *Pierce v. S.* 26 Tex. 114. It should set out the facts or ground constituting the aggravation. *Meier v. S.* 10 App. 39; *Flynn v. S.* 8 App. 368; *Williamson v. S.* 5 App. 485. It may charge different grounds of aggravation in different counts, and in such case, the State will not be compelled to elect. *Waddell v. S.* 1 App. 720. It is not duplicitous because it details certain facts which tend to constitute threats to take life. *Crow v. S.* 41 Tex. 468. The intent to injure need not be averred. *Bronson v. S.* 2 App. 46; *Ferguson v. S.* 4 App. 156; *Milstead v. S.* 19 App. 490; *Ante*, § 812. A defendant indicted for an assault with intent to murder may be convicted of an aggravated assault. *Bolding v. S.* 23 App. 172; *Davis v. S.* 20 App. 302. And also, when indicted for an assault with intent to rape. *Brown v. S.* 7 App. 569.

**§837 — When committed upon an officer.** — In this case the indictment must allege that it was known or declared to the defendant that the person assaulted was an officer discharging an official duty. *S. v. Coffey*, 41 Tex. 46; *Johnson v. S.* 26 Tex. 17. The word "officer" includes all persons legally authorized to perform public duties. *Sanner v. S.* 2 App. 458.

**§838 — When committed in a court of justice.** — An allegation that the assault was made "in a court of justice, then and there being in session," is sufficient. *Murrah v. S.* 25 Tex. 758; *S. v. Hunter*, 44 Tex. 552; *Milstead v. S.* 19 App. 490.

**§839 — When committed in the house of a private family.** — To constitute this ground of aggravation, the defendant must have gone *into* the house of a private family and *there* committed an assault. An indictment to be sufficient must therefore allege that he did go *into* the house, and *there* commit the assault. It will not be sufficient to allege that he committed the assault at such house. And the indictment must also allege that a *battery* was committed. A mere assault, without a *battery* does not come within this ground of aggravation. *Pederson v. S.* 21 App. 485. Form No. 848 of Willson's Cr. Forms is insufficient, because it does not allege a *battery*. The words "and battery," should be inserted after the word "assault." Where the assault occurred in the house of defendant's father, in the common sitting-room of the family, and the defendant at the time was an occupant of said house, and a member of the family, it was held that this ground of aggravation did not apply. *Hall v. S.* 16 App. 6. The indictment must allege that the house was that of "a private family." *S. v. Cass*, 41 Tex. 552.

**§840 — When committed upon an aged or decrepit person.** — A person fifty years of age, having one arm disabled, was held to be "decrepit." *Bowden v. S.* 2 App. 56. A "decrepit" person is one who is disabled, incapable or incompetent, from either physical or mental weakness or defects, whether produced by age or other causes, to such an extent as to render him apparently helpless in a personal conflict with one possessed of ordinary health and strength. Decrepitude may exist without the supervision of age. *Hall v. S.* 16 App. 6.

**§841 — When committed upon a female or child.** — When the ground is that the assaulting party was an adult male, and the assaulted party a female, the indictment must so allege. The allegation must be that the defendant was an "adult male." *Collins v. S.* 5 App. 38; *Griffen v. S.* 12 App. 423; *Lawson v. S.* 13 App. 83. And the name of the assaulted female must be alleged, or it must be alleged that her name is unknown. To describe her as the wife of some named person, will not be sufficient. *Rauch v. S.* 5 App. 863. An "adult" person is one who has attained the full age of twenty-one years. *Shenault v. S.* 10 App. 410; *George v. S.* 11 App. 95; *Hall v. S.* 16 App. 6. A child is a young person, as contradistinguished from a person whose age implies settled habits and discretion. When applied to a boy it means a male not above the age of fourteen years, and when applied to a girl, it means a female not above the age of twelve years. *Bell v. S.* 18 App. 53. "Child" is not synonymous with "minor." *McGregor v. S.* 4 App. 599. The word must be taken in its ordinary acceptation. *Allen v. S.* 7 App. 298. Violent and indecent familiarity by an adult male with the person of a female, against her will, is an aggravated assault. *Veal v. S.* 8 App. 474; *Pefferling v. S.* 40 Tex. 486; *Curry v. S.* 4 App. 574; *Ridout v. S.* 6 App. 249; *Sandford v. S.* 12 App. 196. But not when such familiarity is with the consent of the female. *Atkins v. S.* 11 App. 8; *Crawford v. S.* 21 App. 454. The husband is guilty of an aggravated assault and battery if he chastises his wife. *Owen v. S.* 7 App. 829; *Jones v. S.* 12 App. 156. An assault by one female upon another is not necessarily aggravated, and in such case an adult male who was present and consenting to a simple assault by one female upon another is not guilty of an aggravated assault. *Colquitt v. S.* 34 Tex. 550. But if an adult male procures one female to assault another, and is present when the assault is made, he is guilty of an aggravated assault. *Dunman v. S.* 1 App. 593. An adult male, who assaulted a female, in attempting to eject her from premises owned by him, is guilty of an aggravated assault, and the title to the premises is no protection to him, and not admissible in evidence for him. *Terrell v. S.* 37 Tex. 442. For other decisions relating to assaults upon children, see *Ante*, § 821.

§842—**When the instrument, etc., inflicts disgrace.**—A male person under twenty-one years of age may commit an aggravated assault and battery upon a female by using violent familiarity upon her person, without her consent, with intent to have improper connection with her. *George v. S.* 11 App. 95.

§843—**When serious bodily injury is inflicted.**—“Serious bodily injury” is such as gives rise to apprehension—an injury which is attended with danger. Biting off a small portion of the rim of the ear, it was held, was not inflicting serious bodily injury. *George v. S.* 21 App. 315.

§844—**When committed with a deadly weapon.**—The indictment must allege that the weapon with which the assault was committed, was a “deadly” one. To allege that the assault was committed with a pistol without alleging that the pistol was a deadly weapon, is insufficient. *Key v. S.* 12 App. 506; *Mills v. S.* 23 App. 410; *Williamson v. S.* 5 App. 485; *Wilks v. S.* 3 App. 34. It need not allege that the assault was committed under “circumstances not amounting to an intent to murder or maim.” *Brown v. S.* 2 App. 61; *Hunt v. S.* 6 App. 663; *S. v. Franklin*, 36 Tex. 155. Nor is it necessary, if the assault was committed with a fire-arm, to allege that the same was loaded, or that the assaulted party was within carrying distance of the weapon. *Burton v. S.* 3 App. 408; *Rainbolt v. S.* 34 Tex. 286. Where it was alleged that the assault was committed with a pistol, and that the defendant did shoot at the assaulted party, with intent to kill, it was held that this sufficiently charged an aggravated assault; and it was further held that it was not necessary to allege that the assault was unlawful. *S. v. Sutterloh*, 23 Tex. 10. A “deadly weapon” is one which, in the manner used, is likely to produce death, or serious bodily injury. *Skidmore v. S.* 43 Tex. 93; *Kouns v. S.* 3 App. 13; *McReynolds v. S.* 4 App. 327. A fire-arm is not necessarily a deadly weapon. Whether or not in the particular case, it was a deadly weapon must depend upon its size, or the manner of its use. *Skidmore v. S.* 43 Tex. 94; *Key v. S.* 12 App. 506; *Shadle v. S.* 34 Tex. 572; *S. v. Franklin*, 36 Tex. 155; *Hunt v. S.* 6 App. 663. So, a chair is not necessarily a deadly weapon. *Kouns v. S.* 3 App. 13. Nor is “a black jack pole used as a fence rail.” *Wilson v. S.* 15 App. 150.

§845—**When committed with premeditated design.**—An assault is not necessarily aggravated because committed by the use of means calculated to inflict great bodily injury. It must also be committed with premeditated design. *Pinson v. S.* 23 Tex. 579. An aggravated assault under this subdivision may be committed with the fists. *Keley v. S.* 12 App. 245. An indictment under this subdivision is not duplicitous because it alleges that the assault was committed with a deadly weapon. *Coney v. S.* 2 App. 62.

§846—**Evidence.**—The circumstances of aggravation must be proved as alleged, not other circumstances. *Pinson v. S.* 23 Tex. 579; *McGrew v. S.* 19 App. 302. If the assault is alleged to have been committed with a specific weapon, it must be so proved. *McGee v. S.* 5 App. 492. And proof that the defendant had another weapon which he did not attempt to use, is inadmissible. *Briggs v. S.* 6 App. 144. But if he used or attempted to use such other weapon in the commission of the assault, it is admissible as *res gestæ*, and to show criminal intent. *Cesure v. S.* 1 App. 20; *Richards v. S.* 3 App. 424. If the charge is that the assault was committed with a deadly weapon, it must be proved that the weapon was deadly when used in the manner in which it was used, or attempted to be used. *Wilson v. S.* 15 App. 150; *Hilliard v. S.* 17 App. 210; *Hunt v. S.* 6 App. 663; *Key v. S.* 12 App. 506; *McGrew v. S.* 19 App. 302. The locality and character of the wounds inflicted is competent evidence to prove that the weapon used was a deadly one, and may be sufficient. *Briggs v. S.* 6 App. 144. If the assault was with a fire-arm the State need not prove it was loaded; if unloaded the burden is upon the defendant to prove it. *Crow v. S.* 41 Tex. 468; *Caldwell v. S.* 5 Tex. 18. Language used by both parties, at and immediately after the difficulty, is competent evidence. *Colquitt v. S.* 34 Tex. 550. But that the assaulted party had accused the defendant of theft, was held immaterial, although communicated to the defendant. *Boone v. S.* 31 Tex. 557. So, also, was evidence that since the assault, the assaulted party had threatened to poison the defendant. *Booker v. S.* 4 App. 564. The assaulted party may testify as to the ownership of the *locus* of the assault. *Tucker v. S.* 6 App. 251. What the assaulted party told a witness about the assault the day after the occurrence, is hearsay, and inadmissible in his behalf. *Gonzales v. S.* 16 App. 152. Where the defendant is charged with an assault on a female, it is not competent for the State to put in evidence complaints made by the injured female immediately after the assault, unless they come within the rule of *res gestæ*. *Veal v. S.* 8 App. 47. Where the assault charged is one made by an adult male upon a female, it must be proved that the defendant at the time of the assault was twenty-one years of age. *George v. S.* 11 App. 95; *Andrews v. S.* 13 App. 343. But the sex of the parties need not be proved directly. Thus, where the parties being in court, the defendant was spoken of in the evidence as “a man who wore whiskers” and “kept a hotel,” and the party assaulted was called “Nancy” and referred to in the evidence as “she,” it was held that this was sufficient proof of the sex of the parties. *Tracy v. S.* 44 Tex. 9. So where it was proved that the defendant was a man—a presiding elder—a preacher, and that the female was a wife and mother. *Veal v. S.* 8 App. 47. See also *Davis v. S.* 6 App. 133; *Gaston v. S.* 11 App. 143. But see also *Hall v. S.* 16 App. 6, for evidence held insufficient to show that the defendant was an adult male. Where the charge was an assault upon a child, and on the trial the witnesses all referred to and called the assaulted party “a boy,” it was held that this was sufficient proof that such assaulted party was a child. *Bell v. S.* 18 App. 53. In such a case the statements of a child made two or three nights after the assault as to his physical condition, were held to be inadmissible in evidence. *Dowlen v. S.* 14 App. 61. For other decisions relating to evidence in prosecution for assaults. See *Ante*, § 828 and *Post*, 861, 868.

For evidence held sufficient. See *Brown v. S.* 16 Tex. 122; *Mooring v. S.* 42 Tex. 85; *Young v. S.* 44 Tex. 98; *Risberry v. S.* 1 App. 664; *Dunman v. S.* Id. 593; *Skidmore v. S.* 2 App. 20; *Coney v. S.* Id. 62; *Bligham v. S.* 6 App. 169; *Cator v. S.* 4 App. 87; *Johnson v. S.* 7

App. 210; *Atkins v. S.* 11 App. 8; *Jones v. S.* 12 App. 156; *McMahan v. S.* 16 App. 357; *Bell v. S.* 18 App. 53; *Coker v. S.* 22 App. 20. For evidence held insufficient. See *Chamberlain v. S.* 2 App. 451; *Young v. S.* 7 App. 75; *Pease v. S.* 13 App. 18; *Osborne v. S.* 14 App. 225; *Hall v. S.* 16 App. 6; *McGrew v. S.* 19 App. 302; *Metcalf v. S.* 21 App. 174; *Pederson v. S.* Id. 485; *George v. S.* Id. 315; *Hutton v. S.* 23 App. 386.

§847 — **Charge of the court.** — The charge must be confined to the particular ground, or grounds, of aggravation alleged in the indictment. *Kouns v. S.* 3 App. 13; *Stanfield v. S.* 43 Tex. 167; *Ferguson v. S.* 4 App. 156; *McGregor v. S.* Id. 599; *Coney v. S.* 43 Tex. 414; *Williams v. S.* 8 App. 367; *Kennedy v. S.* 9 App. 399; *Hunt v. S.* Id. 404; *Reid v. S.* Id. 472; *Clubb v. S.* 14 App. 192. A charge which substantially directs the jury that they must convict the defendant of either an aggravated, or a simple assault, leaving them no option to acquit, is erroneous. *Kennedy v. S.* 9 App. 399. "If you believe that an offense has been committed you may find the defendant guilty," etc., was held to be erroneous, because it did not require the jury to believe that the defendant, and none other, committed the offense. *Reid v. S.* 9 App. 472. Where the assault charged was upon a female, and the proof was that she was fifteen years old, and lived with the defendant, who was her brother, and who furnished her with board, lodging, clothing and schooling, it was held that the court should have charged the parental right of correction recognized by art. 490. *Snowden v. S.* 12 App. 105. Where the indictment was for an assault upon a child, and the proof showed that the defendant was but eighteen years of age, the court should have charged that a person under twenty-one years of age could not be convicted of an aggravated assault. *Schenault v. S.* 10 App. 410. Where the evidence demands it, it is error to refuse to instruct that the defendant may be convicted of a simple assault. *Key v. S.* 12 App. 506. But where the evidence is clear and sufficient that the defendant is guilty of an aggravated assault, a charge upon simple assault need not be given. *Jackson v. S.* 25 Tex. Sup. 229; *Chambers v. S.* 42 Tex. 254. Where the testimony tended strongly to show that the alleged injured party was beyond the reach of danger from the means used, the charge should have explained the statutory meaning of "coupled with an ability to commit" the assault. *Boles v. S.* 18 App. 422. On the trial of B, charged with an aggravated assault on C, there was evidence that C was attempting to strike B with a stout walking-stick at the time B stabbed him with a pocket-knife. Held, that it was error to charge "if you believe that B stabbed C without C striking him with the stick, you will find him guilty of an aggravated assault." *McFarlin v. S.* 41 Tex. 23. Where the assault charged was with a pistol, the jury propounded to the court the question, "Is a pistol a deadly weapon, the size not known, and not known whether empty or loaded?" The court answered, "A pistol is a deadly weapon." Held, error. *Skidmore v. S.* 43 Tex. 94. Where the defendant is charged with an assault with intent to murder, and convicted of an aggravated assault, the omission to give in charge the elements of murder is immaterial. *Haynes v. S.* 2 App. 84. The jury should be instructed as to the meaning of the phrase "deadly weapon," where it is charged that the assault is committed with such a weapon. *Kouns v. S.* 3 App. 13. When there is no controversy as to the sex of the parties the charge may assume their sex as alleged. *Davis v. S.* 6 App. 133. If a question arise as to the name of the assaulted party, the charge should submit it to the jury. *Bell v. S.* 25 Tex. 574. It is fundamental error to misstate the penalty in the charge. *Bostick v. S.* 22 App. 136; *Gardenhire v. S.* 18 App. 565; *Howard v. S.* Id. 344; *Veal v. S.* 8 App. 477.

§848 — **ART. 497. — Aggravation may be of different degrees.** — The circumstances of aggravation mentioned in the preceding article are of different degrees, and the jury are to consider these circumstances in forming their verdict and assessing the punishment. [O. C. 489.]

§849 — **ART. 498. — Punishment.** — The punishment for an aggravated assault or battery shall be fine not less than twenty-five nor more than one thousand dollars, or imprisonment in the county jail not less than one month, nor more than two years, or by both such fine and imprisonment. [O. C. 491.]

Penalty changed in revising. The penalty formerly was a fine not less than \$100, nor more than \$1,000, and the jury might add imprisonment in the county jail not exceeding two years.

### CH. 3. — OF ASSAULTS WITH INTENT TO COMMIT SOME OTHER OFFENSE.

ART.		SEC.	ART.		SEC.
499.	Assault with intent to maim.	850		Fact cases.	862
	Specific intent.	851		Charge of the court.	863
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	Malice.	860		Other decisions.	872
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§850 — ART. 499. — **Assault with intent to maim.** — If any person shall assault another with intent to commit the offense of maiming, disfiguring or castration, he shall be punished by fine not exceeding one thousand dollars, or by imprisonment in the penitentiary not less than two nor more than five years; and if such assault be made by a person or persons in disguise, the penalty shall be double. [O. C. 492, amended Act Nov. 6, 1871, p. 20.]

Indictment, Willson's Cr. Forms, 356. See Maiming, etc.

§851 — **Specific intent.** — To constitute this offense there must be a *specific intent* to maim, disfigure, or castrate. See succeeding chapter for definitions of maiming, disfiguring and castration.

§852 — ART. 500. — **With intent to murder.** — If any person shall assault another with intent to murder, he shall be punished by confinement in the penitentiary not less than two nor more than seven years; if the assault be made with a bowie-knife or dagger, or in disguise, the punishment shall be double. [O. C. 493, amended Act Nov. 6, 1871, p. 20.]

Indictment, Willson's Cr. Forms, 357. See MURDER.

§853 — **Indictment.** — The same particularity is not required in charging this offense as is required in charging murder. *Croft v. S.* 15 Tex. 576; *S. v. Jennings*, 35 Tex. 503; *S. v. Wall*, Id. 484. It is not necessary to state the instrument or means used in making the assault. The weapon need not be named, or the manner in which it was used or attempted to be used, or that the defendant was in "carrying distance of the assaulted party." *S. v. Croft*, 15 Tex. 575; *S. v. Peters*, 36 Tex. 325; *James v. S.* Id. 645; *S. v. Kilbough*, 32 Tex. 78; *Bittick v. S.* 40 Tex. 117; *Martin v. S.* Id. 19; *Mayfield v. S.* 44 Tex. 59; *Nash v. S.* 2 App. 362; *Hines v. S.* 3 App. 483; *Montgomery v. S.* 4 App. 140; *Payne v. S.* 5 App. 35; *Davis v. S.* 20 App. 302; *Price v. S.* 22 App. 110. Except where the assault is committed with bowie knife or dagger or in disguise. In which cases double punishment cannot be inflicted unless the means be alleged. *Garcia v. S.* 19 App. 389. The intent to murder must be alleged. *S. v. Johnston*, 11 Tex. 22; *S. v. Nations*, 31 Tex. 561; *Bartlett v. S.* 21 App. 500. And must allege expressly whom the defendant intended to kill. It cannot be inferred that he intended to kill the person alleged to have been assaulted. *Wimberly v. S.* 7 App. 328; *S. v. Nations*, 31 Tex. 561. To allege that the intent was to "kill and murder" is not bad. The words "kill and" may be rejected as surplusage. *Meredith v. S.* 40 Tex. 480. It need not charge that the assault was "feloniously" committed. *Posey v. S.* 32 Tex. 477. Nor that it was committed with "malice aforethought." *Martin v. S.* 40 Tex. 19; *S. v. Jennings*, 35 Tex. 503; *Lyons v. S.* 9 App. 636; *Gordon v. S.* 23 App. 219; *Mills v. S.* 13 App. 487. It may charge an assault on two persons with intent to murder one of them. *S. v. Simson*, 32 Tex. 98. "Did commit and assault" is not a fatal defect. *Martin v. S.* 40 Tex. 19. Where the charge was an assault on Rolan Person's, and the indictment alleged the intent to be to murder Rolan Person, it was held that the indictment was not vitiated by omitting the last letter of the assaulted party's name. *Hart v. S.* 33 Tex. 382. The indictment need not allege all of the parties who participated in the assault in order to admit evidence that a party not on trial and not named in the indictment committed the offense, while the accused was present aiding and abetting in its commission. *Mills v. S.* 13 App. 487.

For indictments held to be good, see *Peters v. S.* 36 Tex. 325; *James v. S.* Id. 645; *Bittick v. S.* 40 Tex. 117; *Walker v. S.* Id. 485; *Mayfield v. S.* 44 Tex. 59; *S. v. Jennings*, 35 Tex. 503; *Warfield v. S.* Id. 736; *Meredith v. S.* 40 Tex. 480; *Crane v. S.* 41 Tex. 494; *Johnson v. S.* 1 App. 130; *Montgomery v. S.* 4 App. 140; *Gordon v. S.* 23 App. 219. For indictments held bad, see

*Jones v. S.* 21 App. 349; *Bartlett v. S.* Id. 500. Form No. 357 of Willson's Cr. Forms, for this offense, is approved in *Bartlett v. S.* 21 App. 500, and *Williams v. S.* Id. 497. A conviction for this offense may be had under an indictment for murder. *Morgan v. S.* 16 App. 593; *Peterson v. S.* 12 App. 650; *Sharp v. S.* 3 App. 138.

§854. — ART. 501. — “**Bowie knife**” and “**dagger**” defined. — A “**bowie-knife**” or “**dagger**,” as the terms are here and elsewhere used, means any knife intended to be worn upon the person, which is capable of inflicting death and not commonly known as a pocket-knife. [O. C. 611.]

§855 — **Bowie knife or dagger must be alleged.** — To authorize the infliction of the double punishment prescribed in case the assault is committed with a bowie-knife or dagger, or in disguise, the indictment must allege that it was so committed. *Garcia v. S.* 19 App. 389.

§856 — ART. 502. — **Test on trial.** — Whenever it appears upon a trial for assault with intent to murder that the offense would have been murder had death resulted therefrom, the person committing such assault is deemed to have done the same with that intent. [O. C. 497.]

§857 — **Construction of preceding article.** — **Must be a specific intent to kill.** — In order to constitute the offense of an assault with intent to murder two things must concur: 1. An assault; and 2, a specific intent to kill. Without a simultaneous concurrence of these two constituents elements, there can be no assault with intent to murder. No other intent save the specific one to kill, will be sufficient. If the intent is to maim, rob, rape, or other than kill, it will not be an assault with intent to murder. The intent may be to kill under circumstances which, if death ensued, it would not be murder. Such intent would not constitute the specific intent required in the offense. The preceding article of the Code is applicable only, where there exists the specific intent to kill. It is not applicable in any case where such intent does not exist. It simply prescribes a test by which to determine whether there was an offense, and if so, what offense; but in thus affording a test does not dispense with the very gist of the offense, that is, a specific intent to kill. *White v. S.* 13 A. 259; *Harrill v. S.* Id. 374; *Gillespie v. S.* Id. 415; *Courtney v. S.* Id. 502; *Davis v. S.* 15 App. 475; *Prewitt v. S.* 20 App. 129; *Long v. S.* 36 Tex. 6.

§858 — **Includes lower degrees of assault.** — This offense includes an aggravated assault, an aggravated assault and battery, a simple assault, and a simple assault and battery, and a conviction may be had for either of those minor offenses under an indictment charging an assault with intent to murder. *Bolding v. S.* 23 App. 172; *Davis v. S.* 20 App. 302; *Jones v. S.* 21 App. 349; *Peterson v. S.* 12 App. 650; *Garcia v. S.* 19 App. 389; *Henderson v. S.* 2 App. 89; *Bittick v. S.* 40 Tex. 117; *James v. S.* 36 Tex. 645; *Gardenheir v. S.* 6 Tex. 342; *Givens v. S.* Id. 344; *Johnson v. S.* 17 Tex. 515; *Reynolds v. S.* 11 Tex. 120; *Posey v. S.* 33 Tex. 343; *Montgomery v. S.* 4 App. 140; *Moore v. S.* 7 App. 14; *C. C. P.* art. 714. But under an indictment for this offense a conviction cannot be had for unlawfully carrying arms. *Thomas v. S.* 40 Tex. 36.

§859 — **The offense — Decisions as to.** — If the assault is voluntary, committed with deliberate design, and with an instrument capable of producing death, in such manner as evidences an intention to take life, and there are no extenuating circumstances, it is an assault with intent to murder. *Yanez v. S.* 20 Tex. 656. The intent is an essential ingredient of the offense and a material inquiry for the jury, under appropriate instructions as to malice and murder. *Auderson v. S.* 1 App. 730; *Lockwood v. S.* Id. 749; *Agitone v. S.* 41 Tex. 501; *Walker v. S.* 7 App. 627; *Aute, § 857.* If the defendant attempted to shoot the assaulted party with intent to kill him, and in such attempt was actuated by malice aforethought, and under circumstances which if the death of the assaulted party had resulted, the homicide would have been murder; but was prevented by any cause from effecting his purpose, he would be guilty of an assault with intent to murder. *Miller v. S.* 15 App. 125. Where it was proved that the defendant, while drunk, shot at a friend and missed him, the material question for the jury to determine was, whether he shot intending to hit, or whether the act was done in a spirit of drunken bravado. *Walker v. S.* 7 App. 627. Where A. and B. agree to fight with knives, and, proceeding to the place agreed upon, A. strikes B. with his knife, and B. draws a pistol and shoots A. and continues to shoot at him while he is retreating, B. is guilty of an assault with intent to murder. *King v. S.* 4 App. 54. Administering poison with malicious intent is not an assault with intent to murder. It is a different and more heinous offense. *Garnet v. S.* 1 App. 605; *Post, art. 542.* Murder, and an assault with intent to murder, are not offenses of the same nature within the meaning of art. 819 of this Code. *Long v. S.* 36 Tex. 6. An assault committed in a mutual combat will not be reduced to an aggravated assault unless committed under the influence of sudden passion arising from an adequate cause. *Spearman v. S.* 23 App. 224; *Crist v. S.* 21 App. 361. If one in committing an assault with intent to murder, accidentally kill a third party, he is guilty of murder in the second degree. *McConnell v. S.* 13 App. 390; *Leggett v. S.* 21 App. 382.

§860 — **Malice.** — Malice is as much an ingredient of this offense as it is of murder. *Hodges v. S.* 3 App. 470; *Daniels v. S.* 4 App. 429; *Garza v. S.* 11 App. 345; *Bobb v. S.* 12 App. 491; *Caruthers v. S.* 13 App. 339. Malice is that condition of the mind which shows a heart regardless of social duty and fatally bent on mischief, the existence of which condition is inferred from acts done, or words spoken. *Harris v. S.* 8 App. 90; *McKinney v. S.* Id. 626; *Bramlette v. S.* 21 App. 611.



**§861 — Evidence.**—To establish this offense the evidence must show that had the death of the assaulted party resulted from the assault the homicide would have been murder. *S. v. Kellogg*, 32 Tex. 74; *Yanez v. S.* 20 Tex. 656. Either in the first or second degree. *Stapp v. S.* 3 App. 138; *Wilson v. S.* 4 App. 637. The evidence must show a specific intent to kill the person assaulted. *Jobe v. S.* 1 App. 183, and cases cited in § 857, Ante. And malice must be proved as in murder. See cases cited in preceding section. It is proper to allow the State to prove that another person than the defendant actually committed the assault, and that the defendant was present aiding and abetting in its commission, although it is not so alleged in the indictment, and although such other person is not charged with the offense. *Mills v. S.* 13 App. 487. The defendant was a watchman at a railroad freight depot, and in the night time fired upon and wounded two persons passing near the depot. Held, that as tending to throw light upon defendant's motive in shooting, and in mitigation, if not justification of the act, he was entitled to prove that there had been a great deal of car-breaking and stealing from the cars at night at said depot a short time previous to the shooting. *Hobbs v. S.* 16 App. 517. Where the defense relied upon was self-defense, the defendant proposed to prove that on the day after the assault there were cuts upon his neck and through his coat, and that there were no such cuts upon his person or clothing previous to the assault, and that he told witnesses who saw these cuts that they were inflicted during the rencontre with the assaulted party, and before the assault was committed by defendant in the same rencontre. Held, the statements of defendant were self-serving declarations, were not *res gestæ*, and were properly rejected; but that the evidence as to the cuts upon his person and clothing was admissible, and should not have been rejected. The objection that such evidence is easily fabricated goes to its credibility and not to its competency. *Good v. S.* 18 App. 39. Evidence of a previous difficulty on the preceding day between the same parties was held admissible. *Carr v. S.* 41 Tex. 593. The attempted use of another weapon than the one alleged may be proved, but where the indictment charged that the assault was with a knife, proof that it was with a gun did not sustain the charge. *Weaver v. S.* 24 Tex. 387. Evidence of the official character of the party assaulted is admissible though not alleged; *Hodges v. S.* 6 App. 615; as is also evidence of circumstances constituting aggravated assault. *Moore v. S.* 7 App. 14. The opinion of a witness as to the deadly character of a tumbler, is not admissible; but where the witness testified that he caught the arm of the assailed as he seized a tumbler, he may state why he did so. *Thomas v. S.* 40 Tex. 36. The declarations of the assaulted party, made after the difficulty, are, ordinarily, incompetent. *Meredith v. S.* 40 Tex. 480. But see an instance where such declarations were held admissible as *res gestæ*, and as *indicia* of the intent of the assaulted party. *Black v. S.* 8 App. 329. And the statements of the defendant about the difficulty are not admissible in his behalf unless they come within the rule of *res gestæ*. *Johnson v. S.* 1 App. 130. But where the State elicited certain words and actions of the defendant preparatory to the difficulty, and that a remark was made by him as he took up the weapon with which the assault was alleged to have been committed, he was entitled to have that remark in evidence on cross-examination. *Taliaferro v. S.* 40 Tex. 523. And where the assaulted party testifies that he has no ill-feeling toward the defendant, his declarations to a contrary effect made before the difficulty are admissible. *McFarlin v. S.* 41 Tex. 23. Articles 611 and 612 of this Code, which authorize a defendant, after laying certain predicates, to prove threats made by the deceased, and the general character of the deceased as a violent or dangerous man, are applicable in prosecutions for this offense. *Bingham v. S.* 6 App. 169; post, § 984. But the character of the injured party, and threats made by him, are immaterial, unless they might have influenced the defendant's act. *Henderson v. S.* 12 Tex. 525; *Murray v. S.* 36 Tex. 642. For other decisions relating to evidence, and which are applicable to this offense, see Post, § 984. And for decisions as to defenses and other procedure pertinent to this offense, see JUSTIFIABLE HOMICIDE—MANSLAUGHTER—MURDER.

**§862 — Fact cases.**—For evidence held sufficient to sustain conviction, see *Yanez v. S.* 20 Tex. 656; *Meredith v. S.* 40 Tex. 480; *Ridens v. S.* 41 Tex. 199; *Crane v. S.* Id. 494; *Carr v. S.* Id. 543; *Young v. S.* 44 Tex. 98; *Pugh v. S.* 2 App. 539; *Stapp v. S.* 3 App. 138; *King v. S.* 4 App. 54; *Collins v. S.* 6 App. 72; *Ferguson v. S.* Id. 504; *Jones v. S.* 13 App. 1; *Meyers v. S.* Id. 14 App. 85; *Johnson v. S.* Id. 306; *Taylor v. S.* 17 App. 46. For evidence held insufficient see *McGuire v. S.* 43 Tex. 210; *Burch v. S.* Id. 376; *Roseborough v. S.* Id. 570; *Jobe v. S.* 1 App. 183; *Ewing v. S.* 4 App. 417; *Black v. S.* 8 App. 329; *Rutherford v. S.* 13 App. 92; *Garcia v. S.* 23 App. 712.

**§863 — Charge of the court.**—Ordinarily the charge should inform the jury what is murder, and what facts constitute that offense. *Lockwood v. S.* 1 App. 750; *Haynes v. S.* 2 App. 84. And it should define or explain what an assault is. *Campbell v. S.* 9 App. 147; *Driskill v. S.* 22 App. 60. And it must explain the term malice. *Smith v. S.* 1 App. 517; *Anderson v. S.* Id. 731; *Williams v. S.* 3 App. 316; *Hodges v. S.* Id. 470; *Ewing v. S.* 4 App. 417; *Wilson v. S.* Id. 637; *Johnson v. S.* Id. 598; *Daniels v. S.* Id. 429; *Caruthers v. S.* 13 App. 339; *Hayes v. S.* 14 App. 330. But it is not necessary to explain the distinction between express and implied malice, as the existence of either kind of malice will be sufficient to constitute this offense. *Anderson v. S.* 1 App. 731; *Wilson v. S.* 4 App. 637. It must instruct the jury that to constitute the offense there must have existed in the mind of the defendant at the time of committing the assault, a specific intent to kill the person assaulted. *Pruitt v. S.* 20 App. 129; *Davis v. S.* 15 App. 475; *White v. S.* 13 App. 259; *Gillespie v. S.* Id. 415; *Jobe v. S.* 1 App. 750. It is ordinarily error to give in charge art. 51 of this Code devolving upon the defendant the burden of proving excuse or justification. *Jones v. S.* 13 App. 1. The court instructed the jury that, "malice is when one with a sedate and deliberate mind and formed design kills another, and such killing is murder." Held, erroneous, inasmuch as killing, to constitute murder, must have been committed unlawfully, and under circumstances which do not excuse or justify the

act. *Pickens v. S.* 13 App. 353. For an inadequate, and incorrect definition of malice, see *Hayes v. S.* 14 App. 330. The law of manslaughter, or aggravated assault need not and should not be charged, when the facts do not raise the issue. *Anderson v. S.* 15 App. 447; *Hines v. S.* 3 App. 484; *Winn v. S.* 5 App. 621; *Carr v. S.* 41 Tex. 544. When the facts demand a charge submitting the issue of aggravated assault, it is not necessary that the definition of manslaughter be given if the law of aggravated assault is otherwise adequately explained. *Wilson v. S.* 4 App. 637. When the court charges as to the law of manslaughter, but fails to instruct as to what the verdict should be in case the killing would have been manslaughter, it is an erroneous charge. *Hodges v. S.* 3 App. 470. In a proper case the charge should define the term "deadly weapon." *Kouns v. S.* 3 App. 13. The charge must instruct correctly as to the penalty. *Howard v. S.* 18 App. 348. For other decisions relating to charges pertinent to this offense, see Post, §§ 869, 891.

§864—**Verdict.**—"We, the jury, find the defendant guilty of an assault with intent to kill," etc., is not a good verdict. *Long v. S.* 34 Tex. 566; *Sheffield v. S.* 1 App. 640. And a verdict "guilty of an attempt to commit an assault" is bad. *White v. S.* 22 Tex. 608. But "guilty of an assault with attempt to murder" was held sufficient. *Hart v. S.* 38 Tex. 382. It is not essential that the verdict should name the offense of which it finds the defendant guilty. A general verdict of "guilty as charged in the indictment," and assessing the punishment is sufficient. *Henderson v. S.* 5 App. 134; *Nettles v. S.* Id. 386.

§865 — **ART. 503.— With intent to rape.**—If any person shall assault a woman with intent to commit the offense of rape, he shall be punished by confinement in the penitentiary not less than two nor more than seven years. [O. C. 494. See §914.]

Indictment, Willson's Cr. Forms, 358; see RAPE.

§866 — **Indictment.**—Form No. 358 of Willson's Cr. Forms, for this offense, is approved in *Lights v. S.* 21 App. 308. The indictment need not allege that the accused is a male, or that the assaulted female is a person in being. See an indictment held to be sufficient. *Greenlee v. S.* 4 App. 845. It need not allege that the assaulted party was a woman or female, if that fact appears from all that is stated in the indictment, but it is better to make the direct allegation of the fact. See indictment held sufficient. *Battle v. S.* 4 App. 595; *Jones v. S.* 18 App. 485. It must allege the essential elements of rape, and among them the means, force, threats, or fraud, by which the rape was intended to be accomplished. An allegation that the accused "did ravish" has been held to imply force and violence, and want of the female's consent; but such implications are not to be deduced from the allegation that he "did rape." See this case for an indictment held to be bad. *Hewitt v. S.* 15 App. 80. Where the assault is upon a female under the age of ten years, it is unnecessary to allege the means by which the rape was intended to be accomplished, or that it was without the consent of the female. In such case these allegations should not be made. *Moore v. S.* 20 App. 275. An indictment which contains no allegation of the non-age of the assaulted female, but charges that the assault was committed with the intent to carnally know her by force, without her consent, charges an assault with intent to rape a female over the age of ten years, and whatever may be the age of the female, devolves upon the State the burden of proving that the assault was made with the intent to commit rape by force, and without consent of the female. Such allegations being descriptive of the offense must be proved. *Moore v. S.* 20 App. 275; *Mosely v. S.* 9 App. 137. Where the assaulted party is alleged to be a "female," this is equivalent to alleging her to be a "woman" and is sufficient. But if the assault was upon a "female under the age of ten years" the indictment should so allege. See an indictment held to be sufficient. *Gibson v. S.* 17 App. 574. In the case last cited it is said that the word "ravish" or "ravished" is essential in all indictments for rape, or for assault with intent to rape. But this expression seems to be in conflict with all the other decisions, and with later decisions of the same court with reference to this offense. If the word "ravish" or "ravished" is used, however, it implies force, and the want of consent of the assaulted party. *Davis v. S.* 42 Tex. 226; *Williams v. S.* 1 App. 90; *Mayo v. S.* 7 App. 342; *Hewitt v. S.* 15 App. 80.

§867 — **What constitutes this offense.**—This offense is constituted by the use of any threatening gesture, showing in itself, or by words accompanying it, an immediate intention, coupled with an ability, to have carnal knowledge of a woman by force, without her consent. *Jones v. S.* 18 App. 485. This offense can only be committed by means of force or attempted force. It cannot be committed by threats or fraud. *Milton v. S.* 23 App. 204; *Burney v. S.* 21 App. 565; *Taylor v. S.* 22 App. 529. Carnal knowledge of a female under the age of ten years, whether it is had with or without her consent, is rape *per se*, and an assault upon such a female with intent to rape, constitutes this offense *per se*. *Moore v. S.* 20 App. 275. The force used, or attempted to be used, must be such as might reasonably be supposed sufficient to overcome resistance, considering the relative strength of the parties, and other circumstances of the case. *Saddler v. S.* 12 App. 194; Post, art. 529. The assault must be committed with the specific intent to rape. No other intent will suffice. Thus an assault with intent to have an improper connection with a woman, but without the use of force, and not without the consent of the woman, would not be an assault with intent to rape. *Thomas v. S.* 16 App. 535; *Curry v. S.* 4 App. 574; *Pefferling v. S.* 40 Tex. 486; *Sandford v. S.* 12 App. 196; *Irving v. S.* 9 App. 66; *McGee v. S.* 21 App. 670; *Jones v. S.* 18 App. 485; *Veal v. S.* 8 App. 474; *Thompson v. S.* 43 Tex. 583. Under an indictment for this offense a conviction may be had for an aggravated or a simple assault. *Brown v. S.* 7 App. 569; *Curry v. S.* 4 App. 574. But not for an attempt to commit

rape. Milton v. S. 23 App. 204; Taylor v. S. 22 App. 529; Burney v. S. 21 App. 565; Brown v. S. 7 App. 569; Williams v. S. 1 App. 90.

§868 — **Evidence.** — The burden of proof to show the criminal intent is upon the State, and evidence showing a mere possibility of the existence of such intent is insufficient. House v. S. 9 App. 567. The evidence must show that the assault was committed with the specific intent to commit rape. See the cases cited in the last portion of the preceding section. When the indictment does not allege that the female assaulted was under the age of ten years, the State must prove that the assault was made without her consent and with intent to commit rape by force although it be shown that she was under said age. Moore v. S. 20 App. 275; Mosely v. S. 9 App. 137. The mother of the alleged injured female was permitted to testify for the State, to the particulars of the complaint made to her by such party on the morning after the night of the alleged assault. Held, error. Such evidence is admissible only when the statements of the alleged injured party are within the rule of *res gestæ*. McGee v. S. 21 App. 670. For evidence held sufficient, see Dibrell v. S. 3 App. 456; Doyle v. S. 5 App. 442; Grimmer v. S. 22 App. 36; Stout v. S. Id. 339. For evidence held to be insufficient, see House v. S. 9 App. 53; Sanford v. S. 12 App. 196; Peterson v. S. 14 App. 162; Thomas v. S. 16 App. 535; Johnson v. S. 17 App. 565; Jones v. S. 18 App. 485; Moore v. S. 20 App. 275; Pless v. S. 23 App. 73.

§869 — **Charge of the court.** — The charge should define an assault. Hemanus v. S. 7 App. 372. And also rape, and its constituents. Fulcher v. S. 41 Tex. 233. It should instruct the jury that there must have existed in the mind of the defendant, at the time of the alleged assault, a specific intent to commit rape by force. Burney v. S. 21 App. 565; McGee v. S. Id. 670; Irving v. S. 9 App. 66. It should not instruct that when the assault has been proved, it rests with defendant to show accident or innocent intention. Thomas v. S. 16 App. 535; Jones v. S. 13 App. 1; Curry v. S. 4 App. 574. Unless an issue of limitation of the offense be raised by the evidence, the charge may omit to instruct in regard thereto. Unlike the offense of rape, this offense is not barred until the lapse of three years after its commission. Moore v. S. 20 App. 275. It should charge the law of aggravated assault when the evidence raises that issue. McGee v. S. 21 App. 670. See §§ 863, 891.

§870 — **ART. 504. — With intent to rob.** — If any person shall assault another with the intent to commit the offense of robbery, he shall be punished by confinement in the penitentiary not less than two nor more than ten years. [O. C. 495, amended by Act Feb. 12, 1858, p. 495.]

The penalty under the original article was confinement in the penitentiary not exceeding three years. Indictment, Willson's Cr. Forms, 359, 360. See Robbery.

§871 — **Indictment.** — It is not necessary in an indictment for this offense to allege specifically that the assault was made with the intent to appropriate the property of the injured party to his own use. It is a sufficient allegation of intent, to allege that the assault was made with "intent to rob." Morris v. S. 13 App. 65.

§872 — **Other decisions.** — For a correct charge upon the issue of drunkenness, when interposed as a defense, see Scott v. S. 12 App. 81; and for evidence held sufficient to sustain a conviction, see same case. For evidence held insufficient, see Robertson v. S. 15 App. 602. For other decisions pertinent to this offense, see ROBBERY.

§873 — **ART. 505. — In attempt at burglary.** — If any person in attempting to commit burglary shall assault another, he shall be punished by confinement in the penitentiary not less than two nor more than five years. [O. C. 496, amended by Act Feb. 12, 1858, p. 171.]

The penalty under the original article was confinement in the penitentiary not exceeding three years. Indictment, Willson's Cr. Forms, 361. See BURGLARY.

§874 — **ART. 506. — Ingredients of the offense.** — An assault with intent to commit any other offense is constituted by the existence of the facts which bring the offense within the definition of an assault, coupled with an intention to commit such other offense, as of maiming, murder, rape or robbery. [O. C. 499.]

§875 — **Construction of preceding article.** — The proper construction, with reference to an indictment, of the preceding article is, that it is only necessary in charging an assault with intent to commit some other offense, to allege an assault, coupled with an intention to commit such other offense, naming it, without alleging the constituent elements of such other offense. Wherever the offense is defined, as is the case in murder, rape, robbery, etc., in charging assaults with intent to commit these offenses, it is only necessary to charge the assault, and the intent to commit the offense, naming such offense. Morris v. S. 13 App. 65; Martin v. S. 40 Tex. 19; Bittick v. S. 40 Tex. 117; Long v. S. 10 App. 186; S. v. Croft, 15 Tex. 576; Lights v. S. 21 App. 308. But see Hewitt v. S. 15 App. 80, which does not seem to be in harmony with the above cited decisions.

## CH. 4.—OF MAIMING, DISFIGURING AND CASTRATION.

ART.	SEC.	ART.	SEC.
507. "Maiming" defined.	876	510. Punishment.	880
Decisions as to.	877	511. "Castration" defined.	881
508. Punishment.	878	512. Punishment.	882
509. "Disfiguring" defined.	879		

§876 — ART. 507.—"Maiming" defined. —To maim is to willfully and maliciously cut off or otherwise deprive a person of the hand, arm, finger, toe, foot, leg, nose or ear; to put out an eye, or in any way to deprive a person of any other member of his body. [O. C. 500, changed in revising.]

Indictment, Willson's Cr. Forms, 362.

§877 — Decisions as to. — An indictment which, otherwise correct, charges the defendant with willfully and maliciously shooting off the toe of another, is sufficient to charge this offense. Under an indictment for this offense, the defendant cannot be convicted of an assault with intent to murder. See this case for evidence held sufficient to support the conviction. *Davis v. S.* 22 App. 45. The under lip is a member of the body, but not being specifically designated as such in the statute, its being so is a question of fact for the jury, under proper instruction, and must not be assumed in the charge. Biting off a portion of it is not necessarily maiming, but the jury should determine whether it was so injured as to substantially deprive the party of the lip at the time. If such an injury was inflicted the offense of maiming is complete, though the member was put back to its proper place and afterwards grew there. *Slattery v. S.* 41 Tex. 619. The charge should explain to the jury the terms "willfully" and "maliciously." *Davis v. S.* 22 App. 45.

§878 — ART. 508. — Punishment. — If any person shall commit the offense of maiming, he shall be punished by confinement in the penitentiary not less than two nor more than ten years. [O. C. 504, amended by Act Feb. 12, 1858, p. 171.]

§879 — ART. 509. — "Disfiguring" defined. — To disfigure is to willfully and maliciously place any mark by means of a knife or other instrument upon the face or other part of the person. [O. C. 501.]

Indictment, Willson's Cr. Forms, 363.

§880 — ART. 510. — Punishment. — If any person shall disfigure another, he shall be punished by confinement in the penitentiary not less than two nor more than five years, or by fine not exceeding two thousand dollars. [O. C. 504, amended by Act Feb. 12, 1858, p. 171.]

§881 — ART. 511. — "Castration" defined. — To castrate is to willfully and maliciously deprive any person of either, or both, or any part of either or both of the testicles. [Added in revising.]

Indictment, Willson's Cr. Forms, 364.

§882 — ART. 512. — Punishment. — If any person shall commit the offense of castration, he shall be punished by confinement in the penitentiary not less than five nor more than fifteen years. [O. C. 505.]

## CH. 5.—FALSE IMPRISONMENT.

ART.	SEC.	ART.	SEC.
513. "False imprisonment" defined.	883	Evidence.	890
514. Assault or violence, same as in assault and battery.	884	Charge of the court.	891
515. What imprisonment necessary.	885	518. Punishment.	892
516. Threat—Effect of.	886	519. Detention after discharge on <i>habeas corpus</i> .	893
517. What detention is not.	887	520. Refusal to allow consultation with counsel.	894
Indictment.	888		
What constitutes the offense.	889		

§883 — ART. 513.—"False imprisonment" defined.—False imprisonment is the willful detention of another against his consent, and where it is not expressly authorized by law, whether such detention be effected by an assault, by actual violence to the person, by threats or by any other means which restrains the party so detained from removing from one place to another as he may see proper. [O. C. 508.]

Indictment, Willson's Cr. Forms, 365-366-367.

§884 — ART. 514.—Assault or violence same as in assault and battery.—The assault or violence may be such as is spoken of in defining the offense of assault and battery. [O. C. 509.]

§885 — ART. 515.—What impediment necessary.—The impediment must be such as is in its nature calculated to detain the person, and from which he cannot by ordinary means relieve himself. [O. C. 510.]

§886 — ART. 516.—Threat—Effect of.—The threat must be such as is calculated to operate upon the person threatened, and inspire a just fear of some injury to his person, reputation or property, or to the person, reputation or property of another; and the jury are to consider the age, sex, condition, disposition or health of the person threatened, in determining whether the threat was sufficient to intimidate and prevent such person from moving beyond the bounds in which he was detained. [O. C. 511.]

§887 — ART. 517.—What detention is not.—It is not an offense to detain a person in the cases and for the objects mentioned in article 490, as justifying the use of force, but whenever it is assumed as a justification that such circumstances existed, it must be shown also that the detention was necessary to effect any of the objects set forth in said article. [O. C. 512.]

§888 — Indictment.—The indictment must allege the detention to have been without lawful authority, and the conclusion "contrary to the statute," etc., will not supply the omission of such allegation. *Redfield v. S. 24 Tex. 133*. It must allege the mode in which the detention was effected,—as by actual violence, assault, threats, or the like,—but need not further particularize it. And if threats be the mode alleged, it need not be averred that they were seriously made, or of such a character as to operate on the person threatened, or to inspire him with a just fear of injury to his person, reputation or property. *Maner v. S. 8 App. 361*. See a good indictment charging false imprisonment by means of threats. *Herring v. S. 3 App. 108*.

§889 — What constitutes the offense.—It is a sufficient imprisonment to stop a man from going in any direction he may think proper, and it is not necessary that he be detained in any particular spot, so he is prevented from moving from place to place, or in the direction he wishes to go. *Woods v. S. 3 App. 204*; *Hawkins v. S. 6 App. 452*; *Herring v. S. 3 App. 108*; *Maner v. S. 8 App. 361*; *Staples v. S. 14 App. 136*. The *gravamen* of this offense consists in the willful detention of another against his consent, and where it is not expressly authorized by law. *Maner v. S. 8 App. 361*. It is the willful and unauthorized detention of another against his consent, whether such detention be accomplished by actual violence, or by force of threats. *Herring v. S. 3 App. 108*; *Woods v. S. Id. 204*. Unavoidable delay of a peace officer in taking bail for a prisoner is not false imprisonment. *Cargill v. S. 8 App. 431*. Nor will a reasonable delay, and confinement in a calaboose when necessary. *Beville v. S. 16 App. 70*. The *posse comitatus* is protected by the officer's warrant, although he is not personally present, and the guilt or innocence of the party arrested is immaterial; but the rule is different with a mere volunteer. *Kirbie v. S. 5 App. 60*.

§890 — Evidence.—The State makes a *prima facie* case by proving the imprisonment, for imprisonment is presumed to be unlawful. It devolves upon the defendant to show that it was lawful. *Kirbie v. S. 5 App. 60*. The decision just cited is expressly qualified in a subsequent case, where it is

held that the defendant, in mitigation of the penalty, was entitled to prove that he arrested the injured party, believing, and having reason to believe, that such party was guilty of crime; and that legal proceedings for crime had been instituted against him, and the nature of such proceedings. This evidence was not admissible in justification, but in mitigation of the offense. The Code of Criminal Procedure, arts 226 to 229, inclusive, prescribes all the circumstances which justify an arrest without warrant, and under other circumstances than these an arrest without warrant is illegal. The fact that the defendant, when he made the arrest, was accompanied by, and acted in concert with an officer, in such case, affords no justification. *Staples v. S. 14 App. 136.* The authority to make an arrest need not be shown to be express. If, from all the circumstances, the law would authorize the arrest, by a fair construction, defendant would not be guilty, because the power was not expressly given. *Beville v. S. 16 App. 70.* When the alleged detention was by means of threats, it need not be proved that the threats were express, or that the injured party made any effort to escape the detention. *Herring v. S. 3 App. 108; Woods v. S. Id. 204.* Evidence to prove menaces made by the injured party while he was detained by the accused, is not admissible. *Harkins v. S. 6 App. 452.* For evidence held sufficient to support conviction, see *Herring v. S. 3 App. 108; Woods v. S. Id. 204; Harkins v. S. 6 App. 452; Geraux v. S. 40 Tex. 97.* For evidence held insufficient, see *Boyd v. S. 11 App. 80.*

**§891—Charge of the court.**—For a correct charge as to what constitutes detention see *Woods v. S. 3 App. 204*, and for a correct charge as to the rights of a person summoned by an officer to assist in an arrest see *Kirbie v. S. 5 App. 60.* See a state of facts upon which the court should have given a requested charge to the effect that where the alleged injured party was attempting to release by force a person whom the defendant, as city marshal, had arrested for being drunk on the streets and disturbing the peace, the defendant had the right, without warrant, to arrest such alleged injured party also, and confine him in jail. *Moseley v. S. 23 App. 409.* It was held error to charge that an officer's authority, in order to justify an arrest, must be *express*. *Beville v. S. 16 App. 70.* And it was error to instruct the jury that the punishment must be both fine and imprisonment. *Redfield v. S. 24 Tex. 133.*

**§892—ART. 518.—Punishment.**—Any person who shall be guilty of the offense of false imprisonment shall be fined not exceeding five hundred dollars, and may be confined in the county jail not exceeding one year. [O. C. 513.]

**§893—ART. 519.—Detention after discharge on habeas corpus.**—If any officer or other person shall hold or detain in any manner any one who has been ordered to be discharged by any court or judge, upon the hearing of a writ of *habeas corpus*, he shall suffer double the punishment prescribed in the preceding article. [O. C. 514.]

Indictment, Willson's Cr. Forms, 367.

**§894—ART. 520.—Refusal to allow consultation with counsel.**—If any officer, or other person having the custody of a prisoner in this State, shall willfully prevent such prisoner from consulting or communicating with counsel, or from obtaining the advice or services of counsel in the protection or prosecution of his legal rights, he shall be punished by imprisonment in the county jail not less than sixty days nor more than six months, and by fine not exceeding one thousand dollars. [Act Nov. 15, 1864, p. 15.]

Indictment, Willson's Cr. Forms 368.

## CH. 6. — OF KIDNAPPING AND ABDUCTION.

ART.	SEC.	ART.	SEC.
521. "Kidnapping" defined.	895	524. "Abduction" defined.	899
At common law.	896	525. Of female under fourteen.	900
522. Punishment.	897	526. Offense complete, when.	901
523. If person kidnapped be actually removed.	898	527. Punishment.	902

§895 — ART. 521. — "Kidnapping" defined. — When any person is falsely imprisoned for the purpose of being removed from the State, or if a minor under the age of seventeen years, for the purpose of being concealed or taken from the lawful possession of a parent or guardian, such false imprisonment is "kidnapping." If the person kidnapped be under the age of fifteen years, it is not necessary that there should be force in order to constitute the offense of kidnapping. [O. C. 515, amended by Act Feb. 12, 1858, pp. 171-172.]

Indictment, Willson's Cr. Forms, 369-370.

§896 — At common law. — At common law the offense of kidnapping is treated as an aggravated species of false imprisonment, and all the ingredients in the definition of the latter offense are necessarily comprehended in the former. The requisites of what was deemed necessary, or at least proper, in an indictment for kidnapping at the common law, would seem to be: 1st. An averment of an assault. 2d. The carrying away or transporting of the party injured, from his own country into another, unlawfully and against his will. It is not sufficient to charge a defendant with kidnapping generally, for he cannot thereby be apprised of the facts he will be required to answer, but the indictment should state specifically the facts and circumstances which constitute the offense. Click v. S. 3 Tex. 282.

§897 — ART. 522. — Punishment. — The punishment for kidnapping shall be imprisonment in the penitentiary not less than two nor more than five years, or fine not exceeding two thousand dollars. [O. C. 516.]

§898 — ART. 523. — If person kidnapped be actually removed. — If the person so falsely imprisoned be actually removed out of the State, the punishment shall be imprisonment in the penitentiary not less than two nor more than ten years. [O. C. 517.]

§899 — ART. 524. — "Abduction" defined. — "Abduction" is the false imprisonment of a woman, with intent to force her into a marriage, or for the purpose of prostitution. [O. C. 518.]

Indictment, Willson's Cr. Forms, 371-372.

§900 — ART. 525. — Of female under fourteen. — If a female under the age of fourteen be taken, for the purpose of marriage or prostitution, from her parent, guardian, or other person having the legal charge of her, it is abduction, whether she consent or not, and although a marriage afterward take place between the parties. [O. C. 519.]

Willson's Cr. Forms, 373.

§901 — ART. 526. — Offense complete, when. — The offense of abduction is complete if the female be detained as long as twelve hours, though she may afterwards be relieved from such detention without marriage or prostitution. [O. C. 520.]

§902 — ART. 527. — Punishment. — Any person who shall be guilty of abduction shall be punished by fine not exceeding two thousand dollars. If by reason of such abduction a woman be forced into marriage, the punishment shall be confinement in the penitentiary not less than two nor more than five years; and if by reason of such abduction a woman be prostituted, the punishment shall be confinement in the penitentiary not less than three nor more than twenty years. [O. C. 521, amended by Act Feb. 12, 1858, p. 172.]

## CH. 7. — RAPE.

ART.	SEC.	ART.	SEC.
528. "Rape" defined.	903	532. Penetration only need be proved.	912
Amendment, change made by.	904	Decisions as to penetration.	913
Indictment.	905	533. Defendant must be over fourteen.	914
529. Definition of "force."	906	Evidence.	915
Decisions as to force and resistance.	907	Charge of the court.	916
530. What threat sufficient.	908	534. Punishment.	917
Decisions as to threats.	909	535. Conviction may be had for attempt.	918
531. "Fraud" defined.	910	Decisions as to attempt.	919
Construction of the preceding article.	911		

§903 — ART. 528. — "Rape" defined. — Rape is the carnal knowledge of a woman without her consent, obtained by force, threats, or fraud; or the carnal knowledge of a female under age of twelve years, with or without consent, and with or without the use of force, threats, or fraud; or the carnal knowledge of a woman other than the wife of the person having such carnal knowledge, with or without consent, and with or without force, threats, or fraud, such woman being so mentally diseased at the time as to have no will to oppose the act of carnal knowledge, the person having carnal knowledge of her knowing her to be so mentally diseased. [O. C. 523, amended by Act of Feb. 25, 1887, p. 7; Acts 1891, Ch. 79, p. 96.]

Indictment, Willson's Cr. Forms, 374-375.

§904 — Amendment, change made by. — The preceding article before it was amended read as follows: —

"ARTICLE 528. 'Rape' is the carnal knowledge of a woman without her consent, obtained by force, threats or fraud, or the carnal knowledge of a female under the age of ten years, with or without consent, and with or without the use of force, threats or fraud."

The amendment, as will be observed, protects a woman who is mentally diseased so as to have no will sufficient to resist the act. This amendment was doubtless made upon the suggestion advanced in *Baldwin v. S.* 15 App. 275, where it is said that the Code does not recognize mental incapacity of a female as a consideration affecting the offense of rape; and, therefore, whatever may have been the mental condition of the female, if she was over the age of ten years at the time of the alleged rape, it is incumbent on the State to allege and prove that the carnal knowledge was obtained without her consent, and by means of force, threats, or fraud. As the article now is, an insane woman is protected as fully as a female under ten years of age, except that it must be shown that the accused at the time he committed the act knew the fact of her mental incapacity. See also *Rodriguez v. S.* 20 App. 542.

§905. — Indictment. — An indictment for rape need not allege that the accused was an adult male, nor that he was over the age of fourteen years when the offense was committed. *Wood v. S.* 12 App. 175; *Cornelius v. S.* 13 App. 349; *Davis v. S.* 42 Tex. 226. The indictment may charge that the rape was effected by all three of the means named in the statute, force, threats and fraud, the charge being made conjunctively. *Sharp v. S.* 15 App. 171; *Lawson v. S.* 17 App. 292; *Cooper v. S.* 22 App. 419. "Female" and "woman" are synonymous, and the indictment may allege that the party ravished was a "female," although the statute uses the word "woman." *Robertson v. S.* 31 Tex. 36; *Gibson v. S.* 17 App. 574. But the words "rape" and "woman" cannot be used interchangeably, the word "ravish" being the proper and indispensable one to use in charging this offense. The word "ravish" implies both force, and the want of consent of the woman, but the word "rape" does not. *Davis v. S.* 42 Tex. 226; *Hewitt v. S.* 15 App. 80; *Gibson v. S.* 17 App. 574; *Mayo v. S.* 7 App. 342; *Williams v. S.* 1 App. 90. Where the female is alleged to be under the age of ten years, allegations of force, threats or fraud, or the want of the female's consent are unnecessary and should not be made. *Davis v. S.* 42 Tex. 226; *Moore v. S.* 20 App. 275. The word "felonious" need not be used in the indictment. *Robertson v. S.* 31 Tex. 36. For indictment held to be good, see *Williams v. S.* 1 App. 90; *Walling v. S.* 7 App. 625; *O'Rourke v. S.* 8 App. 70; *Cornelius v. S.* 13 App. 349; *Sharp v. S.* 15 App. 171. It is not essential that the indictment should allege the character of the force, or specify the threats used to accomplish the rape. It is sufficient to charge in general terms that the rape was accomplished by force, or by threats, or by fraud, or by all those means together. *Cooper v. S.* 22 App. 419. The Code specifies two classes of rape, one upon a woman, and the other upon a female under ten years of age. Where the offense is committed upon a woman, the indictment need not allege that she was over the age of ten years, but where it was committed upon a female under the age of ten years the indictment must so allege. It



is questionable whether these two classes of rape can be joined in the same count in an indictment. *Nicholas v. S.* 23 App. 317. Where there may be uncertainty in the evidence as to whether or not the ravished female was under ten years of age, the pleader should insert two counts in the indictment, charging both classes of rape.

The preceding article as it now is, creates a *third* class of this offense, that is the rape of a woman of diseased mind. In alleging this class of the offense it would doubtless be sufficient to follow the language of the statute, that is, that the defendant "in and upon one C. D., a woman, did then and there make an assault, and that said A. B. did then and there ravish and have carnal knowledge of the said C. D., she, the said C. D., then and there being other than the wife of the said A. B. And she, the said C. D., being then and there so mentally diseased at the time as to have no will to oppose the act of carnal knowledge, and he, the said A. B., then and there knowing her, the said C. D., to be so mentally diseased," etc. It would be advisable, where the proof of mental incapacity of the woman may be uncertain to insert another count in the indictment charging that the rape was by force, threats and fraud, and without the consent of the woman.

§906 — ART. 529. — **Definition of "force."** — The definition of "force," as applicable to assault and battery, applies also to the crime of rape, and it must have been such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties, and other circumstances of the case. [O. C. 524.]

§907 — **Decisions as to force and resistance.** — The force used must be such as might reasonably be supposed sufficient to overcome resistance in the particular case, and the resistance must be *bona fide*. *Anschicks v. S.* 6 App. 524. It is such force as might be reasonably supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances in the case. *Jones v. S.* 10 App. 552; *Saddler v. S.* 12 App. 194; *Favors v. S.* 20 App. 155; *Hernandez v. S.* Id. 15. In determining upon the sufficiency of the force used, the jury is authorized to take into consideration threats made at the time of the commission of the offense. *Sharp v. S.* 15 App. 171; *Bass v. S.* 16 App. 62. The word "force" is not employed with reference to the mere muscular force necessarily exerted by the male in the act of copulation; nevertheless, in estimating the efficiency of the resistance made by the female, her mental capacity is a proper subject of inquiry and consideration. *Baldwin v. S.* 15 App. 275. The use of chloroform as a means comes within the meaning of fraud, and is not force. *Milton v. S.* 23 App. 204. Something more than the failure of consent on the part of the woman, is required to constitute the offense in the case of a rape by force; there must be a resistance made by her. The whole subject of resistance is referable to the question of the consent of the female. A feigned resistance would not show want of consent, while an unfeigned, positive resistance would. *Jenkins v. S.* 1 App. 346; *Anschicks v. S.* 6 App. 524.

§908 — ART. 530. — **What "threat" sufficient.** — The "threat" must be such as might reasonably create a just fear of death, or great bodily harm, in view of the relative condition of the parties as to health, strength, and all other circumstances of the case. [O. C. 525.]

§909 — **Decisions as to threats.** — The threats used must be such as might reasonably create a just fear of death, or great bodily harm, in view of the relative condition of the parties as to health, strength, and all other circumstances of the case. *Jones v. S.* 10 App. 552. Where both force and threats are alleged, in determining the sufficiency of the force, or the effect of the threats proved, it is proper to consider the cogency which the threats may have contributed to the force, and the intensifying influence which the force may have imparted to the threats. *Sharp v. S.* 15 App. 171.

§910 — ART. 531. — **"Fraud" defined.** — The "fraud" must consist in the use of some stratagem by which the woman is induced to believe that the offender is her husband or in administering, without her knowledge or consent, some substance producing unnatural sexual desire, or such stupor as prevents or weakens resistance, and committing the offense while she is under the influence of such substance. It is a presumption of law, which can not be rebutted by testimony, that no consent was given under the circumstances mentioned in this article. [O. C. 526.]

§911 — **Construction of the preceding article.** — That portion of the preceding article with reference to the use of *stratagem*, protects married women only. Having carnal knowledge of a woman when she is asleep, is not *per se* fraud within the meaning of the statute. To constitute the statutory fraud, it must be the use of some stratagem by which the woman is induced to believe that the offender is her husband. *King v. S.* 22 App. 650. The use of chloroform as a means is fraud, and not force. *Milton v. S.* 23 App. 204.

§912 — ART. 532. — **Penetration only need be proved.** — Penetration only is necessary to be proved upon a trial for rape. [O. C. 527.]

§913 — **Decisions as to penetration.** — To warrant a conviction for rape, the fact of penetration must be established by the proof beyond a reasonable doubt, but like other facts may be

established by circumstantial evidence. *Word v. S.* 12 App. 174; *Davis v. S.* 43 Tex. 189. See cases when the evidence to prove penetration was held insufficient. *Baldwin v. S.* 15 App. 275; *Davis v. S.* 43 Tex. 189. See, also, Post § 915.

§914 — ART. 533. — **Defendant must be over fourteen.** — No person, under the age of fourteen, at the time the offense is charged to have been committed, can be convicted of rape, or assault with intent to commit the offense. [O. C. 528.]

§915 — **Evidence.** — To maintain the charge of rape upon a woman by force, the State must prove, 1. Penetration. 2. Force, and 3. That the carnal knowledge was without her consent. *Jenkins v. S.* 1 App. 346. It is not necessary for the State to allege or prove that the defendant was over the age of fourteen years. If he was not, it is matter of defense for him to prove. *Davis v. S.* 42 Tex. 226. The fact of penetration must be proved beyond a reasonable doubt, but may be established by circumstantial evidence. *Word v. S.* 12 App. 175. Where the rape is upon a female under the age of ten years, the testimony of medical experts should be had as to penetration, or its absence reasonably accounted for. Every source of knowledge as to this fact should, in such case, be explored. *Davis v. S.* 42 Tex. 226. And extraordinary effort should be made to corroborate the testimony of the main witness. *Gazley v. S.* 17 App. 267. It is relevant to prove any circumstance which tends to make the proposition at issue either more or less improbable. Under this rule the condition of an undergarment of the alleged injured female, on the first evening and second morning after the alleged rape, was held admissible evidence. *Grimmett v. S.* 22 App. 36. But where witnesses for the State were permitted to testify, that five days after the alleged rape, in company with the prosecutrix they went to the place where she said the rape was committed, and saw weeds, grass, etc., disarranged, as well as other indications that persons had been lying upon the ground, it was held, that in view of the circumstances of that case, such evidence was not admissible; that it was too remote and uncertain. *Lawson v. S.* 17 App. 292. When it is required to prove that force was used, it must be that character of force defined by the statute, that is, such as might reasonably be supposed to be sufficient to overcome resistance, taking into consideration the relative strength of the parties, and other circumstances in the case. In establishing the sufficiency of the force, antecedent threats and violence by the defendant toward the woman, calculated to subject her will to his, are admissible in evidence, and may be considered by the jury, where both force and threats are alleged. And threats relied upon must be of the character defined by the statute, and evidence of force is admissible, and may be considered as intensifying the influence of the threats. *Sharp v. S.* 15 App. 171. Where the want of consent of the woman is necessary to constitute the offense, it must be proved by the State, as well as resistance to the act on her part. *Jenkins v. S.* 1 App. 346. It is proper to ask her when testifying, "Was it done with, or without your consent?" *Coates v. S.* 2 App. 16. Evidence of a *bona fide* resistance by the woman manifests a want of consent, but if the resistance be a feigned one, it does not. *Anschicks v. S.* 6 App. 524.

The woman's character for chastity may be impeached by the defendant, not in justification of the offense, but as tending to show her consent to the act of carnal knowledge. The inquiry must be confined to her general reputation for chastity; and cannot extend to particular instances of unchastity with other men than the defendant. *Lawson v. S.* 17 App. 292; *Favors v. S.* 20 App. 155; *Hernandez v. S.* Id. 155; *Jenkins v. S.* 1 App. 346; *Rogers v. S.* Id. 187; *Dorsey v. S.* Id. 33. But illicit intercourse between her and the defendant may be proved. *Lawson v. S.* 17 App. 292; *Mayo v. S.* 7 App. 342. And as evidence to establish her general reputation for a want of chastity it is competent for the defendant to prove that she had given birth to an illegitimate child prior to the alleged rape. *Wilson v. S.* 17 App. 525. The failure of the alleged injured party to make outcry, or to promptly disclose the outrage, may be proved by the defense to discredit her testimony. *Rogers v. S.* 1 App. 187. On the other hand the State may prove that she promptly complained of the outrage, and may show her state and appearance, and the condition of her clothes shortly after the alleged occurrence. But proof of the particulars of her complaint, and her detailed statement of the facts connected with the alleged outrage cannot be admitted as original evidence, but may be admissible in rebuttal in support of her veracity and to establish the accuracy of her testimony when her credibility has been attacked by the evidence of the defendant. *Lawson v. S.* 17 App. 292; *Johnson v. S.* 21 App. 368; *Holst v. S.* 23 App. 1; *Pefferling v. S.* 40 Tex. 486. Delay in making complaint is a fact which sometimes casts strong suspicion on the testimony of the prosecutrix, but it is a fact which may be satisfactorily explained by other facts showing good reason for not making complaint promptly. *Sharp v. S.* 15 App. 171. Where the prosecutrix made no complaint for several weeks after the offense was alleged to have been committed, it was held that a conviction was not supported by her uncorroborated testimony. *Topolauck v. S.* 40 Tex. 160. But a conviction may be supported upon the uncorroborated testimony of the prosecutrix, even though she be a child under ten years of age. But such cases require special scrutiny by the jury, and a careful weighing of the evidence, with all remote and near circumstances of probability. Extraordinary effort should be made to corroborate the testimony of the prosecutrix in such cases, and when such testimony can be procured its non-production should tell seriously against the prosecution. *Gazley v. S.* 17 App. 267; *Montresser v. S.* 19 App. 281; *Goss v. S.* 40 Tex. 520.

Where the female alleged to have been outraged was held to be too young to testify as a witness, it was held that statements made by her immediately after the occurrence charging the defendant with the act, and giving some of its details, were inadmissible. *Smith v. S.* 41 Tex. 352. A charge of rape by force is not supported by evidence of a rape by threats or fraud.

**Williams v. S.** 1 App. 90. Where the prosecutrix, in testifying, was permitted, over the defendant's objection, to narrate the circumstances of an assault made by the defendant upon her father-in-law when the latter came to her rescue during her struggle with the defendant, it was held that the testimony was admissible; that it was *res gestæ* and relevant. **Thompson v. S.** 11 App. 51. Where the female ravished is under the age of ten years it is not incumbent upon the State to prove the means by which the crime was accomplished, or to prove the want of consent of such female to the act. **Anschlicks v. S.** 6 App. 524; **Mayo v. S.** 7 App. 342; **Craig v. S.** 18 App. 321; **Moore v. S.** 20 App. 275. And, where it is alleged that force, threats or fraud were used in accomplishing a rape upon a female alleged to be under ten years of age, it was held to be no variance to prove that the female was over ten years of age; that the allegation that she was under ten years of age was surplusage and could be disregarded. **Nicholas v. S.** 23 App. 317. But where the rape was upon a female over ten years of age, no matter what was her physical or mental condition, the State must prove her want of consent to the act. **Craig v. S.** 18 App. 321; **Baldwin v. S.** 15 App. 275; *contra*, **Anschlicks v. S.** 6 App. 524. But these decisions were made before the amendment of article 528, and would not apply to the case of a woman mentally diseased so as to have no will to oppose to the act. In such case, however, it would devolve upon the State to prove that the defendant knew that she was so mentally diseased. Where the indictment charged a rape by force alone, and the State was permitted to prove that when the woman attempted to make an outcry the defendant placed his hand over her mouth and commanded her to desist on pain of death, it was held that this evidence was admissible because it was *res gestæ*, bore directly upon the question of her consent, showed the defendant's intent, and was an important fact to be considered in passing upon the degree and character of the force used by the defendant to accomplish his purpose. **Bass v. S.** 18 App. 62.

For evidence held sufficient to support conviction, see **Ake v. S.** 6 App. 398; **Cornelius v. S.** 13 App. 349; **Cone v. S.** Id. 483; **Sharp v. S.** 15 App. 171; **Bass v. S.** 16 App. 62; **Wilson v. S.** 17 App. 525; **Fitzgerald v. S.** 20 App. 281; **Grate v. S.** 23 App. 458. For evidence held insufficient, see **Davis v. S.** 43 Tex. 189; **House v. S.** 9 App. 53; **Baldwin v. S.** 15 App. 275; **Lawson v. S.** 17 App. 292; **Gazley v. S.** Id. 267; **Allen v. S.** 18 App. 120; **Nicholas v. S.** 23 App. 317; **Dickey v. S.** 21 App. 430.

§916 — **Charge of the court.** — The charge should be confined to the case made by the evidence. If the evidence shows the rape to have been committed by one or two of the several means, viz.: force, threats, or fraud, but not by all three of the said means, it is error to charge the jury upon all three of the said means. In other words, though the indictment should charge the three means, the charge of the court should be confined to the means only that is proved by the evidence. **Serio v. S.** 22 App. 633; **Williams v. S.** 1 App. 99. The charge should explain to the jury the statutory meaning "force," and "threats," and "fraud," where the case demands it. **Jones v. S.** 10 App. 552; **Jenkins v. S.** 1 App. 346. It should instruct the jury that penetration should be proved beyond a reasonable doubt. **Word v. S.** 12 App. 174. In explaining "penetration," the charge should instruct the jury plainly, that to constitute rape, the private parts of the female must have been penetrated by the male member, or sexual organ of the man. But see this case for a charge not so specific which was held to be sufficient. **Burk v. S.** 8 App. 336, and see also **Wilson v. S.** 17 App. 525. The charge need only comprise the law applicable to every legitimate deduction which the jury may draw from the facts in evidence. **Rogers v. S.** 1 App. 188. Where the defendant asked the court to charge that if he procured the consent of the woman alleged to have been ravished by him, by promises, the jury should not convict him, it was held that in view of the uncertainty of the evidence as to her non-consent, the instruction should have been given. **Clark v. S.** 30 Tex. 448. The charge should not submit an issue not presented by the indictment. **Craig v. S.** 18 App. 321. Where the indictment charged a rape by force, threats and fraud, and there was no allegation of the nonage of the female, but the evidence showed that she was under the age of ten years, and tended to show that she consented to the act, the court should have instructed at defendant's request, that the State must prove that she did not consent to the act. **Moore v. S.** 20 App. 275.

§917 — **ART. 534. — Punishment.** — Whoever shall be guilty of rape shall be punished by death or by confinement in the penitentiary for life, or for any term of years not less than five, in the discretion of the jury. [O. C. 529, amended by Act Nov. 10, 1886, p. 161.]

The punishment prescribed by the original article was confinement in the penitentiary not less than five, nor more than fifteen years.

§918 — **ART. 535. — Conviction may be had for "attempt."** — If it appear, on the trial of an indictment for rape, that the offense, though not committed, was attempted by the use of any of the means spoken of in articles 529, 530 and 531, but not such as to bring the offense within the definition of an assault with intent to commit rape, the jury may find the defendant guilty of an attempt to commit the offense and affix the punishment prescribed in article 503. [O. C. 530.]

§919 — **Decisions as to attempts.** — This offense is not barred by limitation until after the lapse of three years from its commission, while the offense of rape is barred in one year. **Moore v. S.** 20 App. 275. An "attempt" is an endeavor to accomplish a crime, carried beyond

mere preparation, but falling short of the ultimate design in any part of it. *Lovett v. S.* 19 Tex. 174. A conviction for this offense cannot be had under an indictment for an assault with intent to rape. *Brown v. S.* 7 App. 569; *Williams v. S.* 1 App. 90; *Burney v. S.* 21 App. 565; *Taylor v. S.* 22 App. 529; *Milton v. S.* 23 App. 204. An attempt to commit rape may be committed by means of threats or fraud, as well as by force. The use of chloroform as the means comes within the meaning of fraud and not force. *Milton v. S.* 23 App. 204.

## CH. 8. — OF ABORTION.

ART.	SEC.	ART.	SEC.
536. Definition and punishment.	920	539. In case of death, murder.	924
537. Furnishing the means — An accomplice.	921	540. Destroying unborn child.	925
538. Attempt at.	922	Indictment under preceding article.	926
Decision under preceding article.	923	541. Not punishable when procured by medical advice.	927

§920 — ART. 536. — **Definition and punishment.** — If any person shall designedly administer to a pregnant woman, with her consent, any drug or medicine, or shall use toward her any violence, or any means whatever, externally or internally applied, and shall thereby procure an abortion, he shall be punished by confinement in the penitentiary not less than two nor more than five years; if it be done without her consent the punishment shall be doubled. [O. C. 531.]

Willson's Cr. Forms, 376-377. For insufficient evidence see *Griffith v. S.* 9 App. 372.

§921 — ART. 537. — **Furnishing the means — An accomplice.** — Any person who furnishes the means for procuring an abortion, knowing the purpose intended, is guilty as an accomplice. [O. C. 532.]

Indictment, Willson's Cr. Forms, 378.

§922 — ART. 538. — **Attempt at.** — If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be punished by fine not less than one hundred nor more than one thousand dollars. [O. C. 533, amended by Act Feb. 12, 1858, p. 172.] Indictment, Willson's Cr. Forms, 379.

§923 — **Decision under preceding article.** — It is not necessary to allege in the indictment what drug or medicine was administered. An averment that it was a drug or medicine calculated to produce abortion, is sufficient. The pregnant woman who willingly receives and takes medicine to produce an abortion is not an accomplice, but her moral implication is a proper consideration for the jury in weighing her testimony. Where the father of the woman was a witness for the State and testified that the defendant informed him of his daughter's pregnancy, and suggested that he, the defendant, could give her a drug that would remove the pregnancy, and he, the witness replied, "all right; any thing to save my child," it was held that he was an accomplice, and the court should have charged the jury the law relating to accomplice testimony. In testifying for the State, the implicated woman stated that she informed the defendant about her menstrual periods, and that he told her it would ruin him for her to have a baby. On her cross-examination the defendant asked her what was the occasion or reason for this colloquy between them. Held, that the inquiry was legitimate and should have been allowed. She also testified that she sent to the defendant's wife a note, in her own handwriting, but that she had copied it from an original written by the defendant. Held, that the defendant was entitled to have said note read in evidence, and to use it as a standard of comparison with a letter imputed to, but disowned by her, and also to ask her how the defendant came to write said note. *Watson v. S.* 9 App. 237.

§924 — ART. 539. — **In case of death, murder.** — If the death of the mother is occasioned by an abortion so produced, or by an attempt to effect the same, it is murder. [O. C. 534.]

**§925 — ART. 540. — Destroying unborn child.** — If any person shall, during parturition of the mother, destroy the vitality or life in a child, in a state of being born, and before actual birth, which child would otherwise have been born alive, he shall be punished by confinement in the penitentiary for life, or any period not less than five years, at the discretion of the jury. [O. C. 535.] Willson's Cr. Forms, 380.

**§926 — Indictment under preceding article.** — The manner in which the vitality is destroyed must be stated in the indictment with reasonable particularity; a mere allegation in the language of the statute will not suffice. The indictment need not negative that the act was done under the advice of a physician. *S. v. Rupe*, 41 Tex. 33.

**§927 — ART. 541. — Not punishable when procured by medical advice.** — Nothing contained in this chapter shall be deemed to apply to the case of an abortion procured or attempted to be procured by medical advice for the purpose of saving the life of the mother. [O. C. 536.]

## CH. 9. — ADMINISTERING POISONOUS AND INJURIOUS POTIONS.

ART.	SEC.	ART.	SEC.
542. Poisoning food, well, etc.	928	544. Death within a year, murder.	931
Decisions under preceding article.	929	545. Malpractice punishable.	932
543. Causing another to inhale injurious substances.	930		

**§928 — ART. 542. — Poisoning food, well, etc.** — If any person shall mingle or cause to be mingled any other noxious potion or substance with any drink, food or medicine, with intent to kill or injure any other person, or shall willfully poison or cause to be poisoned any spring, well, cistern or reservoir of water with such intent, he shall be punished by imprisonment in the penitentiary not less than two nor more than ten years. [O. C. 537.]

Indictment, Willson's Cr. Forms, 381-382.

**§929 — Decisions under preceding article.** — The preceding article denounces two offenses. 1. Poisoning food, etc., with intent to kill or injure; and, 2. Willfully poisoning any spring, etc. An indictment for the first need not allege that the act was "willfully" done, but such allegation would be essential in charging the second offense. *Davis v. S.* 4 App. 456. This offense is not to be treated as an assault with intent to murder, or as any other kind of an assault, although if death ensues the offense will be murder. *Garnet v. S.* 1 App. 605.

**§930 — ART. 543. — Causing another to inhale injurious substances.** — If any person shall, with intent to injure, cause another person to inhale or swallow any substance injurious to health, or any of the functions of the body, or if such substance was administered with intent to kill, he shall be punished by confinement in the penitentiary not less than two nor more than five years. [O. C. 538, amended by Act Feb. 12, 1858, p. 172.]

Indictment, Willson's Cr. Forms, 383.

**§931 — ART. 544. — Death within a year, murder.** — If by reason of the commission of the offenses named in the two preceding articles, the death of a person be caused within one year, the offender shall be deemed guilty of murder and be punished accordingly. [O. C. 539.] See MURDER.

**§932 — ART. 545. — Malpractice punishable.** — If any person engaged in the practice of medicine and claiming to be a physician, shall, by the use of any noxious substance, administered in a grossly ignorant manner, produce death, or other great bodily injury, he shall be punished for the offense as any other person would be who had given such substance knowing it to be injurious and intending to kill or injure. [O. C. 540.]

Indictment, Willson's Cr. Forms, 384.

## CH. 10.—OF HOMICIDE.

ART.	SEC.	ART.	SEC.
546. Definition.	933	Article before amendment.	938
547. Destruction of life must be complete.	934	Decisions under preceding article.	939
548. Gross negligence, etc., refers to acts of others.	935	550. Person killed must be in existence.	940
Preceding articles construed.	936	Infanticide.	941
549. Body of deceased must be found.	937	551. Produced by words, etc.	942

§933 — ART. 546. — **Definition.** — “Homicide” is the destruction of the life of one human being by the act, agency, procurement or culpable omission of another. [O. C. 541.]

See MURDER. CORPUS DELICTI.

§934 — ART. 547 — **Destruction of life must be complete.** — The destruction of life must be complete by such act, agency, procurement or omission; but although the injury which caused death might not under other circumstances have proved fatal, yet if such injury be the cause of death, without its appearing that there has been any gross neglect or manifestly improper treatment of the person injured, it is homicide. [O. C. 542.]

§935 — ART. 548. — **Gross negligence, etc., refers to acts of others.** — The foregoing article, in what is said of gross neglect or improper treatment, has reference to the acts of some person other than him who inflicts the first injury, as of the physician, nurse or other attendant. If the person inflicting the injury which makes it necessary to call aid in preserving the life of the person injured, shall willfully fail or neglect to call such aid, he shall be deemed equally guilty as if the injury were one which would inevitably lead to death. [O. C. 543.]

§936 — **Preceding articles construed.** — In defining homicide, the Code is more specific than the common law. The common law defines it, as the “killing of any human creature,” the “killing of a man by a man.” The Code defines it as the *destruction of the life* of one human being, by the *act, agency, procurement or omission* of another, and still further, it requires that the destruction of life must be *complete*, by such *act, agency*, etc. The words “but although the injury which caused death might not, under other circumstances have proved fatal,” used in article 547, refer to and mean *all* injuries which are not of themselves inevitably fatal, or which are not inflicted under circumstances which render them inevitably fatal. In other words, *all* injuries, which under the circumstances of the particular case, are not *necessarily* fatal, but which may cause death. An injury which *must* cause death under any state of circumstances, such as the severance of the head from the body, the severance of the carotid artery, or the breaking of the neck, would not come within the meaning of the words quoted. For injuries of this character no legislation is required, because they cannot be affected by either care or negligence, skillful or unskillful treatment. They produce death in spite of any human aid. But if the injury be such that death is not a certain result thereof, if it be such that human aid and skill may prevent a fatal termination, then it is such an injury as the words quoted refer to. At common law the neglect or improper treatment *must produce the death* in order to relieve the person who inflicted the original injury of the homicide. But the preceding articles of the Code do not require that the neglect or improper treatment should cause the death, either in whole or in part. If there be *gross neglect*, or *manifestly improper treatment*, either in *preventing*, or in *aiding* the fatal effects of the injury, the death of the injured person is not homicide by the party who inflicted the original injury. *Gross neglect and improper treatment* are not only such as *produce* the destruction of life, but such also as *allow, suffer or permit* it. The preceding articles therefore undoubtedly change the rule of the common law, the theory of which is, that he who caused the first injury should be held guilty of the homicide. The cases of *Williams v. S. 2 App. 271*, and *Powell v. S. 13 App. 244*, which declare the common law, rule, are virtually overruled upon this point. *Morgan v. S. 16 App. 593*. The following charge upon this subject was held to be correct and in harmony with the statute. “Homicide is the destruction of the life of one human being, by the act, agency, procurement or culpable omission of another. The destruction of life must be complete by such act or agency. But although the injury which caused death might not, under other circumstances, have proved fatal, yet if such injury be the cause of death, without its appearing that there has been any great neglect, or manifest improper treatment by some other person, such as a physician, nurse, or other attendant, it would be homicide; and if the jury are satisfied from the evidence that some one shot the deceased and inflicted upon him a wound which

was not in itself necessarily mortal, and that the wound inflicted produced blood poisoning, or any other effect which would result in the death of the deceased, the party inflicting the injury would be as guilty as if the wound would of itself inevitably lead to death." *Halt v. S.* 15 App. 202. If the party who inflicted the injury willfully fails to furnish necessary aid, and the injured person dies from the injury, the injury is regarded as inevitably fatal, and no question as to neglect or improper treatment by others can in such case arise as a matter of defense. *Morgan v. S.* 16 App. 593. And the fact that the family of the deceased was present when the wound was inflicted, does not relieve the person inflicting the wound from furnishing aid to the injured party. *Williams v. S.* 2 App. 271.

§937 — ART. 549. — **Body of deceased must be found.** — No person shall be convicted of any grade of homicide unless the body of the deceased, or portions of it, are found and sufficiently identified to establish the fact of the death of the person charged to have been killed. [O. C. 544, amended by act March 8, 1887, p. 14.]

§938 — OLD ART. 549. — **Article before amendment.** — No person shall be convicted of any grade of homicide unless the body of the deceased, or portions of it, are found and sufficiently identified to establish the fact of killing.

This article was amended so as to avoid an important question which might have arisen, that is, did it not require, not only that the body of the deceased, or portions of it should be identified as that of the alleged murdered party, but also that it should be so identified as to establish the fact of *killing*; that is, that the body or portions of it found and identified, should exhibit evidence sufficient to prove that the individual had been *killed*, that is, that the death was produced by violence and not by natural causes. *Walker v. S.* 14 App. 609. Under the article as amended this question cannot arise.

§939 — **Decisions under preceding article.** — In order to sustain a conviction for culpable homicide, it is indispensable that a dead body, or portions of a dead body, be found and be clearly proved to be the body, or portions of the body of the person alleged to have been killed. It is equally indispensable that the death of the alleged dead person shall be clearly established before a conviction can be had, however cogent may be the other facts proved against the defendant. Not even the extra-judicial confession of the accused that he killed the person alleged to have been killed, will, uncorroborated by other evidence of the death of such person, be sufficient to warrant a conviction. *Walker v. S.* 14 App. 609; *Wilson v. S.* 41 Tex. 320. The body may be identified by the best evidence attainable, and its identification by positive testimony is not indispensable. *Taylor v. S.* 35 Tex. 97. For evidence held sufficient as to identity, see *Scott v. S.* 23 App. 521; *Spear v. S.* 16 App. 98; *Wilson v. S.* 43 Tex. 472; *Hamby v. S.* 36 Tex. 523. For evidence held insufficient, see *Wilson v. S.* 41 Tex. 320; *Walker v. S.* 14 App. 609; *Lightfoot v. S.* 20 App. 77; *Ah Hang v. S.* 18 App. 675. For other decisions pertinent to this subject, see MURDER.

§940 — ART. 550. — **Person killed must be in existence.** — The person upon whom the homicide is alleged to have been committed must be in existence by actual birth. It is homicide, however, to destroy human life actually in existence, however frail such existence may be, or however near extinction from other causes. [O. C. 545.]

§941 — **Infanticide.** — An infant cannot be the subject of homicide until its complete expulsion, alive, from its mother. See this case held insufficient to prove the existence of the alleged murdered infant. *Wallace v. S.* 10 App. 255; see also *Sheppard v. S.* 17 App. 74.

§942 — ART. 551. — **Produced by words, etc.** — Although it is necessary to constitute homicide that it shall result from some act of the party accused, yet, if words be used which are reasonably calculated to produce and do produce an act which is the immediate cause of death, it is homicide; as for example — if a blind man, a stranger, a child, or a person of unsound mind, be directed by words to a precipice or other dangerous place where he falls and is killed; or if one be directed to take any article of medicine, food or drink, known to be poisonous and which does produce a fatal effect; in these and like cases, the person so operating upon the mind or conduct of the person injured shall be deemed guilty of homicide. [O. C. 546.]

## CH. 11.—OF JUSTIFIABLE HOMICIDE.

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§943 — ART. 552. — **When justifiable.** — Homicide is justifiable in the cases enumerated in the succeeding articles of this chapter. [O. C. 547.]

## I. OF A PUBLIC ENEMY.

§944 — ART. 553. — **Killing a public enemy.** — It is lawful to kill a public enemy not only in the prosecution of war, but when he may be in the act of hostile invasion or occupation of any part of the State. A public enemy is any person acting under the authority or enlisted in the service of any government at war with this State or the United States. Persons belonging to hostile tribes of Indians, who habitually commit depredations upon the lives or property of the inhabitants of this State, and all persons acting with such tribes are public enemies, and this, whether found in the act of committing such depredations, or under circumstances which sufficiently show an intention so to do. [O. C. 548.]

§945 — ART. 554. — **But not by poison.** — Homicide of a public enemy by poison or the use of poisoned weapons is not justifiable. [O. C. 549.]

§946 — ART. 555. — **Nor a deserter, prisoner, etc.** — Homicide of a public enemy who is a deserter or prisoner of war, or the bearer of a flag of truce, is not justifiable. [O. C. 550.]

## II. OF A CONVICT.

§947 — ART. 556. — **Execution of convict.** — The execution of a convict for a capital offense, by a legally qualified officer, under the warrant of a court of competent jurisdiction, is justifiable when the same takes place in the manner authorized by law and directed by warrant. [O. C. 551.]



### III. BY OFFICERS IN THE PERFORMANCE OF A DUTY, AND BY OTHER PERSONS UNDER CERTAIN CIRCUMSTANCES.

§948 — ART. 557. — **By officer in execution of lawful order.** — Homicide by an officer in the execution of the lawful orders of magistrates and courts, is justifiable when he is violently resisted and has just ground to fear danger to his own life in executing the order. [O. C. 552.]

§949 — ART. 558. — **Even though the order is erroneous.** — The officer is justifiable, though there may have been an error of judgment on the part of the magistrate or court, if the order emanated from a proper authority. [O. C. 553.]

§950 — ART. 559. — **Qualification of the foregoing.** — The rule set forth in the two preceding articles is subject to the following restrictions:

1. The order must be that of a magistrate or a court having lawful authority to issue it.

2. It must have such form as the law requires to give it validity.

3. The person executing the order must be some officer duly authorized by law to execute the order, or some person specially appointed in accordance with law for the performance of the duty.

4. If the person executing the order be an officer, and performing a duty which no other person can by law perform, he must have taken the oath of office and have given bond, where such is required by law.

5. The order must be executed in the manner directed by law, and the person executing the same must make known his purpose and the capacity in which he acts.

6. If the order be a written one, and the person against whom it issues, before resistance offered, wishes to see the same, or hear it read, the person charged with its execution shall produce the order and show it or read it.

7. In making an arrest, under written order, the person acting under such order shall, in all cases, declare to the party against whom it is directed the offense of which he is accused, and state the nature of the warrant, unless prevented therefrom by the act of the party to be arrested.

8. The officer, or other person executing an order of arrest is required to use such force as may be necessary to prevent an escape when it is attempted, but he shall not, in any case, kill one who attempts to escape, unless in making, or attempting such escape, the life of the officer is endangered, or he is threatened with great bodily injury.

9. In overcoming a resistance to the execution of an order, the officer, or person executing the same, may oppose such force as is necessary to overcome the resistance; but he shall not take the life of the person resisting unless he has just ground to fear that his own life will be taken, or that he will suffer great bodily injury in the execution of the order.

10. A prisoner, under sentence of death, or of imprisonment in the penitentiary, or attempting to escape from the penitentiary, may be killed by the officer having legal custody of him, if his escape can in no other manner be prevented. [O. C. 554.]

§951 — ART. 560. — **Order may be written or verbal.** — The order referred to in this chapter may be either written or verbal, where a verbal order is allowed for the arrest of a person. [O. C. 555.]

See Ante, arts. 41-42.

§952 — ART. 561. — **Written orders include what.** — Under written orders are included all process in a criminal or civil action which directs the seizure of the person or of property. [O. C. 556.]

§953 — ART. 562. — **Verbal order justifies only in felony.** — No officer or

other person ordered verbally to arrest another is justified in killing, except the arrest be in a case of felony, or for the prevention of a felony. [O. C. 557.]

§954 — ART. 563. — **Persons aiding officer justified.** — Persons called in aid of an officer, in the performance of a duty, are justified in the same manner as the officer himself. [O. C. 558.]

§955 — ART. 564. — **Persons aiding escape may also be killed.** — All persons opposing the execution of the order, or aiding in an escape, may be treated in the same manner as the person against whom the order is directed, or who is attempting to escape. [O. C. 559.]

§956 — ART. 565. — **Federal officers included.** — Officers acting under the authority of the laws or courts of the United States, have the rights and are liable to the rules prescribed in this chapter. [O. C. 560.]

§957 — **Homicide by officers—Decisions as to.**—An officer or other person, in executing an order of arrest is authorized to use such force as is necessary in overcoming resistance to the execution of such order; but he shall not take the life of the person resisting arrest, unless he has just grounds to fear that his own life will be taken, or that he will suffer great bodily injury in the execution of the order. Plasters v. S. 1 App. 673; Ante, § 950, sub. 9. The rules under which an arrest may be made by a peace officer, without warrant, are clearly and definitely defined. See C. C. P., arts. 226-227-228-229. These articles prescribe the only circumstances under which an arrest can be made by a peace officer without a warrant, except when the arrest is made in the prevention of an offense. Johnson v. S. 5 App. 43; Ross v. S. 10 App. 455; Lacy v. S. 7 App. 403; Staples v. S. 14 App. 136. But a person unlawfully carrying arms may be arrested without warrant. Hodges v. S. 6 App. 615. All peace officers known to the law are carefully enumerated in the Code. C. C. P., arts. 44-44a. A deputy marshal of an incorporated city or town is not a peace officer unless made so by the charter of such city or town. Nor is a bailiff of a grand jury after the expiration of the term of the court for which he was appointed. To constitute a deputy sheriff the appointment must be in writing, and thereupon must be indorsed the appointee's oath of office, and the appointment and oath must be deposited in the office of the clerk of the county court. R. S. art. 4520. Without these formalities there can be no legal deputation. No person other than an officer can make an arrest, except for a felony committed in his presence, or within his view, unless he is specially appointed by a magistrate to execute a particular writ, or is summoned by an officer on a *posse comitatus*. A warrant of arrest to be valid, and also the complaint on which it issues, must specify the accused's name, if known, and if unknown must give a reasonably definite description of him. A fictitious name cannot be assigned to the accused in lieu of his real name, nor can the officer charged with the execution of the warrant interpolate in it the true name of the accused. Nor can a warrant be held valid because the person arrested under it, though described neither by name nor otherwise, proved to be the person against whom the complaint was intended. Alford v. S. 8 App. 545. For the requisites of a warrant of arrest, and a complaint, see C. C. P. arts. 234-236, and for forms of same, see Willson's Cr. Forms, 817-818; Pierce v. S. 17 App. 232. A peace officer has no authority beyond the limits of his county to arrest a party accused of crime. A warrant of arrest issued by a justice of the peace confers no authority to arrest in another county, unless it is indorsed by a judge of the Supreme Court, Court of Appeals, or a district or county judge (when it may be executed anywhere in the State), or by a magistrate of the county in which the accused is found, when it may be executed in the latter county, but must be executed by an officer of the county where the accused is found. Ledbetter v. S. 23 App. 247; Peter v. S. 23 App. 684.

The ordinary jurisdiction of a justice of the peace is circumscribed by the limits of his precinct, but when proceeding as an examining court his authority is co-extensive with his county. Hait v. S. 15 App. 202. If an officer kills his prisoner, who is not resisting or attacking him, but is simply running away to make his escape, in the absence of proof of express malice, he is guilty of murder in the second degree. Caldwell v. S. 41 Tex. 86; Plasters v. S. 1 App. 673. A convict guard is not authorized by sub-division 10 of art. 559 to kill a convict in attempting to re-arrest him after he has escaped. In such case the guard has only the authority of a peace officer. Wright v. S. 44 Tex. 645. But he may kill if absolutely necessary to prevent the escape of the convict in the first instance. Washington v. S. 1 App. 647. In attempting to make an arrest for a petty offense, the officer is not authorized to fire on the party fleeing from such arrest. Finer v. S. 44 Tex. 128. An officer having lawful authority to make an arrest, may, on meeting with resistance, employ such force as may be necessary to overcome such resistance; but he must use no greater force than is necessary for the arrest and detention of the accused. Beaverts v. S. 4 App. 175; Giroux v. S. 40 Tex. 97. And where the evidence showed that a prisoner had escaped by violence from an officer, and was fleeing, but was at the same time in the attitude of, or at least prepared for resistance, it was held that the officer had the right to treat him as resisting. James v. S. 44 Tex. 314. If a process, fair and legal on its face, is placed in the hands of an officer for execution, he will be protected in executing it, although he may know of facts which render such process in reality void. Rainey v. S. 20 App. 455; Tierney v. Frazier, 57 Tex. 437. If a person whose arrest is attempted under legal process knows the purpose and official character of the officer, and the arrest be otherwise lawful, it is his duty to submit, and resistance is unjustifiable, though the officer makes no declaration of his official character or purpose. Plasters v. S. 1 App. 673.

§958 — ART. 566. — **In suppressing riots.** — Homicide is justifiable when necessary to suppress a riot, when the same is attempted to be suppressed in the manner pointed out in the Code of Criminal Procedure, and can in no way be suppressed except by taking life. [O. C. 561.]

See C. C. P., title 3, ch. 4.

§959 — ART. 567. — **In adultery.** — Homicide is justifiable when committed by the husband upon the person of any one taken in the act of adultery with the wife, provided the killing take place before the parties to the act of adultery have separated. [O. C. 562.]

§960 — **Construction of preceding article.** — The words "taken in the act of adultery," as used in the preceding article, do not mean that in order to avail himself of the protection given by said article, and justify a homicidal act, the husband should be an actual eye witness to the physical act of coition between his wife and the person slain; but it will be sufficient if he sees them in bed together, or leaving that position, or in such a position as indicates with reasonable certainty to a rational mind that they had just then committed the adulterous act, or were then about to commit it. But no knowledge otherwise acquired by the husband, however positive, of an adulterous intercourse between his wife and the deceased, will justify the homicide. When adultery is an issue, it may be established by circumstantial evidence, and though a mistake as to the fact of adultery may possibly exist, yet "if a person laboring under a mistake as to a particular fact shall do an act which would otherwise be criminal, he is guilty of no offense, provided it be such a mistake as does not arise from want of proper care on his part." Ante Arts. 45-46. In other words, a person may always act upon reasonable appearances, and his guilt depends upon the reasonableness of the appearances judged of from his own standpoint. When the facts require it the charge of the court should thus explain the words, "taken in the act of adultery," otherwise the jury might conclude that they meant that the parties must be detected in the actual physical act of coition. The words, "before the parties to the act of adultery have separated," mean only that the parties are still together in company with each other, after the act of adultery: not that they are still united in the act of copulation, and, where the facts require it, the charge of the court should so instruct the jury. Adultery, as used in the preceding article, is ecclesiastical, and not statutory adultery, and to justify a homicide under said article, the defendant need not show that adultery, as defined by art. 333 of this Code, was committed, but it will be sufficient if he show a single defilement of his marriage bed, and where this issue is in the case, the court should so instruct the jury. Price v. S. 18 App. 474.

§961 — ART. 568. — **But not in case of connivance.** — Homicide cannot be justified by reason of the existence of the circumstances spoken of in the preceding article, where it appears that there has been, on the part of the husband, any connivance in or assent to the adulterous connection. [O. C. 563.]

#### IV. IN DEFENSE OF PERSON OR PROPERTY.

§962 — ART. 569. — **In defense of person and property.** — Homicide is permitted in the necessary defense of person or property, under the circumstances and subject to the rules herein set forth. [O. C. 567.]

§963 — ART. 570. — **In preventing other felonies.** — Homicide is permitted by law when inflicted for the purpose of preventing the offense of murder, rape, robbery, maiming, disfiguring, castration, arson, burglary, and theft at night, or when inflicted upon a person or persons who are found armed with deadly weapons and in disguise in the night time on premises not his or their own, whether the homicide be committed by the party about to be injured or by some person in his behalf, when the killing takes place under the following circumstances:

1. It must reasonably appear by the acts or by words, coupled with the acts of the person killed, that it was the purpose and intent of such person to commit one of the offenses above named.

2. The killing must take place while the person killed was in the act of committing the offense, or after some act done by him showing evidently an intent to commit such offense.

3. It must take place before the offense committed by the party killed is actually completed; except that, in case of rape, the ravisher may be killed at any time before he has escaped from the presence of his victim, and except, also, in the cases hereafter enumerated.

4. Where the killing takes place to prevent the murder of some other person, it shall not be deemed that the murder is completed so long as the offender is still inflicting violence, though the mortal wound may have been given.

5. If homicide takes place in preventing a robbery, it shall be justifiable if done while the robber is in the presence of the person robbed, or is flying with the money or other article taken by him.

6. In cases of maiming, disfiguring or castration, the homicide may take place at any time while the offender is mistreating with violence the person injured, though he may have completed the offense.

7. In case of arson, the homicide may be inflicted while the offender is in or at the building or other property burnt, or flying from the place before the destruction of the same.

8. In cases of burglary and theft by night, the homicide is justifiable at any time while the offender is in the building, or at the place where the theft is committed, or is within reach of gunshot from such place or building.

9. When the party slain in disguise is engaged in any attempt, by word, gesture or otherwise, to alarm some other person or persons and put them in bodily fear. [O. C. 568; Act Nov. 6, 1871, pp. 20-21.]

§964 — ART. 571. — **Presumption from use of weapon.** — When the homicide takes place to prevent murder, maiming, disfiguring or castration, if the weapons or means used by the party attempting or committing such murder, maiming, disfiguring or castration are such as would have been calculated to produce that result, it is to be presumed that the person so using them designed to inflict the injury. [O. C. 569.]

See Ante, § 110.

§965 — ART. 572. — **In protecting person or property from other attacks.** — Homicide is justifiable also in the protection of the person or property against any other unlawful and violent attack besides those mentioned in the preceding article, and in such cases all other means must be resorted to for the prevention of the injury, and the killing must take place while the person killed is in the very act of making such unlawful and violent attack, and any person interfering in such case, in behalf of the party about to be injured, is not justifiable in killing the aggressor, unless the life or person of the injured party is in peril by reason of such attack upon his property. [O. C. 570.]

§966 — ART. 573. — **Retreat not necessary.** — The party whose person or property is so unlawfully attacked is not bound to retreat in order to avoid the necessity of killing his assailant. [O. C. 571.]

§967 — ART. 574. — **Requisites of the attack.** — The attack upon the person of an individual, in order to justify homicide, must be such as produces a reasonable expectation or fear of death, or some serious bodily injury. [O. C. 572.]

§968 — ART. 575. — **Circumstances justifying in defense of property.** — When, under article 572, a homicide is committed in the protection of property, it must be done under the following circumstances:

1. The possession must be of corporeal property; and not of a mere right, and the possession must be actual and not merely constructive.

2. The possession must be legal, though the right of the property may not be in the possessor.

3. If possession be once lost, it is not lawful to regain it by such means as result in homicide.

4. Every other effort in his power must have been made by the possessor to repel the aggression before he will be justified in killing. [O. C. 573.]

**§969 — Right of self-defense.** — The right of self-defense is founded on the law of nature, and is not, nor can be superseded by any law of society. *West v. S. 2 App. 460.* But self-defense is a defensive not an offensive act, and must not exceed the bounds of mere defense and prevention. There must be at least an apparent necessity to ward off by force some unlawful and violent attack. It is not enough that the party believed himself in danger, unless the facts were such that the jury can say he had reasonable ground for such belief. *Blake v. S. 3 App. 581.* And a person attacked must decide for himself, at his peril, as to whether the circumstances in which he is placed, and upon which he acts, are such as to furnish a reasonable apprehension of danger. *Williams v. S. 2 App. 271.* The questions are, was the slayer in present danger of great bodily harm at the time of the killing? Was the homicide committed in a *bona fide* effort to preserve himself from the impending danger? *Lander v. S. 12 Tex. 462.* One may stand on his self-defense not only when his life may be seriously threatened, but he may do so when the infliction of serious bodily injury is threatened, and the danger is imminent and pressing. *Anderson v. S. 1 App. 730.* But a reasonable belief that another intends to inflict on the party some serious bodily injury, and that he is in such a position that he may carry his intention into effect, is not sufficient to justify the killing of him upon that apprehension; such belief must be founded in part at least, upon some act of the deceased, showing that he has a present intention to inflict the injury; and even then, the means used to repel the assault and prevent the impending injury, must be only such as are necessary under the circumstances. *Hinton v. S. 24 Tex. 454.* An apprehension of future danger does not justify a homicide. The apprehension must be of a present and imminent danger. *Holt v. S. 9 App. 571.* The right of self-defense does not arise when there is opportunity to restrain the assailant by process of law. One who believes his life in danger must, if the circumstances are such that he can, resort to the law for protection. *Penland v. S. 19 App. 365; Weaver v. S. Id. 547.* The right of self-defense is based upon and limited by necessity. When the necessity arises, the right instantly accrues, and when the necessity, real or apparent, ceases the right no longer exists. *Blake v. S. 3 App. 581; Lander v. S. 12 Tex. 462; Hobbs v. S. 16 App. 517.* But as long as the danger, real or apparent, exists, the right of defense continues. *West v. S. 2 App. 460.* An accidental injury to a third party done in self-defense, is no offense. *Clark v. S. 19 App. 495; Plummer v. S. 4 App. 310.*

**§970 — Self-defense under article 570.** — This article comprises all cases in which, from the acts of the assailant, or his words coupled therewith, it reasonably appears that his purpose or intent is to murder, ravish, rob, maim, disfigure, castrate, or do other serious bodily injury to the assailed party. In such case the assailed party may lawfully kill the assailant while he is committing the offense or injury, or when he has done some act evidently showing his intent to commit it, and the assailed party need not first resort to other means of prevention. *Kendall v. S. 8 App. 569; Ainsworth v. S. Id. 532; Robins v. S. 9 App. 666; Hill v. S. 10 App. 618; Gilly v. S. 15 App. 287; Short v. S. Id. 370; Foster v. S. 11 App. 105; King v. S. 13 App. 277; Risby v. S. 17 App. 517; Jones v. S. Id. 602; Stevenson v. S. Id. 618; Penland v. S. 19 App. 365; Hunnicutt v. S. 20 App. 632; Williams v. S. 22 App. 497; Orman v. S. Id. 604; Cartwright v. S. 16 App. 473; May v. S. 23 App. 146; Boddy v. S. 14 App. 528.*

**§971 — Presumption from weapon used by assailant.** — If the weapon or means used by the assailant were calculated to effect the purpose of murder, rape, robbery, disfiguring, castration, or serious bodily injury, it is an absolute presumption of law that it was the intention of the assailant to effect the purpose indicated, and this presumption is imperative to juries as well as court, and when applicable must be given in charge to the jury. *Kendall v. S. 8 App. 569; Jones v. S. 17 App. 602; King v. S. 13 App. 277.*

**§972 — In cases of theft.** — All persons have the right to prevent the consequences of theft, and to seize property which has been stolen, and also to arrest the thief. *C. C. P., art. 343.* A party exercising the right of arrest under such circumstances is, to all intents and purposes, an officer *de facto* and entitled to the same rights, and subject to the same penalties as an officer *de jure*. *Smith v. S. 13 App. 507.* This right does not confer upon the person entitled to exercise it, the right to pursue and take the thief, dead or alive, nor is the thief if attacked under such circumstances deprived of all right of self-defense. *Luera v. S. 12 App. 257.*

**§973 — Self-defense under article 572.** — When the purpose of the unlawful and violent attack is other than those mentioned in §§ 968-969, the person killing must resort to all other means of prevention, except that of retreat. "All other means" does not import all possible means, but all means reasonably proper and effective under the circumstances. *Kendall v. S. 8 App. 569; Ainsworth v. S. Id. 532; Blake v. S. 3 App. 588; Horbach v. S. 43 Tex. 424; Williams v. S. 2 App. 271; Gilly v. S. 15 App. 287.* And to make the killing justifiable it must take place while the person killed is in the very act of making the unlawful and violent attack. *Gilly v. S. 15 App. 287; Williams v. S. 2 App. 271; Kendall v. S. 8 App. 569; Jordan v. S. 11 App. 435.* The killing must be in necessary resistance to aggression apparently violent, immediate and imminent towards the person about to be injured. *Weaver v. S. 19 App. 547.*

**§974 — In defense of property.** — Homicide in the protection of property, is only justifiable after all other means have been resorted to for the prevention of the injury, and the killing must take place while the person killed is in the very act of making such unlawful and violent attack; and such homicide, to be justifiable, must be committed under the following circumstances, viz.: 1. The possession must be of corporeal property, and not of a mere right, and the possession must be actual, and not merely constructive. 2. The possession must be legal, though the right of property may not be in the possessor. 3. If the possession be once lost, it is not lawful to regain it by such means as result in homicide. 4. Every other effort in his power must have been made by the possessor to repel the aggression before he will be justified in killing. It is a general rule that the owner of personal property has a right to use as much force as is necessary to prevent its forcible, illegal removal. *Lilly v. S. 20 App. 1; Weaver v. S. 19*

App. 547; Ross v. S. 10 App. 455. See, also, Souther v. S. 18 App. 352. One who interferes in behalf of the owner of the property is not justified in killing the aggressor unless the life of such owner is imperiled by reason of the attack upon the property. Kendall v. S. 8 App. 569; Risby v. S. 17 App. 517.

§975—**In defense of habitation.**—Defense of one's habitation is a right only limited in extent by the same rules which govern in the defense of the person. Richardson v. S. 7 App. 486; Weaver v. S. 19 App. 547; Turner v. S. 16 App. 378; Stanley v. S. 16 App. 392. The law does not protect a gambling room, so as to authorize the keeper thereof to eject a person from it. Pierce v. S. 21 App. 540.

§976—**In defense of personal liberty.**—If an arrest is illegal and unauthorized, it is a continuous assault of an aggravated nature, and the person arrested, or others in his behalf may employ adequate force to effect a release. If the officer making such illegal arrest is killed, the perpetrators of the homicide will be guilty of no higher offense than manslaughter, and under certain circumstances may be justified. Alford v. S. 8 App. 545; Johnson v. S. 5 App. 47; Goodman v. S. 4 App. 349; James v. S. 44 Tex. 314; Dyson v. S. 14 App. 454. It is no excuse, justification or extenuation, for a homicide committed by a prisoner held in legal custody, that it was committed in an attempt to secure his liberty by escaping from such custody. Wallace v. S. 20 App. 360; Waite v. S. 13 App. 169; Washington v. S. 1 App. 169. A citizen is authorized to stand upon his individual rights and oppose force to force in the prevention of an attempted wrong, and when he is threatened with unlawful arrest, he may not only use force, but can increase that force even to the killing of his adversary, if necessary to prevent the attempted wrong. Ross v. S. 10 App. 455.

§977—**To prevent a felony.**—In no case of attempted felony, other than those named in article 570, is it lawful to take life where the party making such attempt may be arrested and thereby prevented from committing the felony. To justify homicide to prevent the perpetration of a felony, the danger of such felony must not be problematical or remote, but evident and immediate. Any person may arrest, with or without warrant, a party committing, or who has committed a felony in his presence or within his view. Weaver v. S. 19 App. 547.

§978—**Apparent danger.**—It is not essential to the right of self-defense that the danger should in fact exist. It may be only apparent and not real. If it reasonably appears from the circumstances of the case, that danger existed, the person threatened with such apparent danger has the same right to defend against it, and to the same extent, that he would have were the danger real. And in determining whether there was reason to believe that danger did exist, the appearances must be viewed from the standpoint of the person who acted upon them, and from no other standpoint. If to him, it reasonably appeared that the danger in fact existed, he had the right to defend against it to the same extent and under the same rules permitted in case the danger had been real. Conner v. S. 23 App. 378; Spearman v. S. Id. 224; Patillo v. S. 22 App. 586; Brumley v. S. 21 App. 222; Bell v. S. 20 App. 445; Jones v. S. 17 App. 608; Gilly v. S. 15 App. 287; Smith v. S. Id. 338; Short v. S. Id. 370; Moore v. S. Id. 1; King v. S. 13 App. 277; Jordan v. S. 11 App. 435; Horbach v. S. 43 Tex. 242; Rodriguez v. S. 8 App. 129; Bobb v. S. Id. 173; Cartwright v. S. 16 App. 473; Penland v. S. 19 App. 365; Lister v. S. 3 App. 17; Bode v. S. 6 App. 424; Marnoch v. S. 7 App. 269; Richardson v. S. Id. 486; Munden v. S. 37 Tex. 853; Thomas v. S. 40 Tex. 36.

§979—**When there are more assailants than one.**—When there are more assailants than one, the slayer has the right to act upon the hostile demonstrations of either one of them, and to kill either of them, if it reasonably appeared to him that they were present and acting together to take his life, or do him serious bodily injury. McLaughlin v. S. 10 app. 340; Jones v. S. 20 App. 665; Cartwright v. S. 16 App. 473.

§980—**In defense of another, or another's property.**—A person acting in behalf of another, to prevent such other from being murdered, ravished, robbed, maimed, disfigured, or from sustaining serious bodily injury, is entitled to the same justification under the law as would be the person in whose behalf he acts. For a discussion of the law in such cases, see Guffee v. S. 8 App. 187; Foster v. S. Id. 248; Dyson v. S. 14 App. 454; Johnson v. S. 5 App. 43; Sterling v. S. 15 App. 249. Where one person interferes for the protection of another's property, he will not be justified in killing the aggressor unless the life or person of the injured party is in peril by reason of such attack. Risby v. S. 17 App. 517; Kendall v. S. 8 App. 569.

§981—**Provoking difficulty—Imperfect self-defense.**—To one who brings on an affray, or who prepares himself for an encounter in which he intends to wreak his malice, the plea of self-defense is not available, though his own life was imperiled in the affray. Hollis v. S. 8 App. 620. If the slayer provoked the contest with the deceased with the apparent intention of killing him, or doing him some serious bodily injury, he is guilty of murder, although he may have done the act of killing suddenly, without deliberation, and in order to save his own life. The law allows no justification in such a case, and no reduction of the grade of the homicide below that of murder. But if the slayer provoked the contest without any intention to kill or inflict serious bodily injury, and suddenly, without deliberation, did the act of killing, while the homicide would not be justifiable, it might be a lower grade of homicide than murder. Green v. S. 12 App. 445; King v. S. 13 App. 277; Smith v. S. 15 App. 338. Because the slayer by his own wrongful acts produced the necessity to take the life of the deceased in order to preserve his own, it does not always follow that the homicide cannot be justified or excused. Consideration must be addressed to the nature and quality of the wrongful acts by which it is claimed the right of self-defense is forfeited or abridged. Adjudicated cases hold that among the slayer's acts which abrogate or abridge his right of self-defense, are the following: 1. Devices, by language, or otherwise, to provoke the deceased to make an assault which will furnish a pretext for taking his life, or inflicting serious bodily injury upon him. 2. Provocation of the deceased into a quarrel, causing the fatal affray; but mere words or libelous publications do not amount

to such provocation. 3. Preconcert with the deceased to fight him with deadly weapons. 4. Commencing an attack, assault or battery upon the deceased. 5. Going with a deadly weapon to where the deceased is, for the purpose of provoking a difficulty or bringing on an affray, and by words or acts making some demonstration of such purpose calculated to provoke the deceased. The right of self-defense is not impaired by mere preparation for the perpetration of a wrongful act, unheralded, and unaccompanied by any demonstration, verbal or otherwise, indicative of the wrongful purpose. *Cartwright v. S.* 14 App. 486; *Cunningham v. S.* 17 App. 89.

If a person by his own wrongful act brings about the necessity of taking the life of another to prevent being himself killed, he cannot say that such killing was in his necessary self-defense; but the killing will be imputed to malice, express or implied, by reason of the wrongful act which brought it about, or malice from which it was done. (A person cannot avail himself of a necessity which he has knowingly and willfully brought upon himself.) *Logan v. S.* 17 App. 50; *Cunningham v. S.* Id. 89; *King v. S.* 13 App. 277; *Gilleland v. S.* 44 Tex. 356; *Lee v. S.* 21 App. 241; *Thuston v. S.* Id. 245; *Roach v. S.* Id. 249; *Crist v. S.* Id. 361. When a party is a mere trespasser upon another's premises, and thus provokes the difficulty which results in the homicide, and such trespass is not with any intent on his part to kill or do serious bodily injury, or to commit any felony, he would not be deprived wholly of the right of self-defense, but such right would be abridged, and would be only partial and imperfect, and would reduce the homicide from murder to manslaughter. *Roach v. S.* 21 App. 249; *Thuston v. S.* Id. 245; *Arto v. S.* 19 App. 126; *Jones v. S.* 17 App. 602; *King v. S.* 13 App. 602. And if the slayer goes upon the premises with the intention to kill, or to do serious bodily injury, or to commit felony, and abandons such intention in good faith, and tries to escape from or avoid his adversary, if he is pursued his right of self-defense revives. *Roach v. S.* 21 App. 249. Where a person was taken in adultery with another's wife, it was held that he was not deprived wholly of the right of self-defense by reason of this wrongful act on his part; but that in slaying the husband of the woman with whom he was committing adultery, he could claim a partial or imperfect self-defense, and reduce the homicide from murder to manslaughter. The amenability of a person charged with crime is conditioned solely on his own acts, and is never dependent upon the immunity of the injured person in case the result had been different. *Reed v. S.* 11 App. 509; *King v. S.* 13 App. 277. Where the slayer provoked the deceased by profane language and angry gesticulations to strike him a blow with a stick, which was not followed up in such manner as produced a reasonable expectation or fear of death or serious bodily injury, he was not justified on the ground of self-defense in retreating out of danger, drawing a dagger, returning to the conflict, and killing his antagonist. *Isaacs v. S.* 25 Tex. 174.

§982 — **Mutual combat.** — If a person voluntarily engages in a combat, knowing that it will, or may result in death, or some serious bodily injury which may probably produce the death of his adversary or himself, he cannot claim that he is acting in self-defense. *Gilleland v. S.* 44 Tex. 356; *Logan v. S.* 17 App. 50; *Lee v. S.* 21 App. 241; *Cunningham v. S.* 17 App. 89. A homicide committed in mutual combat will not be reduced from murder to manslaughter unless it was committed under the influence of sudden passion arising from adequate cause. *Spearman v. S.* 23 App. 224; *Crist v. S.* 21 App. 361. See evidence which did not warrant a charge on mutual combat. *Rosborough v. S.* 21 App. 672. If death ensues from mutual combat it is murder if undue advantage was taken by the slayer. *King v. S.* 4 App. 54. See Post, §1025; also DUELING.

§983 — **Threats made by deceased.** — When a person accused of an unlawful homicide seeks to justify the act upon the ground of threats against his own life, he is permitted to introduce evidence of such threats, whether communicated to him or not, but no threats will afford justification unless it be shown that at the time of the homicide, the person killed, by some act then done, manifested an intention to execute the threats so made. *Logan v. S.* 17 App. 50; *Miles v. S.* 18 App. 156; *Thomas v. S.* 11 App. 315; *Wall v. S.* 18 Tex. 682; *Johnson v. S.* 27 Tex. 758; *Lander v. S.* 12 Tex. 462; *Peck v. S.* 5 App. 611; *Irwin v. S.* 43 Tex. 236; *Stapp v. S.* 1 App. 734; *Carter v. S.* 8 App. 372; *Horbach v. S.* 43 Tex. 242; *Sims v. S.* 9 App. 586; *Penland v. S.* 19 App. 365; *Howard v. S.* 23 App. 265. See, also, *Dawson v. S.* 33 Tex. 491, overruling *Pridgen v. S.* 31 Tex. 420. (It is immaterial to the defendant's right to act upon the threat, whether it was seriously made or not, if some act was done by the deceased, which, viewed in the light of the threat, rendered it reasonable for the defendant to infer that the deceased was about to execute the threat, and the defendant did not know that the threat was not seriously made. *Wilson v. S.* 18 App. 576. Threats by the deceased against some other person than the defendant cannot justify the homicide. *Talbert v. S.* 3 App. 316. Where a defendant waylaid and killed the deceased, evidence of previous threats by the deceased against the defendant, coupled with a movement on his part at the time of the killing, as if to draw a weapon, was held to be wholly immaterial. *Ex parte Mosby*, 31 Tex. 566. See Post, art. 608, and notes.

§984 — **Threats made by defendant.** — Threats made by the defendant to kill the deceased will not deprive the former of his right to defend himself against an attack made on him by the deceased, on account of such threats. *Parker v. S.* 18 App. 72; *Smith v. S.* 15 App. 338; *White v. S.* 23 App. 154.

§985 — **Evidence on issue of self-defense — Character of deceased.** — Before admitting evidence of the general character of the deceased, there must be a predicate established, by evidence already submitted, tending to prove threats of the deceased, or some act done by him at the time of the killing, which it would aid to explain. *Horbach v. S.* 43 Tex. 243; *Dorsey v. S.* 34 Tex. 651; *Roberts v. S.* 5 App. 141; *Williams v. S.* 14 App. 102; *Moore v. S.* 15 App. 1; *Branch v. S.* Id. 96; *Creswell v. S.* 14 App. 7. The inquiry as to character must be limited to the

general reputation of the person in the community of his residence, or where he is best known, as to peace or violence, and the witness must speak from this knowledge of his general character. *Brownlee v. S.* 13 App. 255. (It is not competent for the defendant to prove that the character of the deceased for honesty was bad.) *Plasters v. S.* 1 App. 673. If the character of the deceased could not have affected the conduct of the defendant, evidence to prove such character is inadmissible. *Henderson v. S.* 12 Tex. 525; *Grissom v. S.* 8 App. 386. It is never competent for the prosecution in the first instance to prove that the person slain was of good or peaceable character. Such evidence, however, may be introduced by the prosecution in rebuttal, when the opposite has been testified to in behalf of the defense, or where the defendant seeks to justify the homicide on the ground of threats made by the deceased. *Russell v. S.* 11 App. 288; *Graves v. S.* 14 App. 113. See Post, art. 608.

**THREATS**—Threats made by the deceased against the defendant are admissible as independent evidence, without first establishing a predicate for their admission by proof of acts done by the deceased at the time of the killing. *Horbach v. S.* 43 Tex. 242; *Howard v. S.* 23 App. 265. But where evidence of such threats could not possibly benefit the defendant, it is not error to reject it. *Penland v. S.* 19 App. 365; *Allen v. S.* 17 App. 637; *Howard v. S.* 23 App. 265. It is not permissible to prove threats made by deceased against another person than the defendant. *Drake v. S.* 5 App. 649; *Talbert v. S.* 8 App. 316. (Evidence of a former difficulty between the parties may be admissible in behalf of the defendant as explanatory of his acts, and is admissible for the State to show the *animus* of the homicide.) *Marnoch v. S.* 7 App. 269.

§986 — **Charge of the court.**—The law of self-defense when invoked by the proof should be given to the jury in plain and intelligible language, without superfluous verbiage. Learned abstractions are not the best means to make it comprehensible by the jury. *Boddy v. S.* 14 App. 528. And the charge should be constructed upon the evidence in the particular case on trial. *Hackett v. S.* 13 App. 406. (When the evidence raises the issue of self-defense, it is the duty of the court, whether requested to do so or not, to give in charge to the jury all the law upon that issue applicable to the evidence.) Under the Code, it is a part of the law of self-defense, that an assailed party is not bound to retreat in order to make good his right of self-defense. Failure to so charge is error, which, if excepted to, necessitates the reversal of a conviction, and if not excepted to will still be ground for reversal if the error was calculated to prejudice the rights of the accused. *Bell v. S.* 17 App. 538; *Arto v. S.* 19 App. 126; *Parker v. S.* 22 App. 105; *White v. S.* 23 App. 154. (Where the facts require it, the charge should instruct that the defendant had the right to act upon apparent danger as it reasonably appeared to him, and that to justify his acts the danger need not be real.) Ante, § 978 and cases there cited. The defendant is entitled to have explained correctly to the jury the law of self-defense in all the phases in which it may be applicable to the evidence. *Whulls v. S.* 23 App. 238; *Hill v. S.* 10 App. 618; *King v. S.* 13 App. 277; *Jackson v. S.* 15 App. 84; *Luera v. S.* 12 App. 257; *Edwards v. S.* 5 App. 593; *Wasson v. S.* 3 App. 474. An accused cannot be considered to have waived his right to a full and correct charge upon an issue raised by the evidence, because his requested charge was not as full as the law requires, nor is the trial court, for such reason, relieved of its duty to give a full and correct charge. *Bell v. S.* 17 App. 538. Where the facts require it, article 571 should be given in charge to the jury. See Ante, § 971. The first subdivision of article 570 declares that it must "reasonably appear," etc. It is error to substitute the word "necessarily" for the word "reasonably" in the charge, as the two words are essentially different in meaning. Also, homicide is justifiable when the slayer kills the deceased *after* the latter has done some act, etc. A charge which omits the word "after" is erroneous because it limits the justification to a killing while the deceased is in the act of killing the slayer, or in the act of doing the act, which evidences his intention to kill the slayer or do him serious bodily injury. *Stevenson v. S.* 17 App. 618. So a charge which limited the right of self-defense to "extreme necessity" was held erroneous. *King v. S.* 13 App. 277. The charge should, in a proper case, draw clearly the distinctions between self-defense under article 570, and self-defense under article 572. *Kendall v. S.* 8 App. 569. See Ante, §§ 970, 973. Post, MURDER.



## CH. 12. — OF EXCUSABLE HOMICIDE.

ART.	SEC.	ART.	SEC.
576. Definition.	987	Decisions relating to.	989
577. The lawful act must be done by lawful means.	988		

§987 — ART. 576. — **Definition.** — Homicide is excusable when the death of a human being happens by accident or misfortune, though caused by the act of another, who is in the prosecution of a lawful object by lawful means. [O. C. 575.]

See Ante, art. 44.

§988 — ART. 577. — **The lawful act must be done by lawful means, etc.** — The lawful act causing the death of another must be done by lawful means and used in a lawful degree. Though lawful for the parent, guardian, schoolmaster, or master, to chastise the child, ward, scholar, or apprentice; yet if this be done with an instrument likely to produce death, or if with a proper instrument the chastisement be cruelly inflicted, and death result, it is murder. [O. C. 576.] Post, Arts. 612, 613.

§989 — **Decisions relating to.** — For facts held to constitute excusable homicide, see *Ex parte Warren*, 31 Tex. 143, and *Ross v. S.* 10 App. 455. It seems to the author that the cases just cited might more properly be classed as justifiable homicides, upon the ground of self-defense. If a person, when acting in lawful self-defense, accidentally kills a third party, it is excusable homicide. *Plummer v. S.* 4 App. 310; *Clark v. S.* 19 App. 495.

## CH. 13. — HOMICIDE BY NEGLIGENCE.

ART.	SEC.	ART.	SEC.
578. Of two kinds.	990	586. Punishment.	998
I. IN THE PERFORMANCE OF A LAWFUL ACT.		II. IN THE PERFORMANCE OF AN UNLAWFUL ACT.	
579. In the performance of a lawful act.	991	587. "Of second degree" defined, etc.	999
580. "Lawful act" defined.	992	588. Can only be committed, when.	1000
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584. Must be no apparent intention to kill.	996	592. In a trespass, etc. — How punished.	1004
585. Homicide must be consequence of the act.	997	Decisions relating to	1005

§990 — ART. 578. — **Of two kinds.** — Homicide by negligence is of two kinds —

1. Such as happens in the performance of a lawful act; and
2. That which occurs in the performance of an unlawful act. [O. C. 577.]

## I. IN THE PERFORMANCE OF A LAWFUL ACT.

§991 — ART. 579. — **In the performance of a lawful act.** — If any person in the performance of a lawful act, shall, by negligence and carelessness, cause the death of another, he is guilty of negligent homicide of the first degree. [O. C. 578.]

Indictment, Willson's Cr. Forms, 385.

§992 — ART. 580. — “**Lawful act**” defined. — A “lawful act” is one not forbidden by the penal law and which would give no just occasion for a civil action. [O. C. 579.]

§993 — ART. 581. — **Must be an apparent danger of causing death.** — To constitute this offense there must be an apparent danger of causing the death of the person killed, or some other. [O. C. 580.]

§994 — ART. 582. — **How distinguished from excusable homicide.** — The want of proper care and caution distinguishes this offense from excusable homicide. The degree of care and caution is such as a man of ordinary prudence would use under like circumstances. [O. C. 581.]

§995 — ART. 583. — **Examples.** — Throwing timbers by a workman from the roof or upper part of a house into a public street or highway, or where a number of persons are known to be around the house, or discharging fire-arms on or near a public highway, other than a street in a town or city, in such manner as would be likely to injure persons who might be passing, are examples of negligent homicide of the first degree, in case of death resulting therefrom. If death is caused by the careless discharge of fire-arms in a public street of a town or city, the offense will be of a higher degree. [O. C. 582.]

§996 — ART. 584. — **Must be no apparent intention to kill.** — To bring the offense within the definition of homicide by negligence, either of the first or second degree, there must be no apparent intention to kill. [O. C. 584.]

§997 — ART. 585. — **Homicide must be consequence of the act.** — The homicide must be the consequence of the act done or attempted to be done. [O. C. 585.]

§998 — ART. 586. — **Punishment.** — Negligent homicide of the first degree shall be punished by confinement in the county jail not exceeding one year, or by fine not exceeding one thousand dollars. [O. C. 586.]

## II. IN THE PERFORMANCE OF AN UNLAWFUL ACT.

§999 — ART. 587. — “**Of second degree,**” defined, etc. — The definitions, rules and provisions of the preceding articles of this chapter, with respect to negligent homicide of the first degree, apply also to the offense of negligent homicide in the second degree, or such as is committed in the prosecution of an unlawful act, except when contrary to the following provisions: [O. C. 587.]

Indictment, Willson's Cr. Forms, 386.

§1000 — ART. 588. — **Can only be committed, when.** — Negligent homicide of the second degree can only be committed when the person guilty thereof is in the act of committing, or in attempting the commission of an unlawful act. [O. C. 588.]

§1001 — ART. 589. — “**Unlawful act**” includes what. — Within the meaning of an “unlawful act,” as used in this chapter, are included —

1. Such acts as by the penal law are called misdemeanors; and,
2. Such acts, not being penal offenses, as would give just occasion for a civil action. [O. C. 589.]

§1002 — ART. 590. — **Homicide in an attempt at felony not negligent.** — When one in the execution of, or in attempting to execute, an act made a felony by the penal law, shall kill another, though without an apparent intention to kill, the offense does not come within the definition of negligent homicide. [O. C. 590.]

§1003 — ART. 591. — **In an attempt at misdemeanor, punished how.** — When the unlawful act attempted, or executed, is one known as a misdemeanor, the punishment of negligent homicide committed in the execution of

such unlawful act shall be imprisoned in the county jail not exceeding three years, or by fine not exceeding three thousand dollars. [O. C. 591.]

§1004 — ART. 592. — **In a trespass, etc. — How punished.** — If the act intended is one for which an action would lie, but not an offense against the penal law, the homicide resulting therefrom is a misdemeanor, and may be punished by fine not exceeding one thousand dollars, and by imprisonment in the county jail not exceeding one year. [O. C. 592.]

§1005 — **Decisions relating to.** — Negligent homicide in the second degree, is a homicide which occurs in the performance of an unlawful act, when the unlawful act does not rise above the grade of a misdemeanor; and when the evidence is of a character that would warrant the jury in concluding that, in the performance of the act, there was no apparent intention to kill, the law applicable to negligent homicide in the second degree should be given to the jury. *Robins v. S.* 9 App. 667; *Robins v. S.* Id. 671. Negligent homicide is a killing which can only be predicated upon facts showing "no apparent intention to kill." *Aikin v. S.* 10 App. 610; *Clark v. S.* 19 App. 495. If, in the commission of a simple assault, or assault and battery upon another, there being no apparent intention to kill, one accidentally kill a third party, he is guilty of negligent homicide of the second degree. *McConnell v. S.* 13 App. 390. But if one committing an assault with intent to murder, accidentally kill a third person, he is guilty of murder in the second degree. *McConnell v. S.* 13 App. 390; *Leggett v. S.* 21 App. 382. When the slayer, under circumstances which would make the homicide manslaughter, if effected, in attempting to kill one, by accident kills another, against whom he had no malice, such killing would not be more penal than that intended. *Ferrell v. S.* 43 Tex. 504. But if he acts in lawful self-defense, such killing would be excusable homicide. Ante, §989. See facts held to demand a charge upon the law of negligent homicide. *Curtis v. S.* 22 App. 227; *McConnell v. S.* Id. 354; *Ellison v. S.* 10 App. 361.

## CH. 14.—OF MANSLAUGHTER.

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§1006 — ART. 593. — **Definition of.** — Manslaughter is voluntary homicide committed under the immediate influence of sudden passion arising from an adequate cause, but neither justified or excused by law. [O. C. 594.]

*Richardson v. S.* 9 App. 612; *Boyett v. S.* 2 App. 93; *Johnson v. S.* 43 Tex. 612; *Jennings v. S.* 7 App. 350; Indictment, *Willson's Cr. Forms*, 387.

§1007 — **Indictment.** — A common law indictment for manslaughter is not sufficient, as this offense at common law differs materially in its definition and essential elements from the offense defined in the preceding article. To be sufficient under the preceding article, the indictment must charge that the defendant, under the immediate influence of sudden passion, arising from an adequate cause, neither justified nor excused by law, did unlawfully and voluntarily kill, etc. *Jennings v. S.* 7 App. 350.

§1008 — **ART. 594.** — “Under the influence of sudden passion” explained. — By the expression “under the immediate influence of sudden passion” is meant —

1. That the provocation must arise at the time of the commission of the offense, and that the passion is not the result of a former provocation.

2. The act must be directly caused by the passion arising out of the provocation. It is not enough that the mind is merely agitated by passion arising from some other provocation, or a provocation given by some person other than the party killed.

3. The passion intended is either of the emotions of the mind, known as anger, rage, sudden resentment, or terror, rendering it incapable of cool reflection. [O. C. 596.]

§1009 — “Sudden passion” — **Meaning of.** — The expression “under the immediate influence of sudden passion” means that the provocation must arise at the time of the killing; the act must be directly caused by the passion arising out of the provocation. The passion is either of the emotions of the mind, known as anger, rage, sudden resentment or terror, rendering the mind incapable of cool reflection. *Bozett v. S.* 2 App. 93. Sudden passion is the evidence of manslaughter under our Code. *Hinton v. S.* 24 Tex. 454. To reduce a homicide from murder to manslaughter, there must have been provocation legally sufficient to produce passion, and such provocation must have actually produced such passion as rendered the mind acting under it, incapable of cool reflection, depriving it for a time, of the power to comprehend the consequences of the act about to be committed. *Maria v. S.* 28 Tex. 698. Where the killing is the result of the provocations mentioned in subdivisions 3 and 4 of article 597, post, the requirement of the preceding article that “the provocation must arise at the time of the commission of the offense, and that the passion is not the result of a former provocation,” is not applicable. In such cases, the time intervening between the slayer’s appraisal of the insult, and his first meeting with deceased is not a material consideration; but it is essential not only that the adequate cause be shown and the state of the slayer’s mind predicated thereon, did actually exist at the time of the killing. *Earnes v. S.* 10 App. 421; *Hill v. S.* 5 App. 2; *Paulin v. S.* 21 App. 436; *Orman v. S.* 22 App. 604; *Howard v. S.* 23 App. 265. Where the evidence tends to show that passion was aroused by an adequate cause, the question whether the act of killing was caused by the passion is for the jury and not the court to pass upon. *Mackay v. S.* 13 App. 360.

§1010 — **ART. 595.** — “Adequate cause” explained. — By the expression “adequate cause” is meant such as would commonly produce a degree of anger, rage, resentment or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection. [O. C. 597.]

§1011 — **ART. 596.** — **What are not adequate causes.** — Insulting words or gestures, or an assault and battery, so slight as to show no intention to inflict pain or injury, or an injury to property, unaccompanied by violence, are not *adequate causes*. [O. C. 598.]

§1012 — **ART. 597.** — **What are.** — The following are deemed adequate causes:

1. An assault and battery by the deceased, causing pain or bloodshed.

2. A serious personal conflict, in which great injury is inflicted by the person killed, by means of weapons, or other instruments of violence, or by means of great superiority of personal strength, although the person guilty of the homicide were the aggressor, provided such aggression was not made with intent to bring on a conflict and for the purpose of killing.

3. Adultery of the person killed with the wife of the person guilty of the homicide, provided the killing occur as soon as the fact of an illicit connection is discovered.

4. Insulting words or conduct of the person killed towards a female relation of the party guilty of the homicide. [O. C. 599.]

§1013 — **ART. 598.** — **For insult to female, killing must be immediate.** — When it is sought to reduce the homicide to the grade of manslaughter, by

reason of the existence of the circumstances specified in the fourth subdivision of article 597 of the Penal Code, it must appear that the killing took place immediately upon the happening of the insulting conduct, or the uttering of the insulting words, or so soon thereafter as the party killing may meet with the person killed, after having been informed of such insults. [O. C. 599a, Act Feb. 12, 1858, pp. 172-173.]

§1014—ART. 599. — **General character of female in issue.** — In every case where the defense spoken of in the preceding article is relied on, it shall be competent to prove the general character of the female insulted, in order to ascertain the extent of the provocation. [O. C. 599b, Act Feb. 12, 1858, p. 173.]

§1015—ART. 600. — **Discretion of jury in such cases.** — The jury shall be at liberty to determine in every case whether, under all the circumstances, the insulting words or gestures were the real cause which provoked the killing. [O. C. 599c, Act Feb. 12, 1858, p. 173.]

§1016—ART. 601. — **"Relation" includes whom.** — Any female under the permanent or temporary protection of the accused, at the time of killing, shall also be included within the meaning of the term *relation*. [O. C. 599d, Act Feb. 12, 1858, p. 173.]

§1017—ART. 602. — **"Adequate cause" must produce the passion.** — In order to reduce a voluntary homicide to the grade of manslaughter, it is necessary not only that adequate cause existed to produce the state of mind referred to in the third subdivision of article 594, but also that such state of mind did actually exist at the time of the commission of the offense. [O. C. 600.]

§1018 — **"Adequate cause" — Decisions as to.** — There are other "adequate causes" than those stated in article 597. That articles is explanatory and not restrictive, and the question as to whether or not adequate cause existed is one of fact for the jury to determine. *Brown v. S.* 38 Tex. 482; *Johnson v. S.* 43 Tex. 612; *West v. S.* 2 App. 460; *Guffee v. S.* 8 App. 187; *Williams v. S.* 7 App. 396; *Marla v. S.* 28 Tex. 698; *Sterling v. S.* 15 App. 249; *Sterling v. S.* Id. 249; *Williams v. S.* Id. 617; *Neyland v. S.* 13 App. 536; *Johnson v. S.* 22 App. 206; *Hobbs v. S.* 16 App. 517. Any condition or circumstance which is capable of enacting, and does create, sudden passion, such as anger, rage, sudden resentment or terror, rendering the mind incapable of cool reflection, whether accompanied by bodily pain or not, is "adequate cause." Where there are several causes to arouse passion, although no one of them might constitute adequate cause, yet all the causes combined might be sufficient to do so. *Waddlington v. S.* 19 App. 266; *Neyland v. S.* 13 App. 536; *Williams v. S.* 15 App. 617. "Adequate cause" means such as would commonly produce a degree of anger, rage, resentment or terror, in a person of ordinary temper, sufficient to render the mind incapable of cool reflection. Insulting words or gestures, or an assault and battery so slight as to show no intention to inflict injury, or an injury to property unaccompanied by violence are not adequate causes. *Boyet v. S.* 2 App. 93; *Rutherford v. S.* 15 App. 236. When a man is injuriously, and without proper authority restrained of his liberty, it is adequate cause for homicide. *Goodman v. S.* 4 App. 349. So an attempted unlawful arrest is adequate cause. *Ross v. S.* 10 App. 455; *Peter v. S.* 23 App. 684. Manslaughter is predicated upon adequate cause, and unless adequate cause exists, the homicide will not be reduced from murder although it was committed under the immediate influence of sudden passion, rendering the mind incapable of cool reflection. *McKinney v. S.* 8 App. 626; *Hill v. S.* 11 App. 456; *Neyland v. S.* 13 App. 536.

§1019 — **"Same" — "Pain or bloodshed."** — An assault and battery causing either pain or bloodshed is adequate cause. It is not necessary that it should cause both pain and bloodshed. *Hill v. S.* 8 App. 142; *Foster v. S.* Id. 248.

§1020 — **Serious personal conflict, etc.** — For facts which required a charge of subdivision 2, article 597, see *Ellison v. S.* 12 App. 557; *Lawrence v. S.* 10 App. 495.

§1021 — **Adultery.** — Subdivision 3, of article 597, presupposes that the adultery would arouse a degree of passion which, for the time, would dethrone reason, but that such passion could constitute an "adequate cause," only until there had been reasonable time for it to subside. *Winkfield v. S.* 41 Tex. 148. Adultery of the deceased with the wife of the slayer, provided the killing occurred as soon as the fact of illicit connection was discovered, is one of the adequate causes expressly enumerated in the statute as sufficient to reduce a homicide from murder to manslaughter. Where this is the provocation it is not required that it should arise at the time of the homicide, but the homicide will be extenuated thereby to manslaughter if it be committed as soon as the fact of such illicit connection is discovered. *Paulin v. S.* 21 App. 436. If an adulterer is attacked by the husband, he is not deprived wholly of the right of self-defense. If he kills the husband to save his own life, he will be guilty of manslaughter only. *Reed v. S.* 11 App. 509.

**§1022 — Insulting words, etc., to female relative.** — Subdivision 4 of article 597 makes insulting words or conduct towards a female relative of the slayer an adequate cause for the passion which reduces murder to manslaughter, provided the killing occurred immediately upon the happening thereof, or so soon thereafter as the slayer, having been informed of the insults, met with the person killed. In such case the requirement of article 594 that the provocation must arise at the time of the killing, and that the passion be not the result of a past provocation, is inapplicable. The time intervening between the slayer's appraisal of the insult and his first meeting with deceased is not a material consideration; but it is essential not only that the adequate cause have a status in the evidence, but that the state of the slayer's mind predicated thereon did actually exist at the time of the homicide. In the state of case contemplated by subdivision 4 of article 597 in connection with article 598, four issues of fact are presented: 1. The occurrence of insulting words or conduct on the part of the deceased towards a female relative of the accused; 2. Whether that was the real provocation which induced the killing; 3. Whether the killing took place immediately on the happening of the insult or as soon thereafter as the accused, having been apprised thereof, met with the deceased; and 4. Whether the accused, when he killed the deceased, was affected by such a degree of anger, rage, resentment or terror as would commonly, in a person of ordinary temper, render the mind incapable of cool reflection. In determining these issues the jury should consider the aspect in which the evidentiary circumstances presented themselves to the accused at the time he acted upon them. *Eanes v. S. 10 App. 421*; *Niland v. S. 19 App. 166*; see also *Orman v. S. 22 App. 604*; *Howard v. S. 23 App. 265*. Where the insulting words, etc., were not in the presence of the slayer, but were communicated to him, it devolves upon him to establish a complete predicate before he will be allowed to prove such insulting words, etc., by showing that he was informed thereof before the homicide, and that he committed the homicide on first meeting with the deceased thereafter. *Howard v. S. 23 App. 265*. The insulting language, etc., need not have been in the presence of the female to be adequate cause. *Hudson v. S. 6 App. 563*. The Mexican term, "Cabron," which means that the person to whom it is applied consents to the prostitution of his wife, is insulting words towards a female relative within the meaning of the statute. *Escareno v. S. 16 App. 85*. But "son of a bitch" are not. *Simmons v. S. 23 App. 653*. For facts which require a charge as to insulting words used by the deceased towards the wife of the defendant, see *Smith v. S. 15 App. 338*. If the female insulted be a relative of the slayer it is not required that she should be under his protection, either permanent or temporary, at the time either of the insult or the killing. It is sufficient if she be a *relative*. It is only in the case that she is not a relative of the slayer that the law requires that she should be under his protection. Any female under his protection at the time of the killing is included within the meaning of *relative*. A step-daughter is a female relation of the step-father while the marriage relation between the mother of the step-daughter and the step-father subsists. *Clanton v. S. 20 App. 615*.

**§1023 — Art. 603. — Provoking contest with intent to kill, not manslaughter.** — Though a homicide may take place under circumstances showing no deliberation, yet if the person guilty thereof provoked a contest with the apparent intention of killing, or doing serious bodily injury to the deceased, the offense does not come within the definition of manslaughter. [O. C. 603.]

**§1024 — Decisions under preceding article.** — Though a homicide may take place under circumstances showing no deliberation, yet, if the person guilty thereof provoked a contest with the apparent intention of killing, or doing serious bodily injury to the deceased, the offense does not come within the definition of manslaughter. But if he provoked the contest without any apparent intention of killing or doing serious bodily injury, and suddenly without deliberation, did the act of killing, while the homicide would not be justifiable, still it might be reduced to a lower grade than murder. *Green v. S. 12 App. 445*; *King v. S. 13 App. 277*; *Smith v. S. 15 App. 338*; *Cartwright v. S. 14 App. 486*; *Cunningham v. S. 17 App. 89*; *Jones v. S. Id. 602*; *Arto v. S. 19 App. 126*; *Thuston v. S. 21 App. 245*; *Roach v. S. Id. 249*; *Reed v. S. 11 App. 509*. For other decisions relative to this subject, see, *Ante*, §981.

**§1025 — Mutual combat — Cooling time.** — Where in a sudden quarrel, both parties engage in the contest willingly, fight on equal terms, and no undue advantage is sought or taken by either, if death ensue, the killing will amount to manslaughter. If one party seeks, or takes any undue advantage of his adversary, and slays him, the killing is murder. *King v. S. 4 App. 54*; *Wilson v. S. Id. 637*. But a homicide committed in mutual combat will not be reduced to manslaughter unless it was committed under the influence of sudden passion arising from an adequate cause. *Spearman v. S. 23 App. 224*; *Crist v. S. 21 App. 361*. For other decisions relating to mutual combat, see *Ante* §982. For decisions as to "Cooling time," see *Hobbs v. S. 16 App. 517*; *Eanes v. S. 10 App. 421*; *Waddington v. S. 19 App. 266*.

**§1026 — Abandonment of the combat.** — If the deceased attacked defendant, and after shooting at him retreated and quitted the combat as far as he could, and the defendant then, under the immediate influence of sudden passion produced by the assault, fired upon and killed the deceased, he would be guilty of manslaughter. *West v. S. 2 App. 460*.

**§1027 — Principals and accomplices.** — Under our Code an accomplice is the same as an accessory before the fact at common law. As at common law there could be no accessories before the fact to manslaughter, so under our Code there can be no accomplice to manslaughter. But at common law there might be a principal in the second degree to manslaughter, and under our Code, the offense of manslaughter admits of principals, and applies as well to this offense

as any other. Several persons may so act together as to become principals in its commission, and one may be guilty of this offense although he did not himself inflict the mortal wound. *Ogle v. S. 16 App. 361; Cartwright v. S. Id. 473.*

§1028 — **Limitation.** — A prosecution for this offense is barred after the lapse of three years from the time of its commission, although the indictment charges murder. *White v. S. 4 App. 468.*

§1029 — **Evidence.** — The wife of the deceased was the only witness to the killing. Over objection by the defendant, she was allowed to testify that a few minutes before he killed her husband, he made indecent proposals to her; but of this fact the deceased was never apprised, and there was nothing to indicate that it influenced or explained the motives or acts of either the deceased or the defendant. Held, that this testimony was irrelevant, and of a character likely to incense the jury against the defendant, and it was material error to admit it. *Gardner v. S. 11 App. 265.* It was proper to permit the State to prove that a few minutes after the deceased was shot, the defendant and another man were seen at the house of deceased's father, and also to prove the language and conduct of defendant at that time and place. This testimony related to matters which transpired immediately after the homicide, and were closely connected with it, and were part of the *res gestæ*. *Cartwright v. S. 16 App. 473.* In order to raise the issue of manslaughter, it is not essential that the overt act relied upon was sufficient to raise the issue of self-defense; but if, in connection with other antecedent facts and circumstances, it excited in the mind of the accused, and was sufficient to excite in the mind of a person of ordinary temper such sudden passion as would render it incapable of cool reflection, then adequate cause would be produced sufficient to raise the issue of manslaughter. *Howard v. S. 23 App. 265; Hobbs v. S. 16 App. 517.* In a trial for assault with intent to murder, it was in proof that C., the alleged injured party, charged the defendant with improper relations with his, C.'s wife, and that the defendant was claiming for himself the paternity of Mrs. C.'s child; which charges were denied by the defendant, and were reasserted by C., who thereupon seized the defendant by his collar and shook him, when the defendant pushed him off and patted him on the shoulder, and C. then ordered defendant to keep his hands off, and was cursing defendant, when defendant shot him. These facts being proved, the defendant proposed to disprove the charges made by C., and to show that his relations with C.'s wife and child had been and were innocent and proper. Held, that the proposed testimony was competent, and should have been permitted to go to the jury in connection with a charge upon manslaughter to the effect that if, from the insults and assault coupled together as adequate cause, they believed that the defendant committed the act under the immediate influence of sudden passion, such as anger, rage or sudden resentment sufficient to render his mind incapable of cool reflection, then they could find him guilty of no higher grade of offense than aggravated assault and battery. *Waddington v. S. 19 App. 266.* The declarations of the defendant made the instant before killing, that deceased had insulted his wife, are not admissible in his behalf, in the absence of other testimony that such insult had been given. *Bassham v. S. 38 Tex. 622.* A defendant convicted of this offense cannot complain that the evidence established murder instead of manslaughter. *Powell v. S. 5 App. 234.* For other decisions pertinent to this subject, see JUSTIFIABLE HOMICIDE; MURDER.

§1030 — **Charge of the court.** — Where the evidence, however inclusively, tends to prove facts from which the jury may deduce a finding of manslaughter, it is incumbent on the trial court to give the law of manslaughter in charge to the jury, and it should be given affirmatively, directly and pertinently to the theory of the case indicated by such evidence. Mere negative or abstract propositions are not sufficient. *McLaughlin v. S. 10 App. 340; Johnson v. S. 43 Tex. 612; Jennings v. S. 7 App. 350; Williams v. S. Id. 396; Moore v. S. 15 App. 1; Neyland v. S. 13 App. 536; Rutherford v. S. 16 App. 649.* If the facts proved create a doubt in the mind of the trial judge as to the necessity of a charge upon the law of manslaughter in a trial for murder, the doubt should be resolved in favor of the accused, and such charge given. *Williams v. S. 7 App. 396; Robbs v. S. 5 App. 346; Halbert v. S. 3 App. 656; Maria v. S. 28 Tex. 698.* But the charge of the court is always sufficient if it distinctly sets forth the law applicable to the evidence; and it is only necessary to give such instructions as are applicable to every legitimate deduction to be drawn from the facts in proof. *Evans v. S. 13 App. 225.* Therefore, in the absence of evidence tending to establish, or that creates a doubt as to whether the homicide be of a lower grade than murder, it is unnecessary and improper for the court to charge upon manslaughter. *Neyland v. S. 13 App. 536; Jackson v. S. 18 App. 586; Burkhard v. S. Id. 599; Anderson v. S. 15 App. 447; Smith v. S. Id. 139; Jones v. S. 22 App. 324; Wallace v. S. 20 App. 360; Roberts v. S. 5 App. 141; Grissom v. S. 4 App. 374; Hill v. S. 11 App. 456; Boyett v. S. 2 App. 93; Halbert v. S. 3 App. 657.*

The charge must be limited to the case on trial. When the defendant was charged with murder, and on a former trial had been convicted for manslaughter, such conviction operated as an acquittal of both degrees of murder, and it was held error for the court upon a second trial to charge the jury upon the law applicable to murder. The charge should have been limited to the law of manslaughter, that being the case on trial. *Parker v. S. 22 App. 105.* A charge which instructed the jury that assault and battery would not be adequate cause unless it produced severe pain, or bloodshed, was held to be erroneous. *Tickle v. S. 6 App. 623.* An instruction that insulting words about and concerning a female relative, who is not present, would not necessarily be adequate cause, was held erroneous. The jury must be left the liberty of determining whether, under all the circumstances, the insulting words were the real cause which provoked the homicide. *Hudson v. S. 6 App. 565.* Where the evidence tends to show that the passion was aroused by an adequate cause arising at the time of the homicide, and the question is, whether or not the homicide was caused by the passion, the jury, and not the court, must pass upon the question. *Mackey v. S. 13 App. 360.* See facts which required the court to instruct the

jury, that if it reasonably appeared to the defendant from the acts of the injured party, that the defendant was in danger of death, or serious bodily injury, and was thereby aroused to such terror or resentment as that his mind was incapable of cool reflection, and in that condition had slain the injured party, his offense would have been manslaughter. *Williams v. S.* 15 App. 617. In a trial for murder it was in proof that the deceased, when shot by the defendant, had just ridden, or was attempting to ride, against the defendant, and there was evidence of provocation of the defendant by the deceased upon occasions prior to that of the homicide. The charge to the jury upon law of manslaughter restricted them to the consideration of such provocation as occurred upon the immediate occasion of the homicide, ignoring all provocations prior thereto. Held erroneous. The jury, in considering of the sufficiency of the provocation, and of its effect upon the mind and passions of the defendant, should not have been so restricted, but should have been allowed to look to all the evidence germane to the issue. *Miles v. S.* 18 App. 156. See a state of facts upon which it was held not to be error to omit to charge the rules of law declared in articles 612 and 614, Post, although the court had charged the substance of article 615, Post. *Hartwell v. S.* 23 App. 68.

In order to raise the issue of manslaughter, it is not essential that the overt act relied upon was sufficient to raise the issue of self-defense, but if, in connection with other antecedent facts and circumstances, it excited in the mind of the accused, and was sufficient to excite in the mind of a person of ordinary temper, such sudden passion as would render it incapable of cool reflection, then adequate cause would be produced sufficient to raise the issue of manslaughter, and the law of manslaughter would be a part of the law of the case, and should be given in charge to the jury. *Howard v. S.* 23 App. 265; *Hobbs v. S.* 16 App. 523. Where the defendant was on trial for manslaughter, under an indictment charging murder, having on a former trial been acquitted of murder, it was held error to charge the jury that if they believed, from the evidence, that the defendant was guilty of either degree of murder, they could find him guilty of manslaughter. Such charge was not warranted by the rule that a verdict for an inferior grade will not be set aside because the evidence showed a higher grade of offense. *Parker v. S.* 22 App. 105. The charge was, "If you believe, from the evidence, beyond a reasonable doubt that the defendant did unlawfully kill the deceased, by shooting him with a pistol, and that the same was done under the immediate influence of sudden passion, arising from an adequate cause, such as insulting words or conduct of the deceased towards female relations of defendant, you will find defendant guilty of manslaughter." Held, erroneous, because it in effect requires that the killing, in order to be reduced to manslaughter, must have immediately followed the insulting words in order to be sudden, although the insulting words were uttered not in the presence or hearing of the defendant, and, although the killing occurred at the first meeting of the parties after the defendant had been informed of the insulting words. *Orman v. S.* 22 App. 206. And in such case it is error to charge that the "provocation must arise at the time of the killing, and must not be the result of a former provocation." *Paulin v. S.* 21 App. 436; *Niland v. S.* 19 App. 166. Where the insulting words were used towards the step-daughter of the defendant, it was held error to charge that she must have been under the protection of the defendant at the time of the homicide in order to make them adequate cause. *Clanton v. S.* 20 App. 615. It is error to charge the jury that they may find the defendant guilty of manslaughter, without also instructing them as to what state of facts would constitute that offense. *Babb v. S.* 12 App. 491. A person convicted of this offense upon an indictment for murder, cannot complain that the jury were instructed upon murder, without evidence to warrant such instruction. *Blake v. S.* 3 App. 581. Or that the evidence established murder and not manslaughter. *Powell v. S.* 5 App. 234.

For evidence demanding a charge upon the law of manslaughter, see *Ross v. S.* 23 App. 689; *Tow v. S.* 22 App. 175; *Liggett v. S.* 21 App. 382; *Rutherford v. S.* 15 App. 236; *Smith v. S.* id. 338; *Moore v. S.* Id. 1; *Reynolds v. S.* 14 App. 427; *Green v. S.* 12 App. 445; *Ellison v. S.* Id. 445; *Brunet v. S.* Id. 521; *Luera v. S.* 12 App. 257; *Holmes v. S.* 11 App. 223; *Reed v. S.* 9 App. 317; *Richardson v. S.* Id. 612. For charges held correct, see *Simmons v. S.* 23 App. 653; *Johanson v. S.* 22 App. 206; *Clark v. S.* 19 App. 495; *Arto v. S.* Id. 126; *Bennett v. S.* 12 App. 15; *Drake v. S.* 5 App. 649. For other decisions relating to charges pertinent to this offense, see JUSTIFIABLE HOMICIDE; MURDER.

§1031 — ART. 604. — **Punishment.** — Manslaughter is of various degrees of culpability, according to the circumstances under which it was committed. It shall be punished by imprisonment in the penitentiary not less than two nor more than five years. [O. C. 602, Act Feb. 12, 1885, p. 173.]

The original article fixed the punishment at not exceeding five years.



## CH. 15. — OF MURDER.

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§1032 — ART. 605. — "Murder" defined. — Every person with a sound memory and discretion who shall unlawfully kill any reasonable creature in being within this State, with malice aforethought, either express or implied, shall be deemed guilty of murder. Murder is distinguishable from every other species of homicide by the absence of the circumstances which reduce the offense to negligent homicide or manslaughter, or which excuse or justify the homicide. [O. C. 607, Act Feb. 12, 1858, p. 173.]

See Ante, art. 195 and Post art. 539, 674, 676, 678, 681. Indictment, Willson's Cr. Forms, 888-889-390-391-392-393-394.

§1033 — ART. 606, — The two degrees. — All murder committed by poison, starving, torture or with express malice, or committed in the perpetration or in the attempt at the perpetration of arson, rape, robbery or burglary, is murder in the first degree, and all murder not of the first degree is murder of the second degree. [O. C. 608, Act Feb. 12, 1858, p. 174.]

§1034 — Former statutes. — By the act of December 21, 1836, p. 187 (Hart Dig., art 356), the crime of murder was defined and its punishment prescribed as follows: "Every person of sound memory and discretion, who shall willfully and maliciously kill any person within this Republic; or aid, abet or instigate the killing of any person, as aforesaid, shall be deemed guilty of murder, and on conviction thereof, shall suffer death." By the Act of March 20, 1848, p. 219 (Hart Dig., Art. 501), it was provided as follows: "All murder committed by poison, starving, torture, or other premeditated and deliberate killing, or committed in the perpetration, or in the attempt at the perpetration of arson, rape, robbery or burglary, is murder in the first degree, and all murder not of the first degree is of the second degree. If the jury shall find any person guilty of murder, they shall also find, by their verdict, whether it is of the first or second degree." The punishment prescribed under said act for murder in the first degree was death, and for murder in the second degree, confinement to hard labor in the penitentiary for not less than three years nor more than fifteen years (Hart Dig., art. 503). This was the first statute dividing the offense into two degrees. The foregoing statute remained in force until the adoption of the Penal Code in 1856, when it was superseded by the following articles: —

"ART. 607. Murder is voluntary homicide committed with deliberate design, by whatever means perpetrated, when the offense does not come within the definition of any of the homicides which are enumerated in the preceding chapters of this title."

"ART. 608. Murder is distinguishable from every other species of homicide by the absence of the circumstances which reduce the offense to negligent homicide or manslaughter, or which excuse or justify the homicide."

"ART. 609. The jury, in every case of murder, will regulate the punishment according to a just estimate of the heinousness of the offense. They are authorized to consider, 1. The means used to effect the killing, and the degree of cruelty displayed by the person guilty thereof. 2. The purpose for which the homicide is committed. 3. The condition of the person murdered. 4. The relationship between the offender and the person killed. 5. The time and place and the circumstances attending the commission of the offense, and any and every circumstance tending to show the degree of moral turpitude attached to the offense, and the influence of its perpetration upon society by reason of the peculiar characteristics attending the case."

By the act of February 12, 1858, the foregoing articles were amended and superseded by articles 607, 608 and 609 as they now exist, the only changes in the meantime relating to the offense being in the punishment affixed thereto, for which changes see Post, § 1072, *et seq.*

§1035—**Indictment.**—It was settled at an early day, and has since been uniformly held, that the common-law form of indictment for murder is sufficient under our statute. *Gehrke v. S. 13 Tex. 568*; *White v. S. 16 Tex. 206*; *Wall v. S. 18 Tex. 682*; *Perry v. S. 44 Tex. 473*. Under the statute of 1848 it was held that the indictment must allege that the assault was made "feloniously and of malice aforethought," but that these words need not be repeated as to the stroke. *Arthur v. S. 3 Tex. 403*. It is not now necessary to allege an assault or to use the word "felonious" or "feloniously" in charging murder. It need not be alleged that the killing was "unlawfully" or "willfully" done. *Stephens v. S. 20 App. 255*; *Bean v. S. 17 App. 60*; *Thompson v. S. 36 Tex. 326*. It must allege that the killing was with "malice aforethought." This allegation is indispensable in an indictment for murder. *McElroy v. S. 14 App. 235*; *Tooney v. S. 5 App. 163*; *McCoy v. S. 25 Tex. 163*. It must allege that the defendant killed the deceased. *Strickland v. S. 19 App. 518*; *Pierce v. S. 21 App. 669*. But an allegation that the defendant "did deprive him" (the deceased) "of life" was held to be a sufficient allegation of killing. *Walker v. S. 14 App. 609*. The indictment must set forth the means by which the life of the deceased was extinguished, or allege that the means used were unknown to the grand jury. *Drye v. S. 14 App. 191*; *Walker v. S. Id. 609*; *Dwyer v. S. 12 App. 535*; *Peterson v. S. Id. 650*; *Sheppard v. S. 17 App. 74*; *S. v. Williams, 86 Tex. 352*. It need not aver that the party slain was a "person of sound memory and discretion" or "a reasonable creature in being" or "a human being." *Bean v. S. 17 App. 60*; *Ogden v. S. 15 App. 454*; *Bohannon v. S. 14 App. 271*; *Wade v. S. 23 App. 308*; *Perryman v. S. 36 Tex. 321*. In order to charge murder in the first degree it need not charge *express* malice aforethought. It is sufficient to charge malice aforethought, as this term embraces both express and implied malice. *Penland v. S. 19 App. 365*; *Bohannon v. S. 14 App. 271*; *Dwyer v. S. 12 App. 535*; *Peterson v. S. Id. 650*; *Longley v. S. 3 App. 611*; *Stapp v. S. 3 App. 138*; *Perry v. S. 44 Tex. 473*; *Henrie v. S. 41 Tex. 573*; *Wall v. S. 12 Tex. 682*; *White v. S. 16 Tex. 206*; *Gehrke v. S. 13 Tex. 568*. It may charge the murder of two or more persons in one count. *Rucker v. S. 7 App. 549*; *Chivarrio v. S. 15 App. 330*. If the murder was committed by one person, and others were present, knowing the unlawful intent of the perpetrator, and aided him by acts, etc., in the commission of the crime, the indictment, in charging such others with the murder, need not allege the particular facts which constitute them principals therein, but may be in the usual form against all the principals. *Davis v. S. 3 App. 91*; *Gladden v. S. 2 App. 508*; *Williams v. S. 42 Tex. 392*. "One Chino, whose other name is to the grand jurors unknown," was held to be sufficient as to the name of the deceased. *De Olles v. S. 20 App. 145*. That the name of deceased, as "Smuttery-My-Darling," is an unusual one, is immaterial. *Wade v. S. 23 App. 308*. See, also, as to allegation of the name of the deceased, *Williams v. S. 3 App. 123*; *Rothschild v. S. 7 App. 519*; *Cock v. S. 8 App. 659*; *Willson's Cr. Forms, 5*, and cases there cited. Where the sex of the deceased is averred, which is unnecessary to do, such averment is descriptive of the offense, and must be proved. *Wallace v. S. 10 App. 255*. Where an indictment in the usual form charges murder, it alleges all kinds or species of murder that could be committed by the means alleged; that is, if it alleges murder by shooting, a murder committed by means of shooting, in the perpetration, or attempt at the perpetration of arson, rape, robbery or burglary may be proved and a conviction therefor had under such indictment. *Sharpe v. S. 17 App. 486*; *Reyes v. S. 10 App. 1*; *Roach v. S. 8 App. 491*; *Tooney v. S. 5 App. 163*. But where the indictment charges that the murder was committed in the perpetration or attempt at the perpetration of robbery, etc., or by poison, the State must prove such a murder, or the indictment will not be sustained. *Sharpe v. S. 17 App. 486*; *Tooney v. S. 5 App. 163*. For indictments for murder held to be sufficient, see *Wade v. S. 23 App. 308*; *Smith v. S. 21 App. 277*; *De Olles v. S. 20 App. 145*; *Stephens v. S. Id. 145*; *Lucas v. S. 19 App. 79*; *Walker v. S. Id. 176*; *Penland v. S. Id. 365*; *Bean v. S. 17 App. 60*; *Sharpe v. S. Id. 486*; *Moore v. S. 15 App. 1*; *Bohannon v. S. 14 App. 271*; *Walker v. S. Id. 609*; *Dwyer v. S. 12 App. 535*; *Peterson v. S. Id. 650*. For murder by poisoning, see *Marshall v. S. 5 App. 273*.

§1036—"Malice aforethought"—**Decisions explaining.**—The distinguishing characteristic of murder is homicide with malice aforethought, express or implied. *Evans v. S. 6 App. 513*; *Pharr v. S. 7 App. 472*; *Babb v. S. 12 App. 491*. The legal signification of the term "malice aforethought" extends beyond its popular acceptation. Its signification is more comprehensive than malevolence, enmity, ill-will, spite, hatred, or revenge. It includes all states of mind under which the killing of a person takes place without any cause which will, in law, justify, excuse or extenuate the homicide. It is a condition of the mind which shows a heart regardless of social duty, and fatally bent on mischief, the existence of which is inferred from acts committed or words spoken. *McCoy v. S. 25 Tex. 33*; *Tooney v. S. 5 App. 163*; *Harris v. S. 8 App.*

90; McKinney v. S. Id. 626; Hayes v. S. 14 App. 330; Bramlette v. S. 21 App. 611. In the early case of Lander v. S. 12 Tex. 462, the term is thus explained: "When the law makes use of the term malice aforethought as descriptive of the crime of murder, it is not to be understood merely in the sense of a principle of malevolence to particulars, but as meaning that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked and malignant spirit. Malice, in its legal sense, denotes a wrongful act done intentionally, without just cause or excuse. The legal import of the term differs from its acceptation in common conversation. It is not, as in ordinary speech, only an expression of hatred and ill-will to an individual, but means any wicked or mischievous intention of the mind. Thus, in the crime of murder, which is always stated in the indictment to be committed with malice aforethought, it is neither necessary in support of such indictment to show that the prisoner had any enmity to the deceased, nor would proof of absence of ill-will furnish the accused with any defense when it is proved that the act of killing was intentional and done without any justifiable cause. Malice, in law, is a mere inference of law, which results simply from a willful transgression of the law. It imports simply the perverse disposition of one who does an act which is unlawful, without a sufficient legal excuse therefor; and the precise and particular intention with which he did the act; whether he was moved *tra vel odio vel causa lucri*, is immaterial; he acts maliciously in willfully transgressing the law. \* \* \* Every intentional killing without lawful justification, excuse or extenuation, is a malicious killing, amounting of course, to murder." See Ante, § 860, and Post, arts. 612 to 615.

§1037—"Express malice" defined.—Express malice is where one with a sedate and deliberate mind, and formed design, unlawfully kills another, which formed design is evidenced by external circumstances discovering that inward intention, as lying in wait, antecedent menaces, former grudges, and concerted schemes to do bodily harm, or other circumstances showing sedate and deliberate mind and formed design unlawfully to kill, or to inflict serious bodily harm, which might probably end in the death of the person upon whom the same was inflicted. Jordan v. S. 10 Tex. 479; McCoy v. S. 25 Tex. 33; Farrer v. S. 42 Tex. 271; Plasters v. S. 1 App. 673; Holden v. S. Id. 226; Primus v. S. 2 App. 369; Halbert v. S. 3 App. 657; Jones v. S. Id. 150; Cox v. S. 5 App. 493; Tooney v. S. Id. 163; Galtan v. S. 11 App. 544; Lewis v. S. 15 App. 647; Sharpe v. S. 17 App. 486. See also Post, arts. 612-613-614-615.

§1038—"Implied malice" defined.—Implied malice is that which the law infers from, or imputes to certain acts. Thus, when the fact of an unlawful killing is established, and there are no circumstances in evidence which tend to establish the existence of express malice, nor which tend to mitigate, excuse or justify the act, then the law implies malice, and the homicide is murder in the second degree. Harris v. S. 8 App. 90, Douglass v. S. Id. 520; Hubby v. S. Id. 597; Neyland v. S. 13 App. 536; Reynolds v. S. 14 App. 147; Turner v. S. 16 App. 378; Cullen v. S. Id. 379; Stanley v. S. Id. 392; Hill v. S. 11 App. 456; Hart v. S. 21 App. 156; Smith v. S. 19 App. 95; Ellison v. S. 12 App. 557; Sharp v. S. 6 App. 650, the latter decision modified in Morgan v. S. 16 App. 593, so as to expunge from the definition of implied malice the word "evident," used in the charge approved in that case.

§1039—Murder in the first degree—What constitutes.—To constitute murder in the first degree, the homicide must be committed by poison, starving, or torture, or in the perpetration, or attempt at perpetration, of arson, rape, robbery or burglary, or with express malice. Primus v. S. 2 App. 369. There must have existed in the slayer at time of homicide a sedate and deliberate mind, and a formed design to kill the deceased, or to do him some serious bodily harm, which caused the death of the deceased. The malevolence must be directed towards the deceased as its object. There must be a specific intention to take the life of the deceased, or to do him some serious bodily harm, the doing of which subsequently causes his death. This specific malevolence, or intent, however, may be embraced in such utter and reckless disregard of life, as shows the slayer to be an enemy to all mankind; as when a man resolves to kill the next man he meets, and does kill him; or shoots into a crowd wantonly, not knowing whom he may kill. In such a case, it may well be said, that he has malevolence towards the particular person killed, because he was one within the general scope of his malignity. The same may be said of one or more persons who enter upon the commission of another felony, in such way as to show a preconceived resolve to kill, or to do great bodily harm to all, or any one who may oppose the design. McCoy v. S. 25 Tex. 33; Ferrell v. S. 43 Tex. 503; Summers v. S. 5 App. 365; Musick v. S. 21 App. 69. The killing may be with express malice, and, therefore, murder in the first degree, though there was, in fact, no intention or design to take the life of the deceased. It is the act by which one doth kill, to which the formed design must refer, and not to the fact of killing. Farrer v. S. 42 Tex. 265. When the homicide is committed by means of poison, starving, torture, or in the perpetration, or in the attempt at the perpetration of arson, rape, robbery or burglary, it is murder in the first degree, *ipso facto*, if characterized by malice aforethought, but without malice aforethought, no homicide can be murder. Tooney v. S. 5 App. 163; Sharpe v. S. 17 App. 486; Pharr v. S. 7 App. 472; Singleton v. S. 1 App. 501; Gonzales v. S. 19 App. 394; Giles v. S. 23 App. 281. See also Post, arts. 611-613-614-615.

§1040—Same—"Sedate and deliberate mind and formed design" explained.—A sedate and deliberate mind imports that the mind is sufficiently composed, calm and undisturbed, to admit of reflection and consideration on the design, and in a condition to comprehend the nature of the act designed and its probable consequences. Primus v. S. 2 App. 369. The act must not result from a mere sudden, rash and immediate design, springing from an inconsiderate impulse, passion, or excitement, however unjustifiable and unwarranted it may be. For in such case the sedate, deliberate mind is wanting, and without it there can be no express malice. But if the design is formed with a sedate, deliberate mind, the fact of such design being executed while

the slayer is under the influence of rage, passion or other character of excitement does not prevent the killing from being attributable to the preconceived express malice of the slayer. But when the design has its first inception and origin in an inflamed and excited mind, incapable of such sedate, deliberate action as is compatible with express malice, and such design is carried into immediate effect before there has been cooling time for passion, or for the excitement to abate, and the mental equilibrium to be restored, the killing under such circumstances, no matter how such passion or excitement may have been induced or originated, cannot be murder in the first degree. *Farrer v. S. 42 Tex. 265; Ake v. S. 30 Tex. 466; Atkinson v. S. 20 Tex. 522; Duebbev. S. 1 App. 159.* Whilst the "formed design" to kill the deceased, or inflict upon him serious bodily harm which would probably result in his death, must originate in, or result from a "sedate and deliberate mind," the law does not, and cannot, define any precise time for the formation of such design. It may take place in the shortest interval, — even the moment before the act, as well as months before, — no time is too short for a wicked mind to design murder. The difference in the degrees of murder does not result from the length of time taken to form the design, or the speed with which it is executed; but upon the condition of the mind forming such design. *Duebbev. S. 1 App. 160; Halbert v. S. 3 App. 657; Jordan v. S. 10 Tex. 479; Farrer v. S. 42 Tex. 265; Atkinson v. S. 20 Tex. 522.* A "formed design" is a conclusion of the mind arrived at by an exercise of the reasoning faculties. *McCoy v. S. 25 Tex. 33; Ake v. S. 30 Tex. 466.* In determining whether murder has been committed with express malice or not, the important questions are: Do the external facts and circumstances at the time of the killing, before or after that time, having connection with, or relative to it, furnish satisfactory evidence of the existence of a sedate, deliberate mind on the part of the person killing at the time he does the act? Do they show a formed design to take the life of the person slain, or do him some serious bodily harm, which in its necessary or probable consequences, may end in his death; or such general reckless disregard of human life, as necessarily includes a formed design against the life of the person slain? If they do, the killing, if it amounts to murder, will be upon express malice. *McCoy v. S. 25 Tex. 33.*

§1041 — Murder in the second degree. — All murder not of the first degree, is murder of the second degree. The distinction between the two degrees is predicated upon the difference between *express* and *implied* malice. As express malice is the essential element of murder in the first degree, so is implied malice the essential element of murder in the second degree. Express malice is never implied or inferred. It must be proved to exist in fact. Implied malice is constructive malice, and not a fact to be proved specifically. It is an inference or conclusion founded upon the particular facts and circumstances of the case as they are ascertained to exist. Thus, when the proof shows an unlawful killing, and no evidence which has been adduced tends to show express malice on the one hand, or any justification, excuse or mitigation on the other, the law implies malice, and the murder is of the second degree. In this degree of murder, it is not required, as in the case of murder in the first degree that the malice which is implied shall be directed towards the deceased, or in other words that there should exist in the mind of the slayer a specific intent to kill the deceased, or to do him serious bodily harm. Thus, if A, unlawfully and actuated by express malice, in attempting to murder B, kills C, a person against whom he has no ill-will, it is murder in the second degree. *McCoy v. S. 25 Tex. 33; Ferrell v. S. 43 Tex. 503; Farrer v. S. 42 Tex. 265; Jordan v. S. 10 Tex. 479; Hamby v. S. 36 Tex. 523; Atkinson v. S. 20 Tex. 522; Murray v. S. 1 App. 417; Tooney v. S. 5 App. 163; Hill v. S. 11 App. 456; Neyland v. S. 13 App. 536; Cullen v. S. 16 App. 379.* For the distinction between the two degrees of murder in a case of infanticide, see *Wallace v. S. 7 App. 570.* See also Post, arts 612-613-614-615.

§1042. — Evidence — *Corpus delicti.* — In prosecutions for murder, the State must establish clearly and satisfactorily the *corpus delicti*. The *corpus delicti* consists of two things: 1, a criminal act; and 2, the defendant's agency in the commission of such act. In homicide, in order to establish the *corpus delicti* it must be proved, 1, the death of the party alleged to be dead, and that the death was produced by the criminal act of some one other than the deceased, and was not the result of accident or natural cause; and, 2, that the defendant committed the act which caused the death. The *corpus delicti* may be established by circumstantial evidence, but the fact of the death of the party alleged to have been killed, and that his death was caused by criminal agency, must be clearly shown, and a confession of the defendant is not of itself sufficient proof of this part of the *corpus delicti*. Special care should be exercised as to this part of the *corpus delicti*, and there should be no conviction except where this part of the case is proved with particular clearness and certainty. *Lovelady v. S. 14 App. 545.* In order to sustain a conviction for culpable homicide, it is indispensable that a dead body, or portions of a dead body, be found, and be clearly proved to be the body, or portions of the body of the person alleged to have been killed. *Walker v. S. 14 App. 609.* For the purpose of identifying the dead body or the portions thereof found, as the remains of the person alleged to have been killed, it is competent to identify clothing and other articles found upon, with, or near to such remains, as the property of the alleged deceased person. *Campbell v. S. 8 App. 84; Early v. S. 9 App. 476.* For instances of identification and attempted identification of remains, see *Wilson v. S. 41 Tex. 320; S. C. 43 Tex. 472; Scott v. S. 23 App. 521; Lightfoot v. S. 20 App. 77; Ah Hang v. S. 18 App. 675; Spear v. S. 16 App. 98; Walker v. S. 14 App. 609; Lum v. S. 11 App. 483.* A witness unskilled in anatomy ought not to be permitted to testify as to the sex of a skeleton, but experts should be called to testify upon that question. *Wilson v. S. 41 Tex. 320.* It is competent to show the cause of a death without the aid of expert witnesses, even in a case where death did not ensue immediately after the infliction of the wound. Experts may give their opinions as to the cause of the death. *Smith v. S. 43 Tex. 643; Powell v. S. 13 App. 244.* For cases and evidence bearing upon the question as to whether the death was caused by the

criminal act or agency of another person than the deceased, see *Lovelady v. S.* 14 App. 545; *S. C.* 17 App. 286; *Olivares v. S.* 23 App. 305; *Trendwell v. S.* 16 App. 560; *Heacock v. S.* 13 App. 97; *Wilson v. S.* 41 Tex. 320; *S. C.* 43 Tex. 472; *Spear v. S.* 16 App. 98; *Scott v. S.* 23 App. 521; *Lucas v. S.* 19 App. 79; *Johnson v. S.* 20 App. 178. For other decisions relating to the *corpus delicti*, see Ante, § 939.

§1043—**Same—Express malice.**—Express malice is an element of murder in the first degree which must be proved, and cannot be inferred. Its actual existence is manifested by external acts or circumstances which may transpire before, at the time of, or immediately after the killing. It is not required that its existence be demonstrated by the evidence with mathematical precision, but it is sufficiently proved if the evidence be sufficient to satisfy and convince the jury beyond a reasonable doubt that it did exist, and the fact of its existence may be established by circumstantial, as well as by direct, evidence. *Walker v. S.* 14 App. 609; *Gaitan v. S.* 11 App. 544; *Jackson v. S.* 9 App. 114; *Richarte v. S.* 5 App. 359; *McCoy v. S.* 25 Tex. 33; *Gomez v. S.* 15 App. 327; *Holden v. S.* 1 App. 226; *Murray v. S.* Id. 418; *Jones v. S.* 3 App. 150; *Farrer v. S.* 42 Tex. 266. The existence of express malice is never presumed from the mere act of killing another with a deadly weapon, by its intentional and deliberate use against the person killed. There must be the other element of murder, to wit, a cool and sedate mind, and a killing in pursuance of a former design to kill, or to inflict some serious bodily injury which would probably result in death. *Summers v. S.* 5 App. 365; *Murray v. S.* 1 App. 418; *Hamby v. S.* 36 Tex. 523; *Farrer v. S.* 42 Tex. 266. Murder in the first degree can be perpetrated by other means than those specified in article 606 ante, and the express malice which characterizes it may be evidenced by other external circumstances besides lying in wait, antecedent menaces, former grudges and concocted schemes. Even in a sudden difficulty, homicide may be committed under circumstances of such enormity, cruelty, or deliberate malignity, as will suffice to show that it was done with express malice, and is murder in the first degree. *Lewis v. S.* 15 App. 347; *Gaitan v. S.* 11 App. 544; *Ex parte Beacom*, 12 App. 318. Express malice may be shown by proof of the cool, calm and circumspect deportment and bearing of the party when the act is done, and immediately preceding and subsequent thereto; his apparent freedom from passion or excitement; the absence of any obvious or known cause to disturb his mind or arouse his passions; the nature and character of the act done; the instrument used, as well as the manner in which the murder is committed; declarations indicating not only the state of the mind, but also the purpose and intent with which he acts, and the motives by which he is actuated; and all such other matters and things pertinent to the issue which may be suggested by the facts. *Farrer v. S.* 42 Tex. 265; *Gaitan v. S.* 11 App. 544; *Garza v. S.* Id. 345; *Singleton v. S.* 1 App. 501; *Plasters v. S.* Id. 673; *Campbell v. S.* 15 App. 506.

The constituents of express malice to be established are: 1. The slayer must be sufficiently self-possessed to comprehend and contemplate the consequences of his acts, and such acts must not be the result of a sudden, rash, inconsiderate impulse or passion. 2. The design formed must be to kill the deceased, or do him serious bodily injury, which may end in death; but this specific malevolence toward the party slain may be embraced in such utter and reckless disregard of life as shows the slayer to be an enemy of all mankind, such as shooting into a crowd, resolving to kill the next man he meets, etc. If the formed design be not to kill or do serious bodily harm to the deceased, but to commit some other felony, the killing will not be on express malice. 3. Malice of all kinds being a state of mind must necessarily be inferred. Its actual existence is manifested by external acts, and these external acts or circumstances may transpire before, at the time of, or subsequent to the killing. Even a sudden killing may be attended with such circumstances as to evidence the existence of actual or express malice, and such existence is always a question for the jury and must be proved by the State. *McCoy v. S.* 25 Tex. 33; *Richarte v. S.* 5 App. 359; *Summers v. S.* Id. 365.

Acts and admissions, and the language of the accused before, at the time of, and even after the killing, may often be pertinent evidence to show express malice. *Duebbe v. S.* 1 App. 159; *Garza v. S.* 11 App. 345. Antecedent menaces, quarrels and grudges may always be shown to prove express malice. *Anderson v. S.* 15 App. 447; *McKinney v. S.* 8 App. 626; *Smith v. S.* 43 Tex. 643. After the deceased had been mortally wounded by the defendant he was carried into a house. During the succeeding night some one on the outside of the house was heard to say: "I wish I had a double-barreled shot gun, I would turn both barrels loose in that room." The witness, who heard the remark, looked out from the house and saw the defendant outside, but saw no one else. Held, that this testimony was properly admitted as tending to prove express malice. *Clampitt v. S.* 9 App. 27. The trial court refused to permit a defendant, on trial for the murder of his wife, to introduce evidence to prove his wife's infidelity with another man, and that recently before the homicide, he was informed of that fact. Held, error. That any evidence which would tend to show that the defendant had reasonable cause to be excited, troubled in mind, or in any wise mentally distracted, and that would render it improbable that in perpetrating the homicide he acted with a cool, sedate and deliberate mind, was admissible upon the issue of express malice. *Burkhard v. S.* 18 App. 599; see, also, *Greta v. S.* 10 App. 36. That the deceased had witnessed an assault and battery committed by defendant, and had made complaint against him therefor, was held competent evidence to prove express malice. *Williams v. S.* 15 App. 104. A fact, apparently irrelevant, may be made relevant and admissible by other facts with which it is connected by the proof. Thus, where the defendant was on trial for the murder of a policeman, the State was allowed to prove that a short time before the killing the defendant said: "He can't arrest me." It was held that this exclamation, isolated from other facts, would not have been legal evidence, but in view of other facts in proof, tending to show that the exclamation referred to the deceased, it was relevant and admissible. *Campbell v. S.* 15 App. 506. "Lying in wait" is evidence of express malice, and one of the

standard illustrations thereof. *Osborne v. S.* 23 App. 431. Where the defendant had, on a former trial, been convicted of murder in the second degree, it was held permissible for the State, on a second trial, to prove that the murder was committed upon express malice. *McLaughlin v. S.* 10 App. 340. Evidence tending to show that the killing was done in the perpetration, or in the attempt at the perpetration of either arson, rape, robbery or burglary, or was committed by means of poison, starving or torture, although the indictment simply alleges in the usual form a murder by violence is admissible. *Roach v. S.* 8 App. 478; *Reyes v. S.* 10 App. 1; *Sharp v. S.* 17 App. 486.

§1044—**Same — Motive.**—Where a crime has been proved, and the circumstances point to the accused as the perpetrator, facts tending to show a motive, though remote, are admissible. *Somerville v. S.* 6 App. 433; *Dill v. S.* 1 App. 277. Thus it was held competent to prove that the defendant had served a term in the penitentiary for burglarizing the house of deceased. *Powell v. S.* 13 App. 244. So, it was held permissible for the State to introduce in evidence an indictment charging defendant's brother with theft from the deceased. *Coward v. S.* 6 App. 60. And it was held admissible for the State to put in evidence an indictment against the defendant for an assault on one W., and also an indictment against said W. and the bail bond of said W. on which deceased was a surety. There was evidence of ill will and threats of the defendant against the deceased because of his having become the surety of said W. on the bail bond. *Rucker v. S.* 7 App. 549. So an indictment pending against the accused at the time of the homicide for an assault on the deceased or theft of his property is competent evidence to prove motive. *Dubose v. S.* 13 App. 418; *Taylor v. S.* 14 App. 340. So an affidavit made by the deceased a short time before the killing, and which was pending at the time of the killing, charging the deceased with an offense, was held admissible evidence to prove motive. *Robinson v. S.* 16 App. 347. It is well settled that an indictment against the defendant for an offense different from that which he is on trial, may be introduced in evidence against him, if such indictment, in any degree, tends to show a motive on the part of the defendant to commit the offense for which he is on trial. This is so, even where such indictment was presented subsequent to the murder for which the defendant is on trial, where such indictment is connected by other testimony with transactions which occurred before the murder, and which tend to show a motive on the part of the defendant to commit the murder. *Kunde v. S.* 22 App. 65. The defendant was a watchman at a railroad freight depot, and in the night time fired upon and wounded two men passing near the depot. Held, that as tending to throw light upon the question of motive in shooting, and as having a tendency to mitigate if not to justify, the conduct of the defendant in shooting, he was entitled to prove that there had been a great deal of car breaking and stealing from the cars at the depot where he was on duty as guard. *Hobbs v. S.* 16 App. 517. Where there was evidence of a conspiracy between the defendant and two other parties to kill the deceased, it was held that the State was entitled to prove on the separate trial of the defendant, ill-feeling existing prior to the homicide between said two other parties and the deceased, as tending to show motive for the commission of the murder. *Thompson v. S.* 19 App. 593. It was held competent for the defendant to prove that the house of the deceased, where the homicide occurred, was a house of prostitution, for the purpose of explaining the intent and object of his presence there. *Villareal v. S.* 26 Tex. 107. It is competent for the State to prove acts of the accused antecedent to the act of killing, which, either in themselves or in connection with other circumstances, tend to prove motive or preparation. *Hubby v. S.* 8 App. 597. The declarations of the accused, made at the time the act is done, and expressive of its object and character, are regarded as verbal acts indicating a present purpose and intention, and are admissible in evidence to determine his motive. *Ward v. S.* 41 Tex. 612. Evidence that deceased on the morning before he was murdered had received money, was held admissible as tending to prove a motive for his murder. *Cordova v. S.* 6 App. 207. And in another case it was held competent for the State to prove that the deceased had considerable money before his removal to Texas, where he was assassinated, though such testimony tended only remotely to prove a motive for his murder. *Early v. S.* 9 App. 476. Where a defendant is charged with the murder of his wife, the State may prove her infidelity to him, and his knowledge of such infidelity to show a motive for the murder. *Phillips v. S.* 22 App. 139. It is never indispensable to a conviction that a motive for the commission of crime should appear, though in cases of circumstantial evidence, the existence or want of motive is sometimes of great importance. *Preston v. S.* 8 App. 30.

§1045—**Same — Dying declarations.**—See article 748 of the Code of Criminal Procedure, prescribing the rules under which dying declarations are admissible in evidence. Said article lays down no new rule, but is merely declaratory of the common law rules of evidence with relation to dying declarations. *Benavides v. S.* 31 Tex. 579; *Black v. S.* 1 App. 368. The admission in evidence of dying declarations does not infringe the constitutional right of a person accused of crime to be confronted with the witnesses against him. *Black v. S.* 1 App. 368; *Burrill v. S.* 18 Tex. 713. Dying declarations are admissible only in cases of homicide, where the death of the party making such declaration is the subject of investigation. *Wright v. S.* 41 Tex. 246; *Krebs v. S.* 3 App. 348; *Roberts v. S.* 5 App. 141; *West v. S.* 7 App. 150. They are not evidence when the homicide charged is that of any other person than the declarant. Thus, if two persons are killed in the same onslaught, the declarations of one are not admissible in a prosecution for the murder of the other. *Krebs v. S.* 3 App. 348. The restrictions under which dying declarations are admissible in evidence, are clearly defined by article 748 of the Code of Criminal Procedure. 1. It must appear that at the time of making such declaration the declarant was conscious of approaching death, and believed there was no hope of recovering. *Edmonson v. S.* 41 Tex. 497; *Lister v. S.* 1 App. 740; *Krebs v. S.* 3 App. 348. It is essential to the admissibility of dying declarations and it is a preliminary fact to be proved by the party

offering them in evidence, that they were made under a sense of impending death; but it is not necessary that the declarant should state at the time of making them, that they are so made. It is enough if it satisfactorily appears in any mode that they were made under that sanction, whether it be proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of his medical or other attendants stated to him, or from his conduct or other circumstances of the case; all of which may be resorted to in order to ascertain the state of the declarant's mind. But where it appears that the declarant, at the time of making the declaration, had any expectation or hope of recovery, however slight it may have been, and though death actually ensued an hour afterwards, the declaration is inadmissible. And his belief that he will not recover, is not itself sufficient unless there also be the prospect of almost immediate dissolution. *Hunnicut v. S. 18 App. 498.* The belief of the declarant that death is inevitable may be inferred from his statement, from the nature of the wound and other circumstances, and it is not necessary that he should apprehend that he would die in a certain number of hours or days. *Krebs v. S. 3 App. 348.* On the preliminary investigation as to the admissibility of the dying declaration a witness in behalf of the State swore that the declarant said he was dying. The defendant proposed to contradict the testimony of this witness by proving that the declarant did not say he was dying. The judge refused to hear the proposed contradictory testimony, but stated that he would admit it to go before the jury on the trial in chief, as evidence tending to impeach the credibility of the State's witness. Held that these rulings were correct. *Hunnicut v. S. 20 App. 632.* Declarant said that he was killed but in his great agony persistently asked his physician to "do something for him." This request of his physician did not show hope of recovery and his declarations were properly admitted. *Hunnicut v. S. 20 App. 632.* 2. It must appear that such declaration was voluntarily made, and not through the persuasion of any person. *Lister v. S. 1 App. 740; Krebs v. S. 3 App. 348; Ledbetter v. S. 23 App. 247.* 3. It must appear that such declaration was not made in answer to interrogatories calculated to lead deceased to make any particular statement. *Lister v. S. 1 App. 740; Krebs v. S. 3 App. 348; Garza v. S. Id. 287; Ledbetter v. S. 23 App. 247.* Interrogatories to a dying person are not prohibited, nor will they invalidate the declarations unless they be of a character calculated to lead the deceased to make the particular statement. *Hunnicut v. S. 18 App. 498.* The mere fact that certain of the dying declarations were made in response to questions asked, does not take from them their voluntary and spontaneous character. *Pierson v. S. 18 App. 524.* 4. It must appear that the declarant was of sane mind at the time of making the declaration. *Garza v. S. 3 App. 287.*

Before the State is entitled to introduce in evidence a dying declaration the predicate prescribed by article 748 of the Code of Criminal Procedure must be established. *Ledbetter v. S. 23 App. 247.* The correct practice is when a dying declaration is proposed to be introduced in evidence by the State, for the court to ascertain by a preliminary examination of the witnesses the condition of the declarant at the time of making such declaration, before admitting the same in evidence. *Benavides v. S. 31 Tex. 579.* If a dying declaration was reduced to writing when made, it is not competent for the prosecution to prove such declaration by parol evidence, without accounting for the non-production of the writing. But, if the deceased made a declaration on more than one occasion, the fact that on one occasion his declaration was reduced to writing, does not preclude parol evidence proving his declaration made on another occasion, but not reduced to writing. *Krebs v. S. 8 App. 1.* Dying declarations are received in evidence from the necessity of the case, for the purpose of identifying the accused, establishing the circumstances of the *res geste*, and proving the transactions which resulted in the homicide; but declarations relating to former and distinct transactions are not admissible. *Temple v. S. 15 App. 304.* They are not competent to prove former or extrinsic transactions, nor to show the mere opinion or belief of the deceased; and *a fortiori*, a witness' opinion as to what the deceased meant by an indefinite expression is not competent evidence. *Warren v. S. 9 App. 619.* A statement of the deceased of a distinct fact, not connected with the circumstances of the death, or the immediate cause of it, is not admissible as a dying declaration, though competent and legal evidence if established by any other competent witness. *Ex parte Barber, 16 App. 369; West v. S. 7 App. 150.* But the name of the deceased may be proved by his dying declaration. *Lister v. S. 1 App. 470.* And where a statement as to the cause of a quarrel is so interwoven with the thread of the narrative that it cannot be separated without destroying the sense, this will not render the declaration inadmissible. *West v. S. 7 App. 150.* Nothing can be evidence in a dying declaration that would not be so if the declarant were testifying as a witness on the trial. The mere opinion of the declarant is therefore inadmissible. But the declaration that the accused "killed me for nothing," is the statement of a fact, and not of opinion, and was held admissible. *Roberts v. S. 5 App. 141.* So, a statement made by deceased that "they had no occasion to shoot me," meaning the defendants, was held to be not a mere inference or opinion of the declarant, but was admissible as the statement of a fact. *Pierson v. S. 21 App. 14.* Where the dying declarations had been reduced to writing, a portion thereof being inadmissible was excluded by the court, and the remainder was admitted without expunging from the writing that portion held to be incompetent. Held correct. That when a written instrument contains both legal and illegal evidence, the court cannot be required to expunge that which is illegal. If the court points out to the jury the illegal testimony, and designates it so that the jury can identify it, it is all that can be required. *Ex parte Barber, 16 App. 369.* Dying declarations may be communicated by the deceased otherwise than by articulate speech; but, however expressed, they must relate facts which deceased, if himself a witness, would be competent to attest. *Warren v. S. 9 App. 619.* A witness to dying declarations, if he is not able to state the precise language used by the declarant, may state the substance of the declarations. *Krebs v. S. 8 App. 1.* It is competent for



the defendant to impeach the dying declarations, by proving statements made by the declarant contradictory of his dying declarations. *Felder v. S. 23 App. 477.* But the admission, and subsequent withdrawal of dying declarations will not entitle the accused to introduce contradictory statements made by the deceased, which were neither *res gestæ*, nor dying declarations, but merely hearsay. *Sutton v. S. 2 App. 342*, cited in *Felder v. S. supra*, and held to be not inharmonious therewith. Objections to the introduction of dying declarations in evidence must be made on the trial. They come too late when made for the first time on a motion for new trial, and will not be considered on appeal. *Thomas v. S. 11 App. 315; Caldwell v. S. 12 App. 302; Black v. S. 1 App. 368; Johnson v. S. 27 Tex. 758.* It is error for the court to instruct the jury that dying declarations constitute the highest testimony known, and must receive full faith and credit. *Walker v. S. 37 Tex. 366.*

§1046 — Same — *Res gestæ*. — *Res gestæ*, are events speaking for themselves through the instinctive words and acts of participants when relating the events. There are no limits of time within which the *res gestæ* can be arbitrarily confined. They may not be coincident as to time if they are generated by an excited feeling which extends without break or let down from the moment of the event they illustrate. In other words, they must stand in immediate causal relation to the act, and become part either of the action immediately producing it, or of action which it immediately produces. Incidents which are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act. Continuousness cannot always be measured by time. Instinctiveness is the requisite, and when this obtains the acts or declarations are *res gestæ*. *Powers v. S. 23 App. 42.* As to declarations, the test is, were the declarations the facts talking through the party, or the party's talk about the fact? *Bradberry v. S. 22 App. 273; Hobbs v. S. 16 App. 517.* A declaration explanatory of an act is admissible in evidence as *res gestæ*, if it was made spontaneously at the time of the act, and before deliberation or time to fabricate the statement. *Foster v. S. 8 App. 248.* Whatever is said by any of the parties to the transaction at the time of the transaction, is a part of the transaction itself, and is admissible in evidence as *res gestæ*. See instances: *Thompson v. S. 19 App. 593; Kennedy v. S. Id. 618.* Language used by combatants to each other at the time and place of the difficulty is *res gestæ*. *Colquitt v. S. 34 Tex. 550.* And a remark made by the deceased in the presence of the accused immediately after the wounding and in relation thereto was held to be *res gestæ*. *Bejarano v. S. 6 App. 265.* It was held proper to permit the State to prove that a few minutes after the deceased was shot, the defendant was seen at the house of the deceased's father, and to prove the language and conduct of the defendant at that time and place, as part of the *res gestæ*. Said testimony related to matters which transpired immediately after the shooting, and were closely connected with the shooting. *Cartwright v. S. 16 App. 473.* Where there was no eye-witness to the homicide, the defendant offered to prove by witnesses who reached the place of the homicide five or ten minutes after it had occurred, the statement made by him to them in relation to such homicide. Held, that his statement so made was *res gestæ* and admissible. *Brunet v. S. 12 App. 521.* The deceased, who was assassinated, immediately after being wounded went into his house, and being asked by his wife who had shot him, replied in substance that the defendant and others had shot him. Held, that his statement was *res gestæ*. *McInturf v. S. 20 App. 335.* Preparatory to, and just before the assassination of the deceased, he was taken by a party of men in the night time out of his father's house, but was allowed to return under surveillance to put on his boots, when, being asked by his mother who the men were, he, with exhibitions of terror, told her in a whisper who three of them were, two of the three being defendants on trial. Held, that this statement of the deceased to his mother was *res gestæ* and admissible in evidence against the defendants. *Cox et al. v. S. 8 App. 255.* In a trial for murder by poisoning, a witness in behalf of the State testified that the day before deceased died witness found him prostrated and helpless behind a saloon and gambling house with which the defendant was connected, and that the deceased then said that he was not drunk, but had been drugged and dragged to that place. Held, that this statement of the deceased was *res gestæ*. *Tooney v. S. 8 App. 452.* A statement made by the deceased twenty minutes after he was wounded respecting the cause and circumstances of the wound, the said statement being so intimately connected with the wounding as to negative the idea of manufacturing testimony, was held to be admissible against the defendant. *Stagner v. S. 9 App. 440.*

In order to constitute declarations a part of the *res gestæ*, it is not necessary that they were precisely coincident in point of time with the principal fact. If they sprang out of the principal fact, tend to explain it, were voluntary and spontaneous, and made at a time so near it as to preclude the idea of deliberate design, they may be regarded as contemporaneous, and are admissible in evidence. *Boothe v. S. 4 App. 202; Foster v. S. 8 App. 248; Neyland v. S. 13 App. 536.* But declarations of the deceased, made an hour or two subsequent to the affray, and after he had gone in search of medical attention, were held to be mere hearsay and not admissible. *Green v. S. 8 App. 71.* Witnesses for the State testified that they heard the fatal shot and the outcry of the deceased, and ran immediately a distance of about one hundred yards to where deceased was lying wounded, and asked him who shot him, and that in reply he stated that the defendant shot him. His statement was held admissible as *res gestæ*. *Washington v. S. 19 App. 521.* A witness testified that from a distance of one hundred and fifty yards, he saw the deceased when he was shot, and that he went immediately to him, and inquired how he shot himself and deceased replied: "I did not do it. I was shot from up yonder," indicating, by a motion, the place from which he was shot. Held, that both the statement and motion of the deceased were *res gestæ* and admissible evidence against the defendant. *Warren v. S. 9 App. 619.* Immediately before deceased was shot, he ordered his daughter, who was defendant's wife, to leave the room. She answered: "No, pa; if I do John will shoot



you" — the John referred to being the defendant, her husband. Held, that this testimony was *res gestæ*. Jeffries v. S. 9 App. 598. Immediately before the shooting defendant's wife called to him to get his pistol, and when he did so, and returned to the place where his wife and the deceased were disputing, she several times ordered the defendant to shoot, which he presently did, inflicting the fatal wound. Held, that this testimony was *res gestæ*, and admissible against the defendant. Cook v. S. 22 App. 511. While sitting in a church, the deceased looked out at a window and remarked to a companion, that the defendant was outside and fixing to kill him, the deceased, and the deceased immediately stepped to the door, where he was fired upon and instantly killed. Held, that the said statement of the deceased and his said conduct were *res gestæ* and admissible evidence against the defendant. Means v. S. 10 App. 16. The remarks or observations of a crowd present at the commission of an offense are not *res gestæ*, but hearsay and inadmissible. Holt v. S. 9 App. 571. Where the State was permitted to prove by a witness that when he arrived at the place of the homicide, some member of the crowd there congregated, pointed to the defendant, whom the witness had just met a short distance from the place of the homicide, and said: "There is the man who did the shooting." Held, that such remark was not a part of the *res gestæ*, and that the trial court erred in admitting it in evidence over the defendant's objection. To entitle the State to introduce in evidence the declaration of a bystander, not connected with the transaction, it must be clearly shown that the defendant heard such declaration, and heard it under circumstances calling for a response from him. But cases may, and do arise where the declarations of a mere bystander would be admissible for the defendant. To illustrate: A. and B. are engaged in a combat. C., a bystander, cries out: "B. is trying to cut A. with a knife." In the further progress of the combat B. is injured by A. The exclamation of C., the bystander, is admissible as tending to show A.'s intent in injuring B.; to show that A. was actuated by the apprehension of danger caused by such exclamation. Felder v. S. 23 App. 477. As part of the *res gestæ*, it is competent to prove that other persons than the deceased, for whose murder the defendant is on trial, were killed in the same onslaught. Krebs v. S. 3 App. 348. And it is also competent to prove as *res gestæ* an additional assault committed by the defendant at the time of the one charged. Simpson v. S. 3 App. 422; Weaver v. S. 24 Tex. 387. Declarations made by the defendant ten or fifteen minutes after he had committed the homicide, and after he had gone a distance of four or five hundred yards from the place of the homicide, were held to be not a part of the *res gestæ* and not admissible for the defendant. Stephens v. S. 20 App. 255. Statements made by the defendant prior to the killing as to his purpose in going to the place where the homicide occurred are no part of the *res gestæ*. Powell v. S. 5 App. 234; see, further, C. C. P., title 8, chap. 7, EVIDENCE.

§1047 — Same — Acts and declarations of the defendant. — Evidence of the conduct and language of the defendant previous to the killing, and which show, or tend to show, the state of mind of the accused, is admissible. Wright v. S. 41 Tex. 246. The declarations and conduct of the defendant either before or after being charged with the offense, are admissible evidence, not as part of the *res gestæ*, but as indicative of a guilty mind. Cordova v. S. 6 App. 207; Langford v. S. 17 App. 445. The actions of the accused when brought into the presence of the dead body of the deceased are competent evidence as indicative of a guilty mind. Handline v. S. 6 App. 347. So his flight after the commission of the homicide, together with the circumstances attending such flight, is evidence against him. Aikin v. S. 10 App. 610; Hardin v. S. 4 App. 355; Blake v. S. 3 App. 581; Gose v. S. 6 App. 121; Hart v. S. 22 App. 563; Williams v. S. Id. 497. Where the *scienter* or *quo animo* of the defendant is necessary to be proved it is competent for the State to introduce testimony of his acts, conduct or declarations, which tend to establish his knowledge or intent, though such acts, conduct or declarations may themselves constitute distinct crimes, and are apparently collateral and foreign to the main issue, and may have occurred either prior or subsequent to the act for which the accused is being tried. McKinney v. S. 7 App. 626. But the acts and declarations of the defendant, are not admissible evidence in his behalf, unless they form a part of the *res gestæ*, or are a part of a confession introduced in evidence against him, or come within the rule that when a part of an act or declaration has been given in evidence, the whole is admissible. Pharr v. S. 10 App. 485; Allen v. S. 17 App. 637; Jones v. S. 22 App. 324; Bradberry v. S. Id. 273. A defendant cannot make evidence for himself by his acts and declarations which were not part of the *res gestæ*. Webb v. S. 8 App. 115; Robinson v. S. 3 App. 256; Harmon v. S. Id. 52; Davis v. S. Id. 92; Ray v. S. 4 App. 450; Powell v. S. 5 App. 234. When the State introduces a portion of defendant's declarations, the accused is entitled to introduce the remainder, as far as the same may be necessary to make that portion introduced by the State fully understood, or to explain the same. Massey v. S. 1 App. 563; Davis v. S. 3 App. 91; Riley v. S. 4 App. 538; Rainey v. S. 20 App. 455. But statements made by defendant twelve days after the homicide in explanation of the statements made by her at the time of the homicide, were held to not come within this rule, and were not admissible in her behalf. Gibson v. S. 23 App. 414. See, also, Kunde v. S. 22 App. 65, for testimony not admissible under this rule. And if the State proves an act of the accused, either party is entitled to prove his accompanying declarations explanatory of such act. Davis v. S. 3 App. 91. Where the State proves the defendant's declarations, the defendant is entitled to prove by his own witness the declarations testified about by the State's witness. Neyland v. S. 13 App. 536. See other decisions upon this subject, C. C. P., title 8, chap. 7, EVIDENCE.

§1048 — Same — Acts and declarations of others than the defendant. — When a conspiracy is shown (which is usually inductively from circumstances), then the declarations of one conspirator in furtherance of the common design, as long as the conspiracy continues, are admissible against his associates, though made in the absence of the latter. The least degree of concert or collusion between the parties to an illegal transaction makes the act of one the act

of all. *Hannon v. S.* 5 App. 549; *Phillips v. S.* 6 App. 364; *Taylor v. S.* 3 App. 170; *O'Neal v. S.* 14 App. 582; *Smith v. S.* 21 App. 96; *Smith v. S.* Id. 107; *Cox v. S.* 8 App. 96; *Kennedy v. S.* 19 App. 618; *Pierson v. S.* 18 App. 524; *Phelps v. S.* 15 App. 45. But in general the acts and declarations of a confederate of the defendant are not evidence against the defendant, if they were made after the consummation of the unlawful enterprise; but such acts or declarations are evidence against the defendant if he was present and acquiesced in them, even after the lapse of some time from the consummation of the offense, and even before he had been charged or prosecuted for complicity in the offense. *Holden v. S.* 18 App. 91; *Long v. S.* 13 App. 211; *Ricks v. S.* 19 App. 308; *Armstead v. S.* Id. 51; *Smith v. S.* 21 App. 107; *Davis v. S.* 9 App. 363; *Avery v. S.* 10 App. 199; *Willey v. S.* 22 App. 408. One conspirator's declaration of his individual intention to commit a crime, not made in furtherance of a design concerted with others, is not evidence against one who subsequently engaged in the conspiracy and co-operated in its execution. *Cox v. S.* 8 App. 254. To render the acts and declarations of a supposed confederate admissible against a defendant, proof must be adduced of the defendant's complicity at the time such acts were done or declarations made by his alleged confederate. The sufficiency of such proof as a predicate for the imputed acts or declarations, is primarily determinable by the judge; but if its sufficiency is a question in the case, it should be submitted to the jury with instructions to disregard such acts and declarations, in case they are not satisfied from the evidence, independent of such acts and declarations of the defendant's complicity in the crime charged. *Loggins v. S.* 8 App. 434. Where a conspiracy has been shown, not only the acts and declarations of a co-conspirator in furtherance of a common design may be proved against the defendant, but also the financial condition of the co-conspirator, in connection with his possession of the effects of the deceased, prior to the consummation of the conspiracy. *Post v. S.* 10 App. 598. Conspiracy cannot be proved against the defendant by the declarations of a co-conspirator made after the consummation of an offense and in the absence of the defendant. But the co-conspirator may, as a witness, testify to the conspiracy against the defendant, and to all matters material to the issue, but in such case corroboration of such testimony is essential to sustain a conviction. *Cohea v. S.* 11 App. 153. Unless part of the *res gestæ*, or part of an act or declaration put in evidence by the State, the acts and declarations of a co-conspirator are not admissible as evidence when offered by the defendant. *Wright v. S.* 10 App. 476. Declarations of the deceased, unless *res gestæ*, dying declarations, or made in the presence of the defendant, are not admissible evidence against the defendant. *Green v. S.* 8 App. 71; *Campbell v. S.* Id. 84; *Hammel v. S.* 14 App. 326. *Gonzales v. S.* 16 App. 152; *Robinson v. S.* Id. 347. But the declarations of the deceased, on leaving home, as to where he was going, are verbal acts, and admissible for the State. *West v. S.* 2 App. 460. Where the evidence showed that a party who was jointly indicted with the defendant for the murder, had equal opportunities with the defendant to commit the murder, it was held that the defendant was entitled to prove the acts and declarations of such party done and made prior to the murder, tending to show motive on the part of such party toward the deceased, and to show a motive on the part of such party to commit the murder. The cases of *Bowen v. S.* 3 App. 617; *Boothe v. S.* 4 App. 202; *Walker v. S.* 6 App. 576 and *Holt v. S.* 9 App. 571, which hold a contrary doctrine are overruled. The rule now established is, that investigation with reference to other parties than the accused should not be permitted in cases either positive or circumstantial, unless the inculpatory facts are such as are proximately connected with the transaction. In other words, to show remote acts or threats would not be admissible unless there were other facts also in proof proximately and pertinently connecting such third party with the homicide at the time of its commission. *Kunde v. S.* 22 App. 65; *McInturf v. S.* 200 App. 335; *Hart v. S.* 15 App. 202; *DuBose v. S.* 10 App. 280. See further upon this subject C. C. P., title 8, chap. 7, EVIDENCE.

§1049 — **Other decisions relating to evidence.**—The guilt of the defendant must be proved with such certainty as to establish it beyond a reasonable doubt. *White v. S.* 36 Tex. 347; *Wallace v. S.* 9 App. 299; *Holmes v. S.* Id. 313; *McNair v. S.* 14 App. 78; *Hackett v. S.* 13 App. 406; *Dyson v. S.* Id. 402. The killing may be proved to have taken place at any time before the presentment of the indictment, either before or after the time charged in the indictment. *O'Connell v. S.* 18 Tex. 343. The mere fact that the defendant knew where the body of the deceased was, is not *prima facie* evidence of the guilt of the defendant of the homicide. *Elizabeth v. S.* 27 Tex. 329. The mere presence of the defendant at the killing will not justify his conviction of the homicide. *Ake v. S.* 31 Tex. 416. In a prosecution dependent wholly upon circumstantial testimony, greater latitude is allowed in the presentation of evidence; but, in such cases it is not sufficient that the circumstances coincide with, account for, and therefore render probable the guilt of the defendant. They must exclude, to a moral certainty, every other hypothesis. *Lovelady v. S.* 14 App. 545; *Pogue v. S.* 12 App. 283; *Pharr v. S.* 10 App. 485; *Jackson v. S.* 9 App. 114; *Taylor v. S.* 9 App. 100; *Shultz v. S.* 13 Tex. 401; *Barnes v. S.* 41 Tex. 342; *Roseborough v. S.* 48 Tex. 570; *Williams v. S.* 41 Tex. 209; *Perkins v. S.* 32 Tex. 109; *Law v. S.* 33 Tex. 37; *Black v. S.* 1 App. 369; *Hampton v. S.* Id. 652; *Taylor v. S.* 3 App. 170. But circumstantial evidence to prove an issuable fact, cannot be resorted to when it appears that primary evidence of such fact existed, and its non-production is not accounted for. *Williams v. S.* 19 App. 276; *Scott v. S.* Id. 325; *Miller v. S.* 18 App. 34; *Baldwin v. S.* 15 App. 275; *Dixon v. S.* Id. 480; *Clayton v. S.* Id. 348; *Hunter v. S.* 13 App. 16; *Myers v. S.* Id. 57; *Gabrielsky v. S.* Id. 428; *Stewart v. S.* 9 App. 321; *Porter v. S.* 1 App. 394. When the inculpatory evidence is circumstantial in its nature, any fact, however unimportant in itself, which tends in the least degree to establish the guilt or innocence of the accused, is competent evidence. In such cases, therefore, incidents may be legitimate evidence which would be deemed irrelevant in a case dependent on direct and positive testimony. In such cases the mind seeks to explore all sources from

which light, however feeble, may be derived, and in the investigation of such cases greater scope is allowed than when the evidence is direct and positive. *Preston v. S.* 8 App. 30; *Howard v. S.* Id. 53; *Bouldin v. S.* Id. 332; *Washington v. S.* Id. 377; *Simms v. S.* 10 App. 131; *Dubose v. S.* Id. 230; *Langford v. S.* 17 App. 445. For other decisions as to evidence pertinent to this offense, and which are not cited in this chapter, refer to HOMICIDE; JUSTIFIABLE HOMICIDE; EXCUSABLE HOMICIDE; NEGLIGENT HOMICIDE; MANSLAUGHTER; INSANITY, and to EVIDENCE, title 8, chap. 7, C. C. P.

§1050 — ART. 607. — **Verdict must find of what degree.** — If the jury shall find any person guilty of murder, they shall also find by their verdict whether it is of the first or second degree; and if any person shall plead guilty to an indictment for murder, a jury shall be summoned to find of what degree of murder he is guilty, and in either case they shall also find the punishment. [O. C. 609, Act Feb. 12, 1858, p. 174.]

§1051 — **Decisions under preceding article.** — The verdict must specify the degree of murder of which the defendant is found guilty. *Isbell v. S.* 31 Tex. 138; *Buster v. S.* 42 Tex. 315; *Colbath v. S.* 2 App. 391; *Brown v. S.* 3 App. 294; *Krebs v. S.* 3 App. 348; *Nettles v. S.* 5 App. 386; *Dubose v. S.* 13 App. 418; *Wooldridge v. S.* Id. 443; *Sanders v. S.* 18 App. 372; *Amstead v. S.* 22 App. 51. The case of *Holland v. S.* 38 Tex. 474, holding contrary to the above rule, was overruled in *Buster v. S.* supra. A verdict which read "We the jury find the defendant guilty of murder in the first degree," etc., was held insufficient because it did not find the degree of murder. *Wooldridge v. S.* 13 App. 443. But a verdict which read, "We the jurors find the defendant guilty and of murder in the first degree," etc., was held sufficient. *Walker v. S.* 13 App. 618. A verdict which read, "We the jurors find the defendant guilty, and *sees* his punishment *deth*," was held to be intelligible, but invalid because it failed to name the degree. *Krebs v. S.* 3 App. 348. A verdict which reads, "We the jury find the defendant *guilty*," etc., is insufficient. It must find the defendant *guilty*. *Harwell v. S.* 22 App. 251; *Wilson v. S.* 12 App. 481; *Taylor v. S.* 5 App. 569. But omitting to cross the "t" in the word guilty, will not vitiate the verdict. *Parlain v. S.* 22 App. 100. Verdicts are to have a reasonable intentment, and to receive a reasonable construction, and are not to be avoided, unless from necessity, originating in doubt of their import, or immateriality of the issue found, or their manifest tendency to work injustice, or their failure to contain that which some express provision of the statute requires they shall contain. Incorrect orthography, or ungrammatical language will not vitiate a verdict. *Walker v. S.* 13 App. 618; *Wooldridge v. S.* Id. 443; *Bland v. S.* 4 App. 15; *Reynolds v. S.* 17 App. 413; *Williams v. S.* 5 App. 226; *Curry v. S.* 7 App. 91; *McMillan v. S.* Id. 100. The verdict must assess the punishment. *Doran v. S.* 7 App. 385; *Wooldridge v. S.* 13 App. 443; Ante, §§ 136-137. Under a former statute it was not essential to the validity of the verdict that it should assess the punishment. *Murray v. S.* 1 App. 417; *Perry v. S.* 44 Tex. 473. Where the verdict assessed the punishment, "in the penitentiary for life," it was held good without the word "confinement" before the words "in the penitentiary for life." *Taylor v. S.* 14 App. 340; *Gage v. S.* 9 App. 259; *Jones v. S.* 7 App. 103. "In the State *prisin*" is equivalent to "in the State penitentiary." *McCoy v. S.* 7 App. 879. But a verdict assessing the punishment at confinement in the State *penity* was held bad. *Keeler v. S.* 4 App. 527. The verdict must be in writing, but it is not imperative that it be written upon the indictment, nor that the jury shall have the indictment with them in their deliberations. *Schultz v. S.* 15 App. 258. It is not only proper, but it is the duty of the court, to refuse to receive an informal verdict, and to call the attention of the jury to the informality and send them out again to consider of their verdict, or to permit the same to be corrected with the consent of the jury. *Taylor v. S.* 14 App. 340; *Jones v. S.* 7 App. 103; *Alston v. S.* 41 Tex. 39. A verdict may lawfully be returned and entered on Sunday. *McKinney v. S.* 8 App. 627; *Powers v. S.* 23 App. 42; *Walker v. S.* 13 App. 618. But judgment thereon cannot be entered on Sunday. *Shearman v. S.* 1 App. 215. The defendant must be present in court when the verdict is rendered, but his counsel need not be. *Beaumont v. S.* 1 App. 533; *Summers v. S.* 5 App. 365; *Richardson v. S.* 7 App. 486; *Mapes v. S.* 13 App. 85. A verdict need not be "filed," but only entered on the minutes. *Williams v. S.* 7 App. 163. A verdict finding the defendant guilty of murder in the second degree, although it does not expressly find him not guilty of murder in the first degree, is valid, and operates as an acquittal of the defendant of murder in the first degree. *Lopez v. S.* 2 App. 204; *Charles v. S.* 13 App. 658. See further upon the subject of VERDICTS, C. C. P. title 8, chap. 6. For forms of verdicts in murder cases, see Willson's Cr. Forms, 733-733a-741.

§1052 — ART. 608. — **Evidence of threats and deceased's character admissible, when.** — Where a defendant accused of murder seeks to justify himself on the ground of threats against his own life, he may be permitted to introduce evidence of the threats made, but the same shall not be regarded as affording a justification for the offense unless it be shown that at the time of the homicide the person killed by some act then done manifested an intention to execute the threat so made. In every instance where proof of threats has been made it shall be competent to introduce evidence of the general character of the deceased. Such evidence shall extend only to an inquiry as

to whether the deceased was a man of violent or dangerous character, or a man of kind and inoffensive disposition, or whether he was such a person as might reasonably be expected to execute a threat made. [O. C. 612, Act Feb. 12, 1858. p. 174.]

§1053 — Threats by deceased — Decisions as to. — When a defendant, accused of murder, seeks to justify his action on the ground of threats against his own life, made by the deceased, he is entitled to prove such threats, although the same had not been communicated to him before the homicide. Such threats are *per se* admissible, and may be proved without a predicate. *Howard v. S.* 23 App. 265. *Logan v. S.* 17 App. 50. *Horbach v. S.* 43 Tex. 259. But no threats will afford justification unless it be shown that at the time of the homicide, the person killed by some act then done, manifested an intention to execute the threats so made. *Logan v. S.* 17 App. 50; *Allen v. S.* Id. 637; *Penland v. S.* 19 App. 365; *Thomas v. S.* 11 App. 315; *Sims v. S.* 9 App. 586; *Irwin v. S.* 43 Tex. 236; *Johnson v. S.* 27 Tex. 757. A doctrine contrary to that established by the decisions above cited, was announced in *Pridgeon v. S.* 31 Tex. 420, but was expressly overruled in *Dawson v. S.* 33 Tex. 491, and the rule as stated in *Johnson v. S.* 27 Tex. 757, was reaffirmed. The defendant for the purpose of showing that his apprehension of danger was reasonable, is entitled to lay before the jury all circumstances which would go to show the character of the threats, the intention with which they were made, and the grounds of fear on which the defendant acted, and hence evidence of previous affrays and difficulties with the deceased, and of previous attacks and threats made by him are admissible for the defendant. *Russell v. S.* 11 App. 288. It was held error to instruct the jury that there must have been "an effort or demonstration to execute the threats" by the deceased in order to justify the defendant's action. *Miles v. S.* 18 App. 156. It is not practicable to fix on what the act manifesting the intention of the deceased to execute his threats shall be; but it must be some act reasonably calculated to induce the belief that the threatened attack has then commenced, to be then executed, and not a mere act of preparation to execute the threats at some other period of time, either speedy or remote. *Irwin v. S.* 43 Tex. 236. The threats must be against the life of the defendant. Threats against the life of another person than the defendant are not admissible in evidence. *Talbert v. S.* 8 App. 316. The mere expression of an opinion by the deceased that the accused was pursuing a line of conduct which would endanger and cost him his life, was held to be not a threat against the life of the accused. *Myers v. S.* 33 Tex. 525. The exclusion of testimony to prove threats made by the deceased will not be error when the evidence in the case shows that such threats could not have afforded justification for the homicide. *Penland v. S.* 19 App. 365; *Ex parte Mosby*, 31 Tex. 566. For other decisions relating to self-defense, see *Ante*, § 969 *et seq.*

§1054 — Character of the deceased as evidence — Decisions as to. — Where there is evidence tending to show that in committing the homicide the defendant acted in self-defense, or under the reasonable apprehension that his life was in danger, or that he was in danger of some serious bodily harm, by reason of some act of deceased, then done, indicating an intention to kill or do serious bodily harm, or that he acted under the impulse of passion without deliberation, he is entitled to prove, in explanation, extenuation or justification of his acts, the general character of the deceased, as being that of a violent and dangerous man, or his general character in any other respect, which would tend to determine the grade of the homicide by showing the intent actuating the defendant in its commission. *Williams v. S.* 14 App. 102; *Moore v. S.* 15 App. 1. But such evidence is only admissible when it is shown that at the time of the homicide the deceased did some act indicating his purpose then to take the life of the defendant, or do him serious bodily harm. *Creswell v. S.* 14 App. 1; *Moore v. S.* 15 App. 1; *Stevens v. S.* 1 App. 591; *Roberts v. S.* 5 App. 141; *Hudson v. S.* 6 App. 565; *Horbach v. S.* 43 Tex. 242; *Irwin v. S.* Id. 236. Or when the circumstances of the case raise a doubt as to whether the defendant committed the homicide in self-defense. *West v. S.* 18 App. 640; *Creswell v. S.* 14 App. 1. The rule laid down in *Horbach v. S.*, *supra*, defining the circumstances under which proof of the general character of the deceased may be put in evidence by a defendant upon a trial for murder, cannot be restricted to the one act of seemingly attempting to draw a pistol or other weapon. The reason of the rule applies with equal force to any act reasonably indicating a present purpose on the part of the deceased to kill, or do some serious bodily injury to the defendant. *Branch v. S.* 15 App. 96. An inquiry as to character must be limited to the general reputation of the deceased in the community of his residence, or where he is best known, and the witness must speak from this knowledge of his general character, and not from his own individual opinion. *Brownlee v. S.* 13 App. 255; *Marshall v. S.* 5 App. 273; *Roach v. S.* 41 Tex. 261. The general character referred to means the general character of the deceased as a dangerous and violent man, or his general character in any other respect that would tend to determine the grade of the homicide by showing the intent actuating the defendant in its commission. *Williams v. S.* 14 App. 102. But it is not competent for the defendant to prove that the general character of the deceased for honesty was bad. *Plasters v. S.* 1 App. 673. The defendant having proved acts of the deceased at the time of the homicide reasonably indicating danger to the defendant, and having also shown that the deceased was a violent, dangerous man, it was held that the defendant was entitled to further prove that the deceased carried deadly weapons about his person. *Lilly v. S.* 20 App. 1. See, also, *Horbach v. S.* 43 Tex. 242. It is never permissible for the State, in the first instance, to prove that the deceased was an inoffensive, peaceable man, or to prove that such was his general character. But where the defendant seeks to justify the homicide on the grounds of threats made against his life by the deceased, the State may, in rebuttal, show that the deceased's gen-

eral character was that of a peaceable, inoffensive man, not reasonably likely to execute threats. *Graves v. S.* 14 App. 113; *Russell v. S.* 12 App. 288. The rules governing the admissibility of threats made by deceased, and of the character of the deceased, are also applicable in prosecutions for assault with intent to murder. *Bingham v. S.* 6 App. 169. For other decisions relating to self-defense, see *Ante*, § 969 *et seq.*

§1055—**State not required ordinarily to introduce all the witnesses to the transaction.**—The State is not ordinarily required to introduce every eye-witness to the transaction. See this subject discussed in *Hunnicut v. S.* 20 App. 626; *Phillips v. S.* 22 App. 139; *Gibson v. S.* 23 App. 414.

§1056—**Murder in first degree—Evidence held sufficient to sustain conviction of.**—*Gherke v. S.* 13 Tex. 568; *O'Connell v. S.* 18 Tex. 343; *Wall v. S.* Id. 682; *McCoy v. S.* 25 Tex. 33; *Drury v. S.* Id. 45; *Johnson v. S.* 30 Tex. 748; *Nelson v. S.* 32 Tex. 71; *Wilson v. S.* 32 Tex. 112; *Holland v. S.* 48 Tex. 474; *Garrett v. S.* 41 Tex. 530; *Wilson v. S.* 43 Tex. 472; *Smith v. S.* Id. 642; *Duebbe v. S.* 1 App. 159; *Singleton v. S.* Id. 501; *Washington v. S.* Id. 647; *Williams v. S.* 3 App. 123; *Bowen v. S.* Id. 617; *Powell v. S.* Id. 630; *Jones v. S.* Id. 150; *Jackson v. S.* 4 App. 292; *Walker v. S.* 6 App. 576; *Coward v. S.* Id. 59; *Harris v. S.* Id. 97; *Cordova v. S.* Id. 207; *Brown v. S.* Id. 286; *Handline v. S.* Id. 348; *Tuttle v. S.* Id. 536; *Lanham v. S.* 7 App. 126; *Noftsinger v. S.* Id. 301; *Smith v. S.* Id. 414; *Krebs v. S.* 8 App. 1; *Preston v. S.* Id. 30; *Howard v. S.* Id. 53; *Carter v. S.* Id. 372; *Washington v. S.* Id. 877; *Tooney v. S.* Id. 452; *Beltsam v. S.* 9 App. 280; *Thomas v. S.* 11 App. 315; *Gaitan v. S.* Id. 544; *Caldwell v. S.* 12 App. 303; *Scott v. S.* Id. 594; *Clanton v. S.* 13 App. 139; *Waite v. S.* Id. 169; *Creswell v. S.* 14 App. 1; *Duran v. S.* Id. 195; *Bohannon v. S.* Id. 271; *Stanley v. S.* Id. 315; *Taylor v. S.* Id. 340; *Davis v. S.* Id. 645; *Phelps v. S.* 15 App. 45; *Darnell v. S.* Id. 70; *Williams v. S.* Id. 104; *Smith v. S.* Id. 139; *Cavitt v. S.* Id. 190; *Gomez v. S.* Id. 327; *Ogden v. S.* Id. 454; *Campbell v. S.* Id. 506; *Lewis v. S.* Id. 647; *Escareno v. S.* 16 App. 85; *Spear v. S.* Id. 98; *Walker v. S.* 17 App. 16; *Chevarrio v. S.* Id. 390; *Sharpe v. S.* Id. 488; *George v. S.* Id. 513; *Rhodes v. S.* Id. 579; *Bryant v. S.* 18 App. 107; *Mendiola v. S.* Id. 462; *Johnson v. S.* Id. 385; *Lane v. S.* 19 App. 54; *Adams v. S.* Id. 250; *Penland v. S.* Id. 365; *Washington v. S.* Id. 521; *Weaver v. S.* Id. 548; *Thompson v. S.* Id. 593; *Kennedy v. S.* Id. 618; *McInturf v. S.* 20 App. 335; *DeOlles v. S.* Id. 145; *Johnson v. S.* Id. 178; *Wallace v. S.* Id. 360; *Thornton v. S.* Id. 519; *Pierson v. S.* 21 App. 14; *Smith v. S.* Id. 277; *Murray v. S.* Id. 466; *Robinson v. S.* 22 App. 129; *Jones v. S.* Id. 324; *May v. S.* Id. 595; *Cooper v. S.* Id. 419; *Cook v. S.* Id. 511; *Rodriguez v. S.* 23 App. 503; *Scott v. S.* Id. 521; *McCullough v. S.* Id. 620; *Ex parte Smith* Id. 100; *Giles v. S.* Id. 281.

§1057—**Same—Evidence held insufficient.**—*Hamby v. S.* 36 Tex. 523; *Saunders v. S.* 37 Tex. 710; *Burnham v. S.* 43 Tex. 322; *Jones v. S.* 4 App. 436; *S. C.* 7 App. 457; *Cox v. S.* 5 App. 493; *Sims v. S.* 8 App. 230; *Roach v. S.* 8 App. 478; *Hodde v. S.* Id. 383; *Kemp v. S.* 11 App. 175; *Heacock v. S.* 13 App. 97; *Lovelady v. S.* 14 App. 545; *S. C.* 17 App. 286; *Williams v. S.* 15 App. 491; *Ex parte Pace*, 16 App. 541; *Ex parte Catney and Hammons*, 17 App. 332; *Hang v. S.* 18 App. 675; *Ex parte Cochran*, 20 App. 242; *Ex parte Dickson*, 20 App. 332; *Ex parte Bryant*, 21 App. 639; *Kunde v. S.* 22 App. 65; *Ex parte Allen*, Id. 201; *Ex parte Kunde*, Id. 418; *O'Conner v. S.* Id. 660; *Ex parte England*, 23 App. 90; *Scott v. S.* Id. 452; *Ex parte McDowell*, 679.

§1058—**Murder in second degree—Evidence held sufficient to sustain conviction of.**—*Lauder v. S.* 12 Tex. 462; *Killingsworth v. S.* 23 Tex. 204; *Gilmore v. S.* 36 Tex. 334; *Weeden v. S.* 41 Tex. 84; *Gilleland v. S.* 44 Tex. 356; *Lopez v. S.* 2 App. 204; *Noland v. S.* 3 App. 598; *Hill v. L. S.* App. 2; *Proffit v. S.* Id. 54; *Rodriguez v. S.* Id. 256; *Templeton v. S.* Id. 398; *Bejarino v. S.* 6 App. 265; *Gardenhire v. S.* Id. 147; *Wilson v. S.* Id. 427; *Evans v. S.* Id. 513; *Rye v. S.* 8 App. 163; *Clark v. S.* Id. 350; *Ross v. S.* 10 App. 455; *Homberg v. S.* 12 App. 1; *Brownlee v. S.* 13 App. 255; *Kemp v. S.* Id. 561; *Coffey v. S.* Id. 580; *Charles v. S.* Id. 658; *Graves v. S.* 14 App. 113; *Allison v. S.* Id. 402; *McDonald v. S.* 15 App. 493; *Conner v. S.* 17 App. 1; *Bell v. S.* Id. 638; *Venters v. S.* 18 App. 198; *Lewis v. S.* Id. 401; *Pierson v. S.* Id. 524; *Loyd v. S.* 19 App. 137; *Rainey v. S.* 20 App. 455; *Rainey v. S.* Id. 473; *Musick v. S.* 21 App. 69; *Smith v. S.* 22 App. 216; *Leache v. S.* Id. 279.

§1059—**Same—Evidence held insufficient.**—*Underwood v. S.* 25 Tex. Supp. 389; *Ake v. S.* 31 Tex. 416; *Barnes v. S.* 41 Tex. 342; *King v. S.* 4 App. 256; *Alford v. S.* 8 App. 546; *White v. S.* 10 App. 381; *Hogan v. S.* 13 App. 319; *Nolen v. S.* 14 App. 474; *Smith v. S.* 15 App. 338; *Turner v. S.* 16 App. 433; *Alexander v. S.* 17 App. 614; *Lucas v. S.* 19 App. 79; *Turner v. S.* 20 App. 56; *Holmes v. S.* 20 App. 110; *Olivares v. S.* 23 App. 305; *Scott v. S.* Id. 452.

§1060—**Charge of the court—In general.**—It is the duty of the trial judge to measure his charge by the evidence adduced, and give instructions to the jury as to every legitimate deduction to be drawn from the evidence; but when he has done this the law's demands are satisfied. *Smith v. S.* 15 App. 139. The charge must be tested by the evidence. It must contain the law and *all* the law applicable to every issue legitimately raised by the evidence. It is always sufficient when it correctly and distinctly sets forth the law applicable to the evidence. *Burkhard v. S.* 18 App. 599; *McConnell v. S.* 22 App. 354. It is never safe to depart from established authorities in giving instructions. With reference to murder, the law has been so fully settled that the courts cannot err if they but employ in their charges the language of standard cases. *Hunt v. S.* 7 App. 212. It must make a pertinent application of the law arising out of the evidence, no matter how weak and impotent the evidence may appear to the court. *Leskasski v. S.* 23 App. 165. In testing the sufficiency of a charge of the court, it must be considered as a whole. Omissions in one part of the charge become immaterial if they are supplied in other portions in such manner as to clearly instruct the jury upon the issue involved and protect the rights of the accused against prejudice. *Smith v. S.* 22 App. 316; *Hodges v. S.* Id. 415; *Steagald v. S.* Id. 464; *Hart v. S.* 21 App. 163. The charge should always contain the instruction that if the jury do not believe the defendant guilty they should acquit him. The omission

of such instruction has a tendency to impress the jury with the belief that, in the opinion of the court, the defendant is not entitled to an acquittal. *Steagald v. S. 22 App. 464.* No intimation of the opinion of the court of the truth or falsity of any part of the evidence should be communicated to the jury. *Pharr v. S. 7 App. 472; Johnson v. S. 9 App. 558.* Where two defendants are jointly tried, the charge should instruct that the jury may acquit one and convict the other. *Hampton v. S. 45 Tex. 154.* The "case" to which the statute (C. C. P., art. 677), requires the charge of the court to apply, means the case as made by the indictment and the evidence. *Cooper v. S. 22 App. 419; Serio v. S. Id. 633; Jones v. S. Id. 680; Levine v. S. Id. 683.* See C. C. P. 677, *et seq.* as to CHARGE OF COURT.

§1061—**Same—Malice aforethought.**—In charging the law of murder it is essential to explain to the jury the meaning of *malice aforethought*. A failure to give such explanation is fundamental error. *Jones v. S. 5 App. 397; Tooney v. S. Id. 163; Pharr v. S. 7 App. 472; Garza v. S. 11 App. 345; Holmes v. S. Id. 223; Bobb v. S. 12 App. 491; Caruthers v. S. 13 App. 339.* The term is sufficiently expounded to the jury by a charge which, without critical refinement, substantially explains its legal, in contradistinction to its ordinary signification. If the charge limits the meaning of the term to hatred, ill will, or hostility, the error is not to the prejudice, but to the advantage of the defendant. *Harris v. S. 8 App. 90.* For a sufficient charge explaining the term. See Willson's Cr. Forms, 708-709; see, also, *Harris v. S. 8 App. 90; McKinney v. S. Id. 626; Bramlette v. S. 21 App. 611.* For defective explanations of the term, see *Pickens v. S. 13 App. 353; Hayes v. S. 14 App. 330.* See Ante, § 1036.

§1062—**Same—Express malice.**—In instructing upon the law of murder in the first degree it is necessary to explain "express malice." For a sufficient charge upon this subject, see Willson's Cr. Forms, 710; *Jordan v. S. 10 Tex. 479; McCoy v. S. 25 Tex. 33; Farrer v. S. 42 Tex. 271; Plasters v. S. 1 App. 673; Cox v. S. 5 App. 493.* That express malice may be evidenced by external circumstances, is a part of its definition, and a charge to that effect is not objectionable as being upon the weight of evidence. *Sharpe v. S. 17 App. 486; Douglass v. S. 8 App. 520.* See Ante, § 1037.

§1063—**Same—Implied malice.**—When the evidence demands a charge upon murder in the second degree, it is essential to explain the term implied malice, and to distinguish this species of malice from express malice. *Jones v. S. 5 App. 397; Pharr v. S. 7 App. 472; Villareal v. S. 26 Tex. 107; Shrivvers v. S. 7 App. 460.* For a sufficient explanation of implied malice, see Willson's Cr. Forms, 711; *Harris v. S. 8 App. 90; Hubby v. S. Id. 597; Douglass v. S. Id. 520; Brown v. S. 4 App. 275; Sharp v. S. 6 App. 650.* For other decisions discussing charges upon implied malice, see *Perry v. S. 44 Tex. 473; Reynolds v. S. 14 App. 427; Turner v. S. 16 App. 378; Stanley v. S. Id. 392; Miles v. S. 18 App. 156; Neyland v. S. 13 App. 536; Ellison v. S. 12 557; Taylor v. S. 13 App. 184; Cullen v. S. 16 App. 379; Morgan v. S. Id. 593; Smith v. S. 19 App. 95; Whittaker v. S. 12 App. 436; Ante, § 1038.*

§1064—**Same—Degrees of homicide.**—It is a settled rule of practice that to relieve the trial judge of charging upon the lower degrees of culpable homicide, the evidence must establish the higher degree. If there be a reasonable doubt as to the degree of the homicide, such doubt must be solved by the jury and not by the court. It would be error to instruct the jury that they must either convict of murder of the first degree, or acquit, if by any possible legitimate construction of the evidence they might convict of the second degree. *Conner v. S. 23 App. 378; Benevides v. S. 14 App. 378; Hill v. S. 5 App. 2; Holden v. S. 1 App. 226; Gatlin v. S. 5 App. 531; Edmonson v. S. 41 Tex. 496; Saunders v. S. Id. 306.* When the evidence totally fails to raise an issue of a lower degree of homicide than murder in the first degree, the court need not and should not, charge upon any lower grade of homicide. *May v. S. 21 App. 595; Bryant v. S. 18 App. 107; Johnson v. S. Id. 385; Jackson v. S. Id. 586; Rhodes v. S. 17 App. 579; Smith v. S. 15 App. 139; Darnell v. S. Id. 70; Gomez v. S. Id. 327; Davis v. S. 14 App. 645; Neyland v. S. 13 App. 536; Lum v. S. 11 App. 483; Hubby v. S. 8 App. 597; Taylor v. S. 8 App. 387; Washington v. S. 1 App. 647; O'Connell v. S. 18 Tex. 343.* The law of manslaughter is no part nor parcel, nor is it essential to a correct understanding of the law of murder in the second degree; and the position that no charge upon murder in the second degree is sufficient unless it explains the law of murder in the second degree is not tenable. And, notwithstanding it is customary for trial judges to preface charges on murder in the second degree with a definition of murder in the first degree, in order to distinguish the difference between express and implied malice, such definition is not indispensable to a clear understanding of the law of murder in the second degree. *Neyland v. S. 13 App. 536.* Where the evidence tended to prove that robbery was the motive which actuated the perpetrator of the homicide, it was held correct, after defining murder and express malice, to instruct the jury that all murder committed in the perpetration, or in the attempt at the perpetration of robbery, is murder in the first degree although the indictment charged murder in the usual form, and did not charge that it was committed in the perpetration or attempt at the perpetration of robbery. *Roach v. S. 8 App. 478; Sharpe v. S. 17 App. 486.* But where the indictment alleged a murder by poisoning, it was held error for the court to charge as to murder committed in the perpetration or attempted perpetration of robbery. *Tooney v. S. 5 App. 163.* Where the defendant, on a previous trial, was convicted of murder in the second degree, and thereby acquitted of murder in the first degree, on a new trial, it is not incumbent on the court to charge on murder in the first degree. *Baker v. S. 4 App. 223.* In such case it is not error to instruct the jury that the defendant had been acquitted of murder in the first degree, and that they should not consider the subject of murder in the first degree. *Pharr v. S. 10 App. 485; West v. S. 7 App. 150.* Where a former trial had resulted in a conviction of manslaughter, it was held error for the court on a new trial, to charge the law of murder, and still further error to instruct the jury, that if they believed the defendant was guilty of either degree of murder, they could find him

guilty of manslaughter. *Parker v. S.* 22 App. 105. A charge on manslaughter is not required, where the proof shows murder in the first degree, or justifiable homicide—or murder in some degree only. *Grisom v. S.* 4 App. 374; *Roberts v. S.* 5 App. 141; *Berry v. S.* 8 App. 515; *Bejarano v. S.* 6 App. 265; *Halbert v. S.* 3 App. 656; *Boyett v. S.* 2 App. 93; *Jones v. S.* 40 Tex. 188; *Hudson v. S.* Id. 12; *Myers v. S.* 33 Tex. 525. But if there be evidence, which however inconclusively tends to prove facts from which the jury may deduce a finding of manslaughter, it is incumbent on the trial court to give the law of manslaughter in charge to the jury; and it should be given affirmatively, directly and pertinently to the theory of the case indicated by such evidence. *Neyland v. S.* 13 App. 536; *McLaughlin v. S.* 10 App. 340; *Rutherford v. S.* 16 App. 649. It is error to charge the jury that they may find the defendant guilty of manslaughter without also instructing them as to what state of facts would constitute that offense. *Babb v. S.* 13 App. 491. Where the conviction is for murder in the second degree, it is not material error that the charge did not correctly define "express malice." *Summers v. S.* 5 App. 365. Though the charge may in some respects be objectionable as to murder in the first degree, yet if it is not so as to murder in the second degree, and the jury find the defendant guilty of murder in the second degree, which finding is supported by the evidence, the conviction will not be disturbed. *Taylor v. S.* 3 App. 387; *Halbert v. S.* Id. 656.

Where the evidence established murder in the first degree, it is not error of which the defendant can complain, that the court charged the jury that they might find the defendant guilty of murder in the second degree, or of manslaughter. *Benavides v. S.* 31 Tex. 579; *Blake v. S.* 3 App. 581. See also *Parker v. S.* 22 App. 105. An inaccuracy in a charge upon implied malice will not constitute material error when the facts of the case are such as that a charge upon murder in the second degree is not called for by the evidence. *Hubby v. S.* 8 App. 597. The court need not define the distinction between the two degrees of murder in the same paragraph of the charge. *Jenkins v. S.* 41 Tex. 128. An instruction that where A. in attempting to kill B. kills C. it is murder in the first degree, is erroneous. But if the defendant was found guilty of murder in the second degree, the error will be immaterial. *Taylor v. S.* 3 App. 387. Such a killing would be murder in the second degree. *McConnell v. S.* 13 App. 390; *Clark v. S.* 19 App. 495; *Halbert v. S.* 3 App. 657; *Angell v. S.* 36 Tex. 542. When the killing intended would have been manslaughter, the accidental killing would not be a higher grade of homicide. *Ferrell v. S.* 43 Tex. 504; *Clark v. S.* 19 App. 495; *McConnell v. S.* 22 App. 354. If the prosecuting attorney disclaims a conviction as to the first degree of murder, the court may so say to the jury and ignore that degree in its charge. *Plasters v. S.* 1 App. 673. If the court does not instruct upon the second degree, but the jury finds the defendant guilty of that degree, the conviction cannot stand. *Taylor v. S.* 3 App. 387. Where the court charged the law of murder in the first degree only, and the jury returned informal verdict convicting the defendant of murder in the second degree, it was held that while the court might direct the jury to correct the informality in the verdict, it was error to reinstruct them by giving them the law of murder in the second degree, and send them back to reconsider their verdict, the jury not having requested any instructions, and the defendant not consenting thereto. *Garza v. S.* 3 App. 286. See facts which were held to justify a charge to the effect that if one kills another by beating in a cruel and unusual manner, it is murder with express malice although he did not intend to kill. *Duebbe v. S.* 1 App. 159. See, also, where a homicide committed with an instrument not likely to produce death, but in a cruel manner, is held to be murder in the second degree. *Whittaker v. S.* 12 App. 436. Where in defining implied malice, in charging upon murder in the second degree, the word "express" was used instead of "implied" it was held that the charge was materially erroneous, and that on appeal the error could not be treated as merely clerical. *Pickett v. S.* 12 App. 86. See Ante, §§ 1037-1038-1039-1040-1041. Also see MANSLAUGHTER and NEGLIGENT HOMICIDE. For charges held sufficient on murder in both degrees, and justifiable homicide in self-defense and in defense of another, see *Bright v. S.* 10 App. 68. For charges on murder in the second degree, manslaughter and justifiable homicide in self-defense held to be correct, see *Kemp v. S.* 13 App. 561. See Post, § 1071, as to reasonable doubt between the degrees.

§1065—Same—Homicide—Cause of death.—The following charge was held to be correct: "Homicide is the destruction of the life of one human being by the act, procurement, or culpable omission of another. The destruction of life must be complete by such act or agency. But, although the injury which caused death might not, under other circumstances, have proved fatal, yet, if such injury be the cause of death, without its appearing that there has been any great neglect, or manifest improper treatment by some other person, such as a physician, nurse, or other attendant, it would be homicide; and if the jury are satisfied, from the evidence, that some one shot the deceased, and inflicted upon him a wound, which was not in itself necessarily mortal, and that the wound inflicted produced blood poisoning, or any other effect which would result in the death of the deceased, the party inflicting the injury would be as guilty as if the wound would of itself inevitably lead to death." *Hart v. S.* 15 App. 202. See this subject fully discussed in *Morgan v. S.* 16 App. 593. See Ante, § 1042, *et seq.* sections headed *corpus delicti*.

§1066—Same—Insanity—Intoxication.—For decisions relating to these defenses, see Ante, §§ 90-94.

§1067—Same—Accident—Mistake.—See Ante, §§ 98-99-100-101-102-103-104-105. See, also, EXCUSABLE HOMICIDE.

§1068—Same—Presumption of intention—Burden of proof.—See Ante, §§ 107-108-109-110-111-112-113-114. See, also, Post, art. 612.

§1069—Same—Alibi.—When there is evidence tending to prove an alibi, it is the duty of the court to explain to the jury in the charge the law with reference to such defense. *Diggs v*



S. 7 App. 359; McGrew v. S. 10 App. 539; Long v. S. 11 App. 381; Granger v. S. Id. 454; Ninnon v. S. 17 App. 650; Hunnicutt v. S. 18 App. 498. But the omission to charge with reference to *alibi* is not such error as will ordinarily cause a reversal of the conviction unless the charge be excepted to because of such omission, or unless a special instruction upon the subject be requested and refused. Davis v. S. 14 App. 645; McAfee v. S. 17 App. 131; Clark v. S. 18 App. 467; Ayres v. S. 21 App. 399. The following charge on *alibi* was held to be correct: "If the evidence raises in your minds a reasonable doubt as to the presence of the defendant at the place where the deceased was killed (if killed), at the time of such killing, you will find him not guilty." Walker v. S. 6 App. 576; Boothe v. S. 4 App. 202. See, also, another approved charge, Thornton v. S. 20 App. 519. See, also, Willson's Cr. Forms, 712-713. A charge which assumes that no evidence of *alibi* can avail the defendant, unless it produces conviction upon the minds of the jury that defendant was not present at the commission of the offense, but was elsewhere, is erroneous. Walker v. S. 42 Tex. 361. A charge that "an *alibi* is a species of defense often set up in criminal cases, and one which seems to figure in this case," was held to be erroneous, because calculated to impress upon the jury, that the court regarded the defense as a pretense. Walker v. S. 37 Tex. 367. Where the court charged, "If the jury believe that the *alibi* which has been set up as a defense in this case has been proven, or if they have a reasonable doubt as to the fact of whether said *alibi* has been proven, they will give the defendant the benefit of it, and acquit him. When an *alibi* is relied on as a defense, it rests on the defendant to prove it to the extent of raising a reasonable doubt as to whether the accused is the person who committed the offense charged." It was held to be error, because it shifted the burden of proof from the State to the defendant. Proof of an *alibi* is not an affirmative proposition by the defendant, but is an attack upon the inculpatory evidence of the State. It may be such as affirmatively disproves the case made by the State, or it may only suffice to legitimately raise a reasonable doubt of the guilt of the accused; and in either case he is entitled to an acquittal. Humphries v. S. 18 App. 302. Where the court charged, "When an offense has been proven to have been committed upon a certain date and at a certain place, and the evidence shows that at that time the accused was at some other place than that where the testimony shows the offense to have been committed, so remote from it as that it would have been impossible for him to have been the person who committed the offense," etc., it was held error, because it rendered nugatory all proof of an *alibi*, unless the State had previously proved the commission of the offense at the time and place involved in the contestation. Humphries v. S. 18 App. 302. Where the court in its general charge misdirected the jury as to *alibi*, but gave a special charge at the request of the defendant which embodied correctly the law upon that issue, it was held that the defendant could not be heard to complain of the misdirection in the general charge. White v. S. 19 App. 343. Where the court charged, "Where the defendant relies upon proof of an *alibi*, that is, proof that he was at some other place at the time of the offense (if any) was committed, the burden of proof as to that fact is on the defendant, and he is required to establish it by a preponderance of evidence; but if the evidence adduced raises a reasonable doubt in the minds of the jury, the defendant is entitled to the benefit of the doubt." Held error, because *alibi* merely traverses the issues tendered in the indictment, and is not a special defense, nor, in its nature, an independent exculpatory fact, and, therefore, the burden of proof is not upon the defendant to establish it. Ayres v. S. 21 App. 399. Where an *alibi* is relied upon, it is not improper for the court, in its charge, to state that fact. Such a charge is not upon the weight of evidence. Powell v. S. 13 App. 244.

§1070—Same—Self-defense.—When the evidence raises the issue of self-defense, it becomes the duty of the court to give in charge the law, and all the law applicable to the evidence upon that issue. Bell v. S. 17 App. 538; Jackson v. S. 15 App. 84; Sterling v. S. Id. 249; Luera v. S. 12 App. 257; Pogue v. S. Id. 283; North v. S. Id. 111; Wasson v. S. 3 App. 474; Whulius v. S. 23 App. 238; Lee v. S. 21 App. 241; Thuston v. S. Id. 245; Pierce v. S. Id. 540; Ashworth v. S. 19 App. 182; Kemp v. S. 11 App. 174; King v. S. 13 App. 277; Guffee v. S. 8 App. 187; Foster v. S. Id. 248; Edwards v. S. 5 App. 593. Such charge should be in plain and intelligible language, without superfluous verbiage. Learned abstractions are not the means best calculated to make it comprehensible by the jury. Boddy v. S. 14 App. 528. Where the issue of self-defense is not fairly raised by the evidence, no charge upon that issue is required, or should be given. Smith v. S. 22 App. 316; Wallace v. S. 20 App. 360. The charge should be applicable to the facts. It is often inadequate to charge simply the language of the statutory provisions upon this issue. Richardson v. S. 7 App. 486; Kendall v. S. 8 App. 569; Talbert v. S. Id. 316. Where the evidence tends to show self-defense under either art. 570 or 572, Ante, the court should frame its charge with reference to the article which is applicable to the facts proved, and should not charge with reference to the other article. But where the evidence raises a question as to which of the two articles apply to the facts, the charge should be with reference to both articles, and should draw clearly the distinctions between the two kinds of attack justifying homicide. Kendall v. S. 8 App. 569. See also, upon the subject of said two articles, Horbach v. S. 43 Tex. 242; Gilliland v. S. 44 Tex. 356; Ainsworth v. S. 8 App. 532; Robins v. S. 9 App. 666; Foster v. S. 11 App. 105; Risby v. S. 17 App. 517; Penland v. S. 19 App. 365. Article 574, Ante, in express terms, and without qualification or condition, justifies homicide committed for the protection of the slayer's person against an attack which "produces a reasonable expectation or fear of death or some serious bodily injury." This is a substantive and independent provision of the Code, entirely consistent with the preceding article 570 and 572, and there is no legal warrant to engraft upon it the condition or requirement of article 572, that "other means" for the prevention of the injury must be resorted to before the slayer is justifiable in killing his assailant. If, therefore, there be evidence tending to prove that the homicide was committed for the protection of the slayer against an attack by the deceased, which produced a reasonable



expectation of fear of "serious bodily injury" to the slayer, it would be error to instruct the jury to convict, unless the slayer, before killing the deceased, resorted to other means for the prevention of the injury. *Hunnicut v. S. 20 App. 632*. The instruction should be, that if the attack by the deceased was such as might reasonably produce in the mind of the slayer a reasonable expectation of either death or *serious bodily harm*, he would not be required to resort to other means than killing to prevent the injury. *Blake v. S. 8 App. 582*; *Check v. S. 4 App. 444*; *Ainsworth v. S. 8 App. 538*; *Kendall v. S. Id. 577*; *Bright v. S. 10 App. 68*; *Foster v. S. 11 App. 105*; *Jordan v. S. Id. 448*; *Boddy v. S. 14 App. 540*; *Branch v. S. 15 App. 103*; *Short v. S. Id. 376*; *Gilly v. S. Id. 301*; *Sterling v. S. Id. 256*; *Cartwright v. S. 16 App. 473*; *Morgan v. S. Id. 595*; *Jones v. S. 17 App. 611*; *Hunnicut v. S. 18 App. 522*; *Williams v. S. 22 App. 497*; *Orman v. S. Id. 604*; *Lee v. S. 21 App. 241*. If at the time of the killing, the conduct of the deceased, viewed in the light of all the circumstances, was such as to create in the mind of the defendant a reasonable apprehension of death or serious bodily injury, although in fact no such danger existed, his right to kill to prevent the apparent danger would be as complete as if the danger had been real. And the appearances or indications of danger must be viewed and considered from the defendant's stand-point in determining whether or not they were reasonably calculated to produce, and did produce in his mind the fear of death or serious bodily harm. Where the evidence demands it, the charge of the court should clearly explain to the jury these rules with reference to apparent danger, and should not restrict the right of self defense to actual danger. *Marnoch v. S. 7 App. 269*; *Richardson v. S. Id. 486*; *Pharr v. S. Id. 472*; *Rodriguez v. S. 8 App. 129*; *Bobb v. S. Id. 173*; *Jordan v. S. 11 App. 435*; *Moore v. S. 15 App. 1*; *Smith v. S. Id. 338*; *Cartwright v. S. 16 App. 473*; *Jones v. S. 17 App. 602*; *Bell v. S. 20 App. 445*; *Brumley v. S. 21 App. 222*; *Spearman v. S. 23 App. 224*; *Conner v. S. Id. 378*. In connection with this phase of self-defense, see also, Ante §§ 1051-1052-1053, as to threats made by deceased, and as to evidence of his character. The rules as to apprehended danger are equally applicable and should be given in charge to the jury, where there is evidence tending to show that other persons are acting together with the deceased in the attack upon the defendant. In such case the charge should not ignore the participancy of such other persons, and should not limit the defendant's right of self-defense to the hostile demonstrations of the deceased alone, but should recognize such right with reference to the acts, each and all of the parties apparently making, or participating in the attack upon him. *McLaughlin v. S. 10 App. 340*; *Jones v. S. 20 App. 665*; *Cartwright v. S. 16 App. 473*. If the slayer provoked the contest with the deceased with the apparent intention of killing him, or doing him some serious bodily injury, he is guilty of murder, although he may have done the act of killing suddenly, without deliberation, and in order to save his own life. The law allows no justification in such case, and no reduction of the grade of the homicide below that of murder. But if the slayer provoked the contest without any intention to kill or inflict serious bodily injury, and suddenly, without deliberation, did the act of killing, while the act would not be justified, still it might be a lower grade of homicide than murder. When the evidence calls for it, the rules relating to the provoking of the contest by the defendant should be fully and clearly explained in the charge in so far as they may be applicable to the evidence. For discussions and explanations of such rules, see the following cases: *Gilliland v. S. 44 Tex. 356*; *Reed v. S. 11 App. 509*; *Green v. S. 12 App. 445*; *King v. S. 13 App. 277*; *Cartwright v. S. 14 App. 486*; *Smith v. S. 15 App. 338*; *Logan v. S. 17 App. 50*; *Jones v. S. Id. 602*; *Arto v. S. 19 App. 126*; *Lilly v. S. 20 App. 1*; *Thuston v. S. 21 App. 245*; *Roach v. S. Id. 249*; *White v. S. 23 App. 154*. That the defendant, if unlawfully attacked by the deceased, is not bound to retreat in order to avoid the necessity of killing his assailant, is a part of the law of self-defense, and failure to so instruct the jury, when the facts in evidence require the instruction, is material error, although not excepted to at the time of the trial. *Arto v. S. 19 App. 126*; *Bell v. S. 17 App. 538*; *Parker v. S. 22 App. 105*; *White v. S. 23 App. 154*. See Ante, art. 573. For other decisions pertinent to the issue of self-defense, see Ante, § 969, *et seq.* See, also, Ante, §§ 1052-1052a-1053.

§1071 — Same — Presumption of innocence and reasonable doubt. — The presumption of innocence, in connection with the rule as to reasonable doubt, should be given in charge. Ante, §§ 81-32-33. The rule as to reasonable doubt must be charged in every felony case, whether asked or not. *Hutto v. S. 7 App. 44*; *Goode v. S. 2 App. 520*; *Lindsay v. S. 1 App. 327*; *Black v. S. Id. 368*; *Priesmuth v. S. Id. 480*; *Mace v. S. 6 App. 470*. As to reasonable doubt should be charged in the language of the statute. (C. C. P. Art. 727). Without any attempt at amplification or explanation. *Shultz v. S. 20 App. 315*; *Fury v. S. 8 App. 471*; *Holmes v. S. 9 App. 313*; *Bland v. S. 4 App. 15*; *Ham v. S. Id. 645*; *Chapman v. S. 3 App. 67*; *Massey v. S. 1 App. 563*; *Bramlett v. S. 21 App. 641*. In a prosecution for murder the rule of reasonable doubt should be charged as between the different degrees. *Murray v. S. 1 App. 417*; *Eanes v. S. 10 App. 422*; *McCall v. S. 14 App. 353*. A charge with respect to reasonable doubt is sufficient if it applies the rule to the whole of the case, though not to each and every contested question arising upon the evidence. *McCullough v. S. 23 App. 620*; *Ashlock v. S. 16 App. 13*; *Barr v. S. 10 App. 507*. It is not error to refuse to instruct for acquittal if there was a reasonable doubt of the defendant's sanity when he committed the homicide. *King v. S. 9 App. 515*; *Webb v. S. Id. 490*. The rule of reasonable doubt applies to the case as sought to be established by the State, and not to a defense set up by the accused, to criminative and not exculpatory facts. *Rockhold v. S. 16 App. 577*; *Dyson v. S. 13 App. 402*. A charge which directs the jury to acquit, if they can reasonably conclude from the evidence that the defendant is innocent, is erroneous. The jury need never conclude, reasonably or otherwise, that the defendant is innocent, but only that the evidence fails to establish his guilt. *McMillan v. S. 7 App. 142*; *Myers v. S. Id. 640*; *Smith v. S. 9 App. 150*; *Robertson v. S. Id. 209*; *Blocker v. S. Id. 279*; *Wallace v. S. Id. 299*. A charge, that the "defendant is entitled to all reasonable doubts," is improper, because it authorizes

speculation and doubt outside the facts of the case. *Reid v. S.* 9 App. 472. A charge which instructs the jury to acquit if they have a reasonable doubt as to the "guilt or innocence" of the accused is erroneous. *Patterson v. S.* 12 App. 223. *Hackett v. S.* 13 App. 406; *McNair v. S.* 14 App. 78; *Holland v. S.* Id. 182; *Thomas v. S.* Id. 200.

§1072 — ART. 609. — **Punishment.** — The punishment of murder in the first degree shall be death or confinement in the penitentiary for life, and the punishment of murder in the second degree shall be confinement in the penitentiary for not less than five years. [O.C. 612a, amended by Act Feb. 12, 1858, p. 174.]

§1073 — **Decisions as to punishment.** — The constitution of 1869 empowered juries to substitute imprisonment for life in lieu of death for murder in the first degree. The constitution of 1869 was wholly superseded by the constitution of 1876, which latter constitution contains no provision upon the subject. The effect of this change in constitutions was to restore the penalty for murder in the first degree as it was prior to the adoption of the constitution of 1869, that is, to make the penalty death, absolutely, depriving juries of the power to substitute imprisonment for life. Thus the punishment remained, until the adoption of the Revised Penal Code, which prescribes the alternative punishment of death, or confinement in the penitentiary for life. *McInturff v. S.* 20 App. 335; *Cox v. S.* 8 App. 254; *Hunt v. S.* 7 App. 212. Imprisonment in the penitentiary for life is not the penalty for murder in the second degree, and a charge of the court to that effect is error, although the penalty actually assessed by the jury was within the limits of the law. *Wilson v. S.* 14 App. 524. Pending an appeal from a conviction of murder in the first degree, which conviction was had when the penalty prescribed was death absolutely, the Revised Penal Code took effect. Held, that the change made in the punishment by the Revised Code did not invalidate the conviction, nor exempt the defendant from the penalty adjudged against him. *Walker v. S.* 7 App. 245. For decisions as to the amelioration of punishment, and the defendant's right of election in such case, see Ante, § § 40-41-42.

§1074 — **Former acquittal and conviction.** — A conviction of murder in the second degree operates as an acquittal of murder in the first degree and a conviction of manslaughter operates as an acquittal of murder in both degrees, and so a conviction of negligent homicide would operate as an acquittal of murder and manslaughter. *Jones v. S.* 13 Tex. 168; *Hampton v. S.* 1 App. 652; *Baker v. S.* 4 App. 223; *Vestal v. S.* 8 App. 648; *Givens v. S.* 6 App. 344; *White v. S.* 9 App. 390; *Thomas v. S.* 40 Tex. 86. But an acquittal or conviction of an assault with intent to murder, or of an aggravated assault and battery, will not bar a prosecution for culpable homicide, if such acquittal or conviction was had before the death of the injured party. *Johnson v. S.* 19 App. 453; *Curtis v. S.* 22 App. 227.

## CH. 16.—OF DUELING.

ART.	SEC.	ART.	SEC.
610. Dueling, etc. — How punished.	1075	Former statutes.	1077
611. Homicide in, murder in the first degree.	1076		

§1075 — ART. 610. — **Dueling, etc. — How punished.** — Any person who shall, within this State, fight a duel with deadly weapons, or send or accept a challenge to fight a duel with deadly weapons either within the State or out of it, or who shall act as a second, or knowingly aid or assist in any manner those thus offending, shall be deemed guilty of a felony, and upon conviction shall be punished by confinement in the penitentiary not less than two nor more than five years. [O. C. 603, amended as to punishment in revising.]

Indictment, Willson's Cr. Forms, 395-396-397-398-399-400.

§1076 — ART. 611. — **Homicide in, murder in the first degree.** — If, in any duel hereafter fought in this State, either of the combatants be killed, or receive a wound from which he afterward dies within three months, the survivor shall be deemed guilty of murder in the first degree and be punished accordingly. [O. C. 605, amended as to punishment in revising.]

§1077 — **Former statutes.** — Under the statutes as they existed prior to the revision the offenses denounced by article 610 were punished by disqualification to hold office, and by fine not less than one thousand dollars and imprisonment in the county jail not exceeding twelve months. Where a duel was fought and a homicide was the result, the offense was made manslaughter and punished accordingly. O. C. arts. 603-604-605. See Const., art. 16, §

## CH. 17.—GENERAL PROVISIONS RELATING TO HOMICIDE.

ART.	SEC.	ART.	SEC.
612. Means or instruments used must be considered.	1078	Decisions under preceding article.	1081
Decisions relating to preceding article.	1079	614. If in sudden passion not with deadly weapon.	1082
613. If injury be done in a cruel manner.	1080	615. If evil or cruel disposition be exhibited.	1083
		Weapon used, character of.	1084

§1078 — ART. 612.—**Means or instruments used must be considered.** — The instrument or means by which a homicide is committed are to be taken into consideration in judging of the intent of the party offending; if the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless from the manner in which it was used such intention evidently appears. [O. C. 613.]

§1079—**Decisions relating to preceding article.**—The preceding article and articles 613 and 615 Post, apply to cases where the *intention* to kill evidently appears, or where it is evidenced by the cruel manner in which the injury was inflicted. Article 614 Post, applies to a case where there was no intention to kill, and the homicide was divested of an evil and cruel disposition. Where the evidence makes the intention of the slayer at all doubtful articles 612-613-615 should not be given in charge without also giving in charge article 614. *Dones v. S. 8 App. 112; Hill v. S. 11 App. 456.* A charge should not give undue prominence to the presumption arising against a defendant from the character of the weapon, or the manner in which it was used. See an instance where such error was committed. *Bell v. S. 17 App. 583; Whittaker v. S. 12 App. 436.* For a charge held correct see *Gatlin v. S. 5 App. 531.* See Ante, arts 50-571. See also *Gaitan v. S. 11 App. 544.*

§1080 — **ART. 613. — If injury be done in a cruel manner.**—If any injury be inflicted in a cruel manner, though with an instrument not likely under ordinary circumstances to produce death, the killing will be manslaughter or murder, according to the facts of the case. [O. C. 614.]

§1081 — **Decisions under preceding article.**—If the injury were inflicted in a cruel manner, the law implies malice, notwithstanding the instrument used in inflicting the injury be one not likely to produce death. It is the *cruel* manner in which the act is committed that stamps it as malicious. *Whittaker v. S. 12 App. 436; Cook v. S. 22 App. 511; McCoy v. S. 25 Tex. 33; Jordan v. S. 10 Tex. 479.*

§1082 — **ART. 614. — If in sudden passion not with deadly weapon.**—Where a homicide occurs under the influence of sudden passion, but by the use of means not in their nature calculated to produce death, the person killing is not deemed guilty of the homicide unless it appear that there was an intention to kill, but the party from whose act the death resulted may be prosecuted for and convicted of any grade of assault and battery. [O. C. 615.]

§1083 — **ART. 615. — If evil or cruel disposition be exhibited.**—Where the circumstances attending a homicide show an evil or cruel disposition, or that it was the design of the person offending to kill, he is deemed guilty of murder or manslaughter, according to the other facts of the case though the instrument or means used may not in their nature be such as to produce death ordinarily. [O. C. 615.]

§1084 — **Weapon used — Character of.**—A deadly weapon is one, which in the manner used is likely to produce death. *McReynolds v. S. 4 App. 327; Coney v. S. 2 App. 62; Kev v. S. 12 App. 506; Wilson v. S. 15 App. 150; Hillland v. S. 17 App. 210; Howard v. S. 18 App. 348.* The testimony of medical witnesses as to the deadly character of the weapon used is competent evidence. *Waite v. S. 13 App. 169; Banks v. S. Id. 182.*

## TITLE 16.—OF OFFENSES AGAINST REPUTATION.

CH. 1. OF LIBEL.  
2. SLANDER.CH. 3. FALSE ACCUSATION AND THREATS OF  
PROSECUTION.

## CH. 1. — OF LIBEL.

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616. "Libel" defined.	1085	631. Nor concerning qualifications of professional men.	1103
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§1085 — ART. 616. — "Libel" defined. — He is guilty of "libel" who, with intent to injure, makes, writes, prints, publishes, sells or circulates any malicious statement affecting the reputation of another in respect to any matter or thing pointed out in this chapter. [O. C. 618.]

Indictment, Willson's Cr. Forms, 401.

§1086 — Indictment. — For indictments held sufficient, see *Woody v. S.* 16 App. 252; *Morton v. S.* 3 App. 510. An indictment for libel must set out the libel in *hæc verba*, and must show upon its face that it is so set out. The literal language of the libel must be set forth, although it may be indecent and obscene. The distinction between libel at common law, and libel as defined by this Code, is, that libel at common law is punishable because of its tendency to provoke a breach of the peace, while under this Code it is punishable as well because of its tendency to injure the reputation of the person against whom it is directed. Such being the case, the indictment need only allege the intent to injure the person libeled, and need not allege the tendency and intent to provoke a breach of the peace. *Coulson v. S.* 16 App. 189; *Woody v. S.* Id. 252.

§1087 — Constitutionality of libel law. — The provisions of this chapter are not in derogation of the freedom of the press, nor violative of the constitutional provisions which secure to every person the right to speak, write, or publish, his opinions on any subject, being responsible for the abuse of that privilege, and which prohibit the enactment of any law curtailing the liberty of speech, or of the press. *Morton v. S.* 3 App. 510. Bill of Rights, Const. art. 1, sec. 8.

§1088 — ART. 617. — Punishment. — If any person be guilty of libel he shall be punished by fine not less than one hundred nor more than two thousand dollars, or by imprisonment in the county jail not exceeding two years; and the court may enter up judgment and issue an order thereupon directing the sheriff to seize and destroy all the publications, prints, paintings or engravings constituting the libel as charged in the indictment or information. [O. C. 619.]

§1089 — **ART. 618. — Publishing writing purporting to be done by another.** — If any person with intent to injure the reputation of another, shall, without lawful authority, make, publish or circulate a writing purporting to be the act of some other person, and which comes within the definition of libel, as given in this chapter, he shall be punished in the same manner as if the act purported to be his own; and the rules with respect to libel apply also to the making and circulation of such false writing. [O. C. 620.]

Indictment, Willson's Cr. Forms, 402; Ante, § 1086.

§1090 — **ART. 619. — "Maker" explained.** — He is the maker of a libel who originally contrived and either executed it himself by writing, printing, engraving or painting or dictated or caused it to be done by others. [O. C. 621.]

§1091 — **ART. 620. — "Publisher."** — He is the publisher of a libel who, either of his own will or by the persuasion or dictation of another, executes the same in any of the modes pointed out as constituting a libel; but if any one by force or threats is compelled to execute such libel he is guilty of no offense. [O. C. 622.]

§1092 — **ART. 621. — "Circulating."** — He is guilty of circulating a libel who, knowing its contents, either sells, distributes or gives, or who with malicious design, reads or exhibits it to others. [O. C. 622a.]

§1093 — **Mailing is circulating.** — Depositing a libel in the post-office for transmission to the party addressed, is a publication, or circulating of it. Coulson v. S. 16 App. 189; Smith v. S. 32 Tex. 594. So it is circulating it to read and exhibit it to others. Moody v. S. 16 App. 252.

§1094 — **ART. 622. — The ideas the statement must convey.** — The written, printed or published statement to come within the definition of libel, must convey the idea either—

1. That the person to whom it refers has been guilty of some penal offense; or

2. That he has been guilty of some act or omission which, though not a penal offense, is disgraceful to him as a member of society, and the natural consequence of which is to bring him into contempt among honorable persons; or

3. That he has some moral vice, or physical or mental defect or disease, which renders him unfit for intercourse with respectable society, and such as should cause him to be generally avoided; or

4. That he is notoriously of bad or infamous character, or

5. That any person in office, or a candidate therefor, is dishonest, and therefore unworthy of such office, or that while in office he has been guilty of some malfeasance rendering him unworthy of the place. [O. C. 623.]

For writings held to be libels, see Moody v. S. 16 App. 252; Morton v. S. 3 App. 510; Leader v. S. 4 App. 162; Smith v. S. 32 Tex. 594.

§1095 — **ART. 623. — Mode of publication.** — A libel may be either written, printed, engraved, etched or painted, but no verbal defamation comes within the meaning thereof; and whenever a defendant is accused of libel, by means of a painting, engraving or caricature, it must clearly appear therefrom that the person said to be defamed was, in fact, intended to be represented by such painting, engraving or caricature. [O. C. 624.]

§1096. — **ART. 624. — A manuscript must be circulated.** — In order to render any manuscript a libel it must be circulated or posted up in some public place. [O. C. 624.]

§1097 — **ART. 625. — Editor, etc., prima facie guilty.** — If the libel be in printed form, and issues or is sold in any office or shop where a public newspaper is conducted, or where books or other printed works are sold or printed, the editor, publisher and proprietor of such newspaper, or any one of them, or

the owner of such shop, is to be deemed guilty of making or circulating such libel until the contrary is made on the trial to appear. [O. C. 626.]

§1098 — ART. 626. — **But may avoid responsibility, how.** — The editor, publisher or proprietor of a public newspaper may avoid the responsibility of making or publishing a libel by giving the true author of the same, provided such author be a resident of this State and a person of good character, except in cases where it is shown that such editor, publisher or proprietor caused the libel to be published with malicious design. [O. C. 627.]

§1099 — ART. 627. — **Mechanical executor not guilty, unless.** — No person shall be convicted of libel merely on evidence that he has made a manuscript copy of a libel or has performed the manual labor of printing it, unless it be shown positively that such person was actuated by a malicious design against the person defamed. But the person for whose account or by whose order it was printed shall be presumed to have known the intent of the publication, and shall be liable for the offense. [O. C. 628.]

§1100 — ART. 628. — **Actual injury not necessary.** — It is sufficient to constitute the offense of libel if the natural consequence of the publication of the same is to injure the person defamed, although no actual injury to his reputation has been sustained. [O. C. 629.]

§1101 — ART. 629. — **Intent to injure presumed.** — The intent to injure is to be presumed if such would be the natural consequence of the libel, though no actual proof be made that the defendant had such design; and in all trials of libel the jury are to judge from the facts proved relative to the malicious design of the defendant as to what penalty ought to be imposed under the restrictions herein prescribed. [O. C. 630.]

Smith v. S. 32 Tex. 594.

§1102 — ART. 630. — **True statement concerning candidate not libel.** — It is no offense to make true statements of fact, or express opinions as to the integrity or other qualifications of a candidate for any office or public place or appointment. [O. C. 631.]

Const. art. 1, § 8.

§1103 — ART. 631. — **Nor concerning qualifications of professional men.** — It is no offense to publish true statements of fact as to the qualifications of any person for any occupation, profession or trade. [O. C. 632.]

Const. art. 1, § 8.

§1104 — ART. 632. — **No criticism of any book, work of art, etc.** — It is no offense to publish any criticism or examination of any work of literature, science or art, or any opinion as to the qualifications or merits of the author of such work. [O. C. 633.]

Const. art. 1, § 8.

§1105 — ART. 633. — **The offense relates to persons only.** — To constitute libel there must be some injury intended to the reputation of *persons*, and no publication as to the government or any of the branches thereof as such, is an offense under the name of seditious writings or any other name. [O. C. 634.]

§1106 — ART. 634. — **Respecting religious systems, etc.** — It is no libel to make publication respecting the merits or doctrines of any particular religion, system of morals or politics, or of any particular form of government. [O. C. 635.]

§1107 — ART. 635. — **Corporation cannot be libeled.** — It is no libel to make any publication respecting a body politic or corporate as such. [O. C. 636.]

§1108 — ART. 636. — **Nor legislative or judicial proceedings, unless, etc.** — It is no libel to publish any statement respecting any legislative or ju-

dicial proceedings, whether the statement be in fact true or not, unless in such statement a charge of corruption is made against some person acting in a legislative or judicial capacity. [O. C. 637.]

§1109 — **ART. 637. — Recorder of minutes, etc., not liable.** — Where any person, by virtue of his office, is required to record the proceedings of any department of the government or of any body corporate or politic, or of any association organized for purposes of business, or as a religious, moral, benevolent, literary or scientific institution, he cannot be charged with libel for any entry upon the minutes or records of such department, body or association, made in the course of his official duties. [O. C. 638.]

§1110 — **ART. 638. — But all members of the association who assent, are.** — If any false statement be entered upon the minutes or record of proceedings of any corporate body or association included within the meaning of the preceding article, which would be libel if written, printed, published or circulated by an individual, according to the previous articles of this chapter, the persons being members of such body or association, who assent to, and direct such libelous statement to be made, are guilty of libel under the same rules as if the false statement had been written, published or circulated in any other manner than as a part of the record or proceedings of such body or association, subject, however, to the restrictions contained in the succeeding article. [O. C. 639.]

§1111 — **ART. 639. — Intent to injure not presumed, unless, etc.** — The libelous statement referred to in the preceding article is not to be presumed to have been made with intent to injure, from the mere fact that such would be the natural result thereof, unless it appear from other facts that the statement was in fact made with that intention. [O. C. 640.]

§1112 — **ART. 640. — “Malicious” signifies what.** — The word “malicious” is used to signify an act done with evil or mischievous design, and it is not necessary to prove any special facts showing ill feeling on the part of the person who is concerned in making, printing, publishing or circulating a libelous statement against the person injured thereby. [O. C. 641.]

§1113 — **ART. 641. — Statement in legislative or judicial proceedings not included.** — No statement made in the course of a legislative or judicial proceeding, whether true or false, although made with intent to injure and from malicious purposes, comes within the definition of libel. [O. C. 642.]

Lindsay v. S. 18 App. 280.

§1114 — **ART. 642. — Truth of the statement may be shown, when.** — In the following cases the truth of any statement charged as a libel may be shown in justification of the defendant: —

1. Where the publication purports to be an investigation of the official conduct of officers or men in a public capacity.

2. Where it is stated in the libel that a person has been guilty of some penal offense, and the time, place and nature of the offense is specified in the publication.

3. Where it is stated in the libel that a person is of notoriously bad or infamous character.

4. Where the publication charges any person in office, or a candidate therefor, with a want of honesty, or of having been guilty of some malfeasance in office, rendering him unworthy of the place. In other cases the truth of the facts stated in the libel cannot be inquired into. [O. C. 643.]

Const. art. 1, § 8.

§1115 — **Shall not be shown, when.** — Where a private citizen was libeled as “a hireling, a murderer, and a coward,” it was held that the truth of such charge could not be proved as a defense. Smith v. S. 32 Tex. 594. Where the libelous matter consisted of a charge that the person against whom it was uttered had been guilty of embezzlement, and was a “liar, swindler, and dead-beat,” it was held competent, under the latter portion of said charge, to prove, in



defense, the general reputation of the libeled party. But if the libel had charged "embezzlement" only, the inquiry should have been restricted to his general character for honesty. *Leader v. S.* 4 App. 162.

§1116 — ART. 643. — **Province of jury.** — The jury in every case of libel are not only the judges of the facts and of the law, under the direction of the court, in accordance with the constitution, but they are judges of the intent with which a libel may have been published or circulated, subject to the rules prescribed in this chapter, and in rendering their verdict they are to be governed by a consideration of the nature of the charge contained in the libel, the general reputation of the person said to be defamed and the degree of malice exhibited by the defendant in the commission of the offense. [O. C. 644.]

§1117 — ART. 644. — **This title relates only to penal action.** — This title regulates the law with regard to libel when prosecuted as a penal offense, and is not intended to have any operation upon the subject so far as relates to civil remedies for the recovery of damages. [O. C. 645.]

## CH. 2. — OF SLANDER.

ART.	SEC.	ART.	SEC.
645. Definition and punishment.	1118	Evidence.	1121
Indictment.	1119	When not slander.	1122
646. Procedure in prosecution for.	1120		

§1118 — ART. 645. — **Definition and punishment.** — If any person shall, orally or otherwise, falsely and maliciously, or falsely and wantonly, impute to any female in this State, married or unmarried, a want of chastity, he shall be deemed guilty of slander, and, upon conviction, shall be fined not less than one hundred nor more than one thousand dollars, and the jury may, in addition thereto, find a verdict for the imprisonment of defendant in the county jail not exceeding one year. [Added in revising.]

Indictment, Willson's Cr. Forms, 403-404.

§1119 — **Indictment.** — An indictment for this offense must set forth, at least substantially, the words or acts constituting the alleged slander. It will not be sufficient to allege in general terms an imputation of a want of chastity. *Lagrone v. S.* 12 App. 426; *Milton v. S.* Id. 552; *Hammers v. S.* 13 App. 344; *McMahon v. S.* Id. 220; *Wiseman v. S.* 14 App. 74; *Conlee v. S.* Id. 222. It should also allege that the slander was perpetrated in the presence of some person or persons, and the better practice is to name such person or persons, or some of them. *McMahon v. S.* 13 App. 220; *Wiseman v. S.* 14 App. 74. For indictments held good, see *Patterson v. S.* 12 App. 458; *Humbard v. S.* 21 App. 200.

§1120 — ART. 646. — **Procedure in prosecution for.** — In any prosecution, under this chapter, it shall not be necessary for the State to show that such imputation was false, but the defendant may in justification show the truth of the imputation, and the general reputation for chastity of the female alleged to have been slandered may be inquired into. [Added in revising.]

§1121 — **Evidence.** — The law presumes the chastity of every woman, and it does not devolve upon the State to prove the chastity of the alleged slandered female. *Lagrone v. S.* 12 App. 426. Nor does it devolve upon the prosecution to prove the falsity of the imputation, but the prosecution must show that the imputation was made maliciously or wantonly. *McMahon v. S.* 13 App. 220. The State must prove the alleged slander substantially as alleged. *Humbard v. S.* 21 App. 200; *Conlee v. S.* 14 App. 222. See a variance between the *allegata* and the *probata* in this respect, held to be material and fatal to the conviction. *Conlee v. S.* 14 App. 222. The name of the alleged slandered female must be sufficiently proved to identify and unless this is done the proof will not only be held insufficient, but the variance between the allegation and the proof will be fatal. See an instance — *Humbard v. S.* 21 App. 200. The defendant may prove in justification: 1. That the *particular imputation* which he made against the female is true.

2. That her general reputation for chastity at the time he made the imputation was bad. But he cannot be permitted to prove any other acts or conduct of the female indicating a want of chastity, except those specifically embraced in the imputation made by him. *Patterson v. S.* 12 App. 458; *McMahan v. S.* 13 App. 220. But if the imputation be general, as that the impugned female "is a whore," he would be entitled to prove specific acts of such female going to establish the truth of such imputation. *Wagner v. S.* 17 App. 554. But the imputation being "she is a whore," not "she was a whore" it was held to be not competent for the defendant to prove that prior to her marriage she had lived in adultery with her husband, but it was competent for him to prove that she practiced illicit intercourse with other men than her husband. *Wagner v. S.* 17 App. 554; *Duke v. S.* 19 App. 14.

§1122 — **When not slander.** — Article 645, Ante, does not include or apply to defamatory language used in a judicial proceeding. The extent and object of the enactment is merely to make it a penal offense to maliciously or wantonly impute to a female a want of chastity. A construction applying it to language used in a judicial proceeding would make the law violative of an established public policy; and such construction of a statute, when avoidable, will not be adopted. *Lindsey v. S.* 18 App. 280.

### CH. 3.—OF FALSE ACCUSATION AND THREATS OF PROSECUTION.

ART.		SEC.	ART.		SEC.
647.	Combination to falsely accuse another.	1123	649.	Threats of prosecution to extort money.	1125
648.	To extort money.	1124	650.	Publishing another as a coward.	1126

§1123 — **ART. 647. — Combination to falsely accuse another.** — If any two or more persons shall combine falsely to accuse another of an offense, and shall, in pursuance of such combination make such accusation before a court or magistrate, or in any newspaper or other public print, or by the circulation of hand-bills, or in any other public manner, by writing, they shall be punished by fine not exceeding two thousand dollars, or by imprisonment in the county jail not exceeding two years. [O. C. 646.]

Indictment, Willson's Cr. Forms, 405-406.

§1124 — **ART. 648. — To extort money.** — If the purpose of such combination be to extort money or any pecuniary advantage, the punishment shall be fine not to exceed two thousand dollars and imprisonment in the penitentiary not to exceed three years. [O. C. 647.]

Indictment, Willson's Cr. Forms, 407.

§1125 — **ART. 649. — Threats of prosecution to extort money.** — If any person, with intent to extort money, or any pecuniary advantage, shall threaten to accuse another of a felony, before any court, or to publish any other statement respecting him which would come within the meaning of a libel, he shall be punished in the manner set forth in article 647. [O. C. 648.]

See Post, art. 813; Indictment, Willson's Cr. Forms, 408.

§1126 — **ART. 650. — Publishing another as a coward.** — If any person shall, in any newspaper or hand-bill, or by notice posted up in any place, publish another as a coward, or use toward him other opprobrious language, he shall be fined in an amount not exceeding two hundred dollars; and if such publication or posting be in consequence of a refusal to fight a duel the punishment shall be fine not less than five hundred nor more than one thousand dollars. [O. C. 649.]

Indictment, Willson's Cr. Forms, 409.

## TITLE 17.—OF OFFENSES AGAINST PROPERTY.

## CH. 1. ARSON.

2. OTHER WILLFUL BURNING.
3. MALICIOUS MISCHIEF.
4. INFECTIOUS DISEASES AMONG ANIMALS.
5. CUTTING AND DESTROYING TIMBER.
6. BURGLARY.
7. OFFENSES ON BOARD OF VESSELS, STEAMBOATS AND RAILROAD CARS.
8. ROBBERY.
9. THEFT IN GENERAL.
10. THEFT FROM THE PERSON.
11. THEFT OF ANIMALS.
12. MISCELLANEOUS PROVISIONS RELATING TO THE RECOVERY OF STOLEN ANIMALS, AND THE DETECTION AND PUNISHMENT OF THIEVES.

## CH. 13. ILLEGAL MARKING AND BRANDING, AND OTHER OFFENSES RELATING TO STOCK.

14. ESTRAYS.
15. OFFENSES RELATING TO THE PROTECTION OF STOCKRAISERS IN CERTAIN LOCALITIES.
16. EMBEZZLEMENT.
17. SWINDLING AND FRAUDULENT DISPOSITION OF MORTGAGED PROPERTY.
18. OFFENSES COMMITTED IN ANOTHER COUNTRY OR STATE.

### CH. 1. — OF ARSON.

ART.	SEC.	ART.	SEC.
651. Definition of.	1127	657. Except, when.	1135
Indictment.	1128	658. Owner may destroy, except when.	1136
652. "House" defined.	1129	659. Exceptions.	1137
653. Offense complete, when.	1130	660. Part owner, cannot burn.	1138
654. "Design" the essence of the offense.	1131	661. Punishment.	1139
655. Intent presumed, when.	1132	662. Burning a State building.	1140
Decisions as to intent.	1133	Evidence.	1141
656. Explosions included.	1134	663. Attempt at arson.	1142
		"Attempt" defined.	1143

§1127 — ART. 651. — **Definition of.** — "Arson" is the willful burning of any house included within the meaning of the succeeding article of this chapter. [O. C. 679.]

Indictment, Willson's Cr. Forms, 410.

§1128 — **Indictment.** — The indictment need not allege that the burning was felonious and malicious; it is sufficient to allege that it was willful. *Tuller v. S. 8 App. 501*; *Thomas v. S. 41 Tex. 27*. An indictment for this offense, in addition to charging the arson, alleged that a child was in the house at the time the house was burned, and that said child was seriously injured by the fire. Held, that the allegation as to the child did not make the indictment duplicitous, but was a proper allegation in view of article 673, Post. *Beaumont v. S. 1 App. 533*. Where the indictment is against the owner for burning his own house, it must allege ownership of the house in the accused, and the particular facts which bring such burning within some one of the exceptions specified in article 659, Post. *Tuller v. S. 8 App. 501*.

§1129 — ART. 652. — **"House" defined.** — A "house" is any building, edifice or structure inclosed with walls, and covered, whatever may be the materials used for building. [O. C. 680.]

*Smith v. S. 23 App. 357*.

§1130 — ART. 653. — **Offense complete, when.** — The burning is complete when the fire has actually communicated to a house, though it may be neither destroyed nor seriously injured. [O. C. 684.]

*Smith v. S. 23 App. 357*; *Delaney v. S. 41 Tex. 601*.

§1131 — ART. 654. — **"Design" the essence of the offense.** — It is of no consequence by what means the fire is communicated to a house, if the burning is with design. It may be by setting fire to any combustible material communicating therewith, by an explosion, or by any other means. [O. C. 685.]

*Smith v. S. 23 App. 357*.

**§1132 — ART. 655. — Intent presumed, when.** — When fire is communicated to a house by means of the burning of another house, or some combustible matter, it shall be presumed that the intent was to destroy every house actually burnt, provided there was any apparent danger of such destruction. [O. C. 686.]

**§1133 — Decisions as to intent.** — In *Delaney v. S.* 41 Tex. 601, it was held that if a prisoner in jail sets fire to the door, with the intent to burn off the lock so as to effect his escape, or burns a hole in the floor for the same purpose, it is not arson. But, if he communicates the fire to the building without such definite purpose, but with intent to create an alarm, and thus effect his escape in the confusion, being at the same time indifferent whether the building is consumed or not, it would be arson. But the doctrine of that case in so far as it holds that if a prisoner willfully sets fire to the prison for the purpose of making his escape, with no design of burning the house down, has been expressly overruled in *Smith v. S.* 23 App. 357, where the question is fully discussed.

**§1134 — ART. 656. — Explosions included.** — The explosion of a house by means of gunpowder or other explosive matter, comes within the meaning of arson. [O. C. 687.]

**§1135 — ART. 657. — Except, when.** — A house blown up, or otherwise destroyed, for the purpose of saving another house from fire, is not within the meaning of arson. [O. C. 688.]

**§1136 — ART. 658. — Owner may destroy, except when.** — The owner of a house may destroy it by fire or explosion, without incurring the penalty of arson, except in the cases mentioned in the succeeding article. [O. C. 689.]

Indictment, Willson's Cr. Forms, 411; Ante, § 1128.

**§1137 — ART. 659. — Exceptions.** — When a house is within a town or city; or when it is insured; or when there is within it any property belonging to another; or when there is apparent danger by reason of the burning thereof, that the life or person of some individual, or the safety of some house belonging to another will be endangered, the owner, if he burn the same, is guilty of arson, and shall be punished accordingly. [O. C. 690.]

Ante, § 1128.

**§1138 — ART. 660. — Part owner cannot burn.** — One of the part owners of a house is not permitted to burn it. [O. C. 691.]

**§1139 — ART. 661. — Punishment.** — If any person be guilty of arson, he shall be punished by confinement in the penitentiary not less than five nor more than twenty years. [O. C. 694.]

Post, art. 673, 674.

**§1140 — ART. 662. — Burning a State building.** — If any person shall willfully burn the capitol building of the State, the treasury building or comptroller's office, the supreme court building, the executive mansion, or the general land office, he shall be punished by confinement in the penitentiary for life. [O. C. 694.]

Indictment, Willson's Cr. Forms, 412.

**§1141 — Evidence.** — Arson has ever been regarded as an offense against the security of the habitation rather than the property, and the actual title and true ownership can rarely be a matter for material inquiry in prosecutions for this offense. The landlord himself may commit it on the house occupied by, or in possession of the tenant, for during the lease the house is the property of the tenant; and so the true owner may be held liable for the offense, although the contract of purchase be simply executory, and for default he may re-enter and repossess the premises by action for title and possession. The court will not inquire into the tenure or interest of the occupier or person in possession of the house, if in fact it is occupied or possessed by such person. *Tuller v. S.* 8 App. 501. It was held competent for the prosecution, for the purpose of proving malice on the part of the defendant toward the alleged injured party, to show that prior to the arson there had been difficulties between the defendant and the owner of the burned property, and that the defendant was the aggressor in such difficulties. *Davis v. S.* 15 App. 594. The primary rule of evidence which requires that the proof shall correspond with the allegations, and be confined to the point in issue, excludes all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in issue. Under this rule, it was held error, to permit the State, over objection, to prove that, prior to the commission of the arson, for which the defendant was on trial, he was charged with the commission of another and distinct offense, and was a fugitive

from justice. *Chumley v. S.* 20 App. 547. Mere failure to explain an inculpatory fact does not enhance its probative force; but, if the inculpatory fact be questioned, or its criminative import be controverted, and the accused has it in his power, if false, to prove it to be so, but fails to make such proof or fails to explain it when it is in his power to do so, such failure tends to establish its truth, or its criminative import. Positive recognition of defendant's voice, by a witness who was familiar with it, may suffice to identify the defendant as the culprit. *Davis v. S.* 15 App. 594. For evidence held sufficient to sustain a conviction, see *Williams v. S.* 41 Tex. 209; *Davis v. S.* 15 App. 594; *Smith v. S.* 23 App. 357. For evidence held insufficient, see *Tulser v. S.* 8 App. 501; *McMahan v. S.* 17 App. 321.

§1142 — ART. 663. — **Attempt at arson.** — If any person shall, by any means calculated to effect the object, attempt to commit the offense of arson, he shall be punished by confinement in the penitentiary not less than two nor more than seven years. [O. C. 708.]

Indictment, Willson's Cr. Forms, 413.

§1143 — “**Attempt**” defined. — To “attempt” is to make an effort to accomplish some object; to try, to endeavor, to use exertion for some purpose. It necessarily implies an exertion or effort. An attempt to commit a crime is an endeavor to accomplish it, carried beyond mere preparation, but falling short of the ultimate design, in any part of it. *Lovett v. S.* 19 Tex. 174.

## CH. 2. — OF OTHER WILLFUL BURNING.

ART.	SEC.	ART.	SEC.
664. Rules of arson applicable.	1144	672. Burning personal property of another.	1153
665. Burning other buildings, hay, lumber, etc.	1145	673. Punishment double in case of personal injury.	1154
666. Ship, or other vessel, or boat.	1146	674. When death ensues, murder.	1155
667. Offense complete, when.	1147	675. Attempt at other willful burning.	1156
668. Bridge burning.	1148	675a. Willfully firing grass in inclosure of another.	1156a
669. Burning woodland or prairie.	1149	675b. Willfully firing grass with intent to injure.	1156b
Article 669, before amendment.	1150		
670. Offense complete, when.	1151		
671. Burning personal property insured.	1152		

§1144 — ART. 664. — **Rules of arson applicable.** — The rules and definitions contained in the preceding chapter, with respect to arson, apply also to willful burnings under the provisions of this chapter, where they are not clearly inapplicable. [O. C. 697.]

§1145 — ART. 665. — **Burning other buildings, hay, lumber, etc.** — If any person shall willfully burn any building not coming within the description of a house as defined in the preceding chapter, or shall willfully burn any stack of corn, hay, fodder, grain or flax, or any pile of boards, lumber or wood, or any fence or other inclosure, the property of another, he shall be punished by confinement in the penitentiary not less than two nor more than five years, or by fine not exceeding two thousand dollars. [O. C. 698.]

Indictment, Willson's Cr. Forms, 414-415. For evidence held insufficient to sustain a conviction for burning a fence, see *Pipe v. S.* 3 App. 56.

§1146 — ART. 666. — **Ship, or other vessel, or boat.** — If any person shall willfully burn any ship or other vessel, or any boat of any kind whatsoever, he shall be punished by confinement in the penitentiary not less than two nor more than seven years, or by fine not exceeding two thousand dollars. [O. C. 699.]

Indictment, Willson's Cr. Forms, 416.

§1147 — ART. 667. — **Offense complete, when.** — This offense is complete only when some person other than the person offending has an interest in the

property by insurance, or otherwise, at the time the burning takes place. [O. C. 700.]

§1148 — ART. 668. — **Bridge burning.** — If any person shall willfully burn any bridge, which by law or usage is a public highway, he shall be punished by imprisonment in the penitentiary not less than two nor more than seven years, or by fine not exceeding five thousand dollars. [O. C. 701, amended by Act Feb. 12, 1858, p. 177.]

Indictment, Willsons Cr. Forms, 417.

§1149 — ART. 669. — **Burning woodland or prairie.** — If any person shall willfully or negligently set fire to, or burn, or cause to be burned, any woodland or prairie not his own, he shall be punished by fine not less than fifty, nor more than three hundred dollars. [O. C. 702, amended by Act April 14, 1883, p. 102.]

Indictment, Willson's Cr. Forms, 418. For an indictment held good see S. v. White, 41 Tex. 64.

§1150 — **Article 669 before amendment.** — The preceding article before it was amended read as follows:

ART. 669. If any person shall willfully burn, or cause to be burned, any woodland or prairie not his own, at any time between the first of July and the fifteenth of February succeeding, he shall be fined not less than fifty nor more than three hundred dollars.

§1151 — ART. 670. — **Offense complete, when.** — The offense named in the foregoing article is complete where the person offending sets fire to his own woodland or prairie, and the fire communicates to the woodland or prairie of another. [O. C. 703.]

§1152 — ART. 671. — **Burning personal property insured.** — If any person with intent to defraud, shall willfully burn any personal property owned by himself, which shall be at the time insured against loss or damage from fire, he shall be punished by confinement in the penitentiary not less than two nor more than five years. [O. C. 704, amended Act Feb. 12, 1858, p. 178.]

Indictment, Willson's Cr. Forms, 419.

§1153 — ART. 672. — **Burning personal property of another.** — If any person shall willfully burn any personal property belonging to another, the punishment for which is not otherwise provided for in this chapter, he shall be fined not exceeding two thousand dollars. [O. C. 705.]

Indictment, Willson's Cr. Forms, 420.

§1154 — ART. 673. — **Punishment doubled in case of personal injury.** — If any bodily injury less than death is suffered by any person, by reason of the commission of any of the offenses named in this and the preceding chapter, the punishment may be increased by the jury so as not to exceed double that which is prescribed in cases where no such injury is suffered. [O. C. 706.]

Indictment, Willson's Cr. Forms, 421.

§1155 — ART. 674. — **When death ensues, murder.** — Where death is occasioned by any of the offenses described in this and the preceding chapter, the offender is guilty of murder. [O. C. 707.]

See Ante, MURDER.

§1156 — ART. 675. — **Attempts at other willful burning.** — If any person shall, by any means calculated to effect the object, attempt to commit any of the offenses enumerated in this chapter, he shall receive such punishment as may be assessed by the jury, not to exceed one-half of the penalty which would have been affixed in case the offense attempted had been actually committed; *provided*, that when the punishment shall be confinement in the penitentiary, in no case shall the lowest term be less than two years. [O. C. 708, amended by Act Feb. 12, 1858, p. 178.]

Indictment, Willson's Cr. Forms, 422; Ante, § 1143.

§1156a — ART. 675a. — **Willfully firing grass in inclosure of another.** — That any person who shall willfully fire any grass within any inclosure, not his own, in this State, with intent to destroy the grass in such pasture, or any part thereof, or any person who shall fire the grass on the outside of any inclosure with the intent to destroy the grass in such inclosure, by the communication of said fire to the grass within, shall be deemed guilty of a felony, and upon conviction, punished by confinement in the State penitentiary for a term of not less than two, nor more than five years. [Act Feb. 7, 1884, pp. 66–67.]

Phillips v. S. 17 App. 169.

§1156b — ART. 675b. — **Willfully firing grass with intent to injure, etc.** — That if any person shall willfully, and with intent to injure the owner, or owners of the stock grazing thereon, set fire to any grass upon land not his own, with intent to destroy the same, he shall be confined in the State penitentiary for a period not less than one year, nor more than three years. [Act Feb. 7, 1884, pp. 66–67.]

### CH. 3. — MALICIOUS MISCHIEF.

ART.	SEC.	ART.	SEC.
676. Willfully sinking vessels, etc.	1157	683a. Injuring, etc., baggage.	1177
677. Destroying telegraph or obstructing message.	1158	684. Injuring fence, leaving open gates, etc.	1178
678. Obstructing railway track, etc.	1159	Decisions under preceding article.	1179
Preceding article before amended.	1160	684a. Wantonly and willfully, etc., cutting, etc., fence.	1180
Decisions under preceding article.	1161	685. Dogging stock when fence insufficient.	1181
679. Killing animal to injure owner.	1162	686. "Insufficient fence" defined.	1182
Indictment.	1163	687. Removing rock, earth, etc., from premises of another.	1183
Evidence.	1164	690†. Herding stock in half mile of residence.	1184
Charge of the court.	1165	Changes made in preceding article.	1185
Distinction between this offense and theft.	1166	691. Each hour a separate offense.	1186
680. Wantonly killing dumb animal, etc.	1167	691a. Fishing and hunting on inclosed lands of another.	1187
Indictment.	1168	691b. Not an offense, unless, etc.	1188
Evidence.	1169	Inclosing land of another.	1189
Charge of the court.	1170	691c. Preventing the moving, etc., of railroad trains.	1190
Former acquittal no bar, when.	1171	691d. Each day a separate offense.	1191
630a. Using animals without consent of owner.	1172	691e. Willfully injuring railroad, etc.	1192
681. Removing buoy, etc.	1173		
682. Robbing orchards, gardens, etc.	1174		
683. Destroying fruit, corn, etc.	1175		
Decisions under preceding article.	1176		

† Arts. 688 and 689 were submitted by the revisors and stricken out by the Legislature.

§1157 — ART. 676. — **Willfully sinking vessels, etc.** — If any person shall willfully and maliciously cast away, sink or destroy, in any way other than by fire, any vessel or boat which, together with its cargo, if any, shall be of the value of one hundred dollars or more, he shall be punished by imprisonment

in the penitentiary not less than two nor more than five years, or by fine not exceeding two thousand dollars. If the life of any person is lost by such act, the offender is guilty of murder. [O. C. 709, amended by Act. Feb. 12, 1858, p. 178.]

Indictment, Willson's Cr. Forms, 423.

§1158 — ART. 677. — **Destroying telegraph or obstructing message.** — If any person shall intentionally break, cut, pull or tear down, misplace, or in any other manner injure any telegraph or telephone wire, post, machinery, or other necessary appurtenance to any telegraph or telephone line, or in any way willfully obstruct or interfere with the transmission of messages along such telegraph or telephone line, he shall be punished by confinement in the penitentiary not less than two nor more than five years, or by fine not less than one hundred nor more than two thousand dollars. [O. C. 710, amended by Act Feb. 10, 1885, p. 10, the amendment being to insert the words "or telephone" after the word "telegraph."]

Indictment, Willson's Cr. Forms, 425-426; Post, § 1190.

§1159 — ART. 678. — **Obstructing railroad track, etc.** — If any person shall willfully place any obstruction upon the track of any railroad, or remove any rail therefrom, or displace or interfere with any switch thereof, or in any way injure such road, or shall do any damage to any railroad, locomotive, tender, or car, whereby the life of any person might be endangered, he shall be punished by imprisonment in the penitentiary not less than two nor more than seven years. If the life of any person be lost by such unlawful act, the offender is guilty of murder. [O. C. 711, amended by Act March 8, 1887, p. 14.]

Indictment, Willson's Cr. Forms, 426-427; Post, § 1192.

§1160 — **Preceding article before amended.** — Before being amended the preceding article read as follows: ART. 678. If any person shall willfully place any obstruction upon the track of any railroad, or remove any rail therefrom, or in any other way injure such road, or shall do any damage to any railroad, or car, whereby the life of any person might be endangered, he shall be punished by imprisonment in the penitentiary not less than two nor more than seven years. If the life of any person is lost by any such unlawful act, the offender is guilty of murder.

§1161. — **Decisions under preceding article.** — To warrant a conviction of this offense the evidence must show that the act done was such as might have endangered human life. See evidence held insufficient to show that human life was endangered by the act committed. *Bullion v. S.* 7 App. 462.

§1162. — ART. 679. — **Killing animal to injure owner.** — If any person shall willfully kill, maim, wound, poison or disfigure any horse, ass, mule, cattle, sheep, goat, swine, dog or other domesticated animal, or any domesticated bird of another, with intent to injure the owner thereof, he shall be fined not less than ten nor more than two hundred dollars. And in prosecutions under this article the intent to injure may be presumed from the perpetration of the act. [O. C. 713, Act Feb. 12, 1858, p. 178. In revising the words "or other domesticated animal, or any domesticated bird," were added.]

Indictment, Willson's Cr. Forms, 428.

§1163 — **Indictment.** — Under the original article 679, the penalty was regulated by the amount of the injury done to the owner, and it was therefore held that it was necessary to allege in the indictment the amount of such injury. *Nicholson v. S.* 3 App. 31; *Uecker v. S.* 4 App. 234; *Thomas v. S.* 42 Tex. 236; *S. v. Heath*, 41 Tex. 426. But such allegation is not now essential, as the penalty is not regulated or affected by the amount of the injury done. *Shaw v. S.* 23 App. 493. It need not be alleged that the animal, etc., killed, etc., was a "domesticated animal," if it was one specifically named in the statute. An information which charged the wounding of "a hog," was held sufficient, without further description of the animal. *Rivers v. S.* 10 App. 177. When the animal was described as a "steer," the description was held to be sufficient. *S. v. Lange*, 22 Tex. 591. The "color" or other particular description of the animal need not be alleged, but if alleged must be proved. *Benson v. S.* 1 App. 6. The act must be charged to have been done "willfully." *Uecker v. S.* 4 App. 234.

§1164 — **Evidence.** — Where the indictment charged the defendant with killing a bull, it was held that the State need not prove the brand on the animal. It is sufficient if the ownership of



the animal be proved, and this may be done by other evidence than that of a recorded brand. *Nutt v. S.* 19 Tex. 340. The evidence must clearly establish that the act occurred *before* indictment. *Branch v. S.* 41 Tex. 622. Under art. 679 before it was amended, it was held that where the indictment charged the killing of a *horse*, and the proof showed the animal killed was a *gelding*, the charge was not supported by the evidence. *Gholston v. S.* 33 Tex. 342. But as the article now reads, an allegation that the animal was a *horse*, would be sustained by proof that it was a *gelding*. *Johnson v. S.* 16 App. 402; *Valesco v. S.* 9 App. 7. When the accused was asked by the owner of an animal which had been shot, "What made you shoot my mare?" and in reply said, "I did not shoot her with shot," it was held that such reply was not a confession of guilt. *Dover v. S.* 32 Tex. 84. Where the indictment charged that the defendant did "wound and kill" a certain animal, and the proof showed that the animal was wounded, but not killed, it was held that there was a fatal variance between the allegation and the proof. *Reid v. S.* 8 App. 430. But this decision seems to be in conflict with several others. See, *Lancaster v. S.* 43 Tex. 519; *Phillips v. S.* 29 Tex. 233; *Johnson v. S.* 9 App. 249; *Hammil v. S.* 14 App. 326; *Hart v. S.* 2 App. 39. To constitute this offense the act must have been done "willfully," that is, with evil intent, with legal malice, without legal justification, and the evidence must show such willfulness to sustain a conviction. *Lane v. S.* 16 App. 172; *Farmer v. S.* 21 App. 423. It is not necessary to prove malice toward the owner. And the fact that a person other than the owner authorized the act is not admissible evidence for the defense, unless such authority can be traced to the owner. And the fact, that after killing the property the defendant carried the same to the owner, is no defense, the offense being complete by the killing. *Wallace v. S.* 30 Tex. 758. See evidence held insufficient to show evil intent. *Lane v. S.* 16 App. 172.

§1165—**Charge of the court.**—It is not correct to instruct that it is an offense to willfully kill, etc., "any animal." The instruction should be limited to any "domesticated animal," etc. *Achterberry v. S.* 8 App. 463. The charge should expound the legal signification of the word "willfully," that is, that the act was done with an evil intent, with legal malice, without reasonable ground for believing such act to be lawful and without legal justification. *Thomas v. S.* 14 App. 200; *Shubert v. S.* 16 App. 645; *Lane v. S.* Id. 172; *Trice v. S.* 17 App. 43; *Owens v. S.* 19 App. 242; *Rose v. S.* Id. 470; *Yoakum v. S.* 21 App. 260; *Baker v. S.* Id. 264; *Willson's Cr. Forms*, 719. Where the evidence tended to show that the act was committed in the necessary defense of defendant's property, it was held that the jury should have been instructed with reference to such defense, and should have been directed that the act of the defendant was not willful, if committed in the necessary protection of his property from destruction or injury. *Thomas v. S.* 14 App. 200; *Lane v. S.* 16 App. 172. It was held not error to charge that the intent to injure may be presumed from the perpetration of the act, such presumption being expressly created by article 679 as amended. Before the amendment of said article, however, the intent to injure could not be presumed from the mere act of injuring. *Lane v. S.* 16 App. 172; *Newton v. S.* 3 App. 245. The charge should be confined to the case made by the indictment and the evidence. *Haynes v. S.* 10 App. 480.

§1166—**Distinction between this offense and theft.**—The distinction between the offense denounced in the preceding article and theft is, that a willful killing with intent to injure the owner of the property completes the former, while to constitute the latter there must exist the additional fraudulent intent to deprive the owner of the value of the property and to appropriate it to the use of the offender. *Martin v. S.* 44 Tex. 172; *Thompson v. S.* 30 Tex. 356.

§1167—**ART. 680. — Wantonly killing dumb animal, etc.**—If any person shall willfully or wantonly kill, maim, wound, disfigure, poison, or cruelly and unmercifully beat and abuse any animal or bird included in the preceding article, he shall be fined not exceeding two hundred and fifty dollars. [O. C. 714. In revising, the word "or" was substituted for the word "and" between the words "willfully" and "wantonly," and the word "disfigure" was inserted after the word "wound."]

Indictment, *Willson's Cr. Forms*, 429.

§1168—**Indictment.**—The indictment need not allege the ownership of the animal or bird. *S. v. Bocker*, 32 Tex. 611; overruling *S. v. Smith*, 21 Tex. 748; *Turman v. S.* 4 App. 586; *Darrell v. S.* 6 App. 482. Under article 680 prior to its being amended, it was necessary to allege that the act was done both *willfully and wantonly*, but as the article now reads it is sufficient to charge that it was committed either willfully or wantonly. *Rountree v. S.* 10 App. 110. It need not allege an intent to injure the owner. Article 679 is intended for the protection of the *owner* of the animals or birds, while this article 680 is intended for the protection of the animals or birds themselves. *Turman v. S.* 4 App. 586. See Ante § 1163.

§1169—**Evidence.**—In a prosecution for wantonly killing a dog, it was held that what the dog had done before the time of the killing could not be shown in evidence as a defense, so as to afford a legal excuse to the defendant to kill the dog at the time he did. *McDaniel v. S.* 5 App. 475. In a prosecution for willfully and wantonly wounding a hog, it was held competent for the defendant to prove that the hog was preying on his premises, and that after such wounding he sent the owner its value. *Lott v. S.* 9 App. 206. In a trial for wantonly killing a horse, it was in proof that the animal was a bad fence breaker, and evidence tending to show that the killing was prompted by a desire on defendant's part to prevent the destruction of his crops, and not by a spirit of wantonness, it was held to countervail the presumption of innocence, and warrant a conviction, it was incumbent on the State to prove that defendant's crop was not

properly protected against live stock. *Davis v. S.* 12 App. 11. The killing of an animal which is in the habit of trespassing upon one's crop, during an act of trespass, to prevent a destruction of the crop, and not from wantonness, was held to not constitute this offense. *Branch v. S.* 41 Tex. 622. But it seems the act will in such case not be justified unless the crop was properly protected by a lawful fence. *Jones v. S.* 3 App. 228. See also upon this subject *Thomas v. S.* 14 App. 200; *Lane v. S.* 16 App. 172. In a prosecution for willfully and wantonly killing a cow, it was held that the defendant should have been permitted to prove that the animals with which the cow herded, were breachy, and in the habit of trespassing upon crops. It was proper evidence to be considered by the jury in determining whether the killing was willful or wanton or done under circumstances sufficient to negative such motives. *Reedy v. S.* 22 App. 271. Where the evidence shows that the animal was killed, wounded, etc., while *inside* of cleared and cultivated land surrounded by an insufficient fence it shows a different offense than that denounced by art. 680. It shows the offense denounced by art. 685, and in such case a conviction cannot be had under article 680. *Payne v. S.* 17 App. 40; *McRay v. S.* 18 App. 331. The evidence must show a *willful* or a *wanton* act. *Farmer v. S.* 21 App. 423; Ante § 1164.

§1170—**Charge of the court.**—The charge of the court should explain to the jury the meaning of "willfully," and also "wantonly." "Willfully" means that the act was done with an evil intent, — with legal malice, without reasonable ground for believing it to be lawful, and without legal justification. "Wantonly" means that the act was committed regardless of the rights of another, in reckless sport, or under such circumstances as evince a wicked or mischievous intent, and without excuse. *Thomas v. S.* 14 App. 200; *Willson's Cr. Forms*, 719-720. The charge should not make the guilt or innocence of the defendant depend upon whether or not he used greater force than was necessary in protecting his property where such issue was not raised by the evidence. In a proper case the charge should instruct that if it reasonably appeared to the defendant that his property was in danger of serious injury, he would be justified in killing the animal threatening such injury. *Farmer v. S.* 21 App. 423; Ante, § 1165.

§1171 — **Former acquittal no bar, when.**—The offenses denounced by articles 679 and 680 are distinct and separate offenses, and therefore an acquittal of one will not bar a prosecution for the other. *Irvin v. S.* 7 App. 78.

§1172 — **ART. 680a. — Using animals without consent of owner.**—Any person who shall hereafter take up and use any horse, mare, gelding, mule, ox, cow, or any other dumb animal, the property of another, and without the consent of the owner thereof, shall be fined in any sum not less than ten nor more than one hundred dollars; *provided*, that nothing herein contained shall prevent a prosecution for the theft of such animals, whenever the offense, of which said party shall be guilty, shall come within the meaning of that crime; *and, provided*, that this article shall not be construed as in any way interfering with the laws regulating estrays. [Act 1879, p. 129.]

Indictment, *Willson's Cr. Forms*, 430. See Post, art. 766.

§1173 — **ART. 681. — Removing buoy, etc.**—If any person shall willfully and mischievously remove any buoy, beacon, light, or any other mark or signal erected for the purpose of indicating the channel in any bay, river, lake or other navigable water within the State; or shall erect any false buoy, beacon, light or mark, or signal to indicate the channel in any such bay, river, lake or other navigable water with intent to mislead or deceive, he shall be punished by confinement in the penitentiary not less than two nor more than five years, or by fine not exceeding two thousand dollars; and if death occurs by reason of such unlawful conduct, the offender is guilty of murder. [O. C. 715, amended by Act Feb. 12, 1858, p. 179.] Indictment, *Cr. Forms*, 431-432.

§1174—**ART. 682.—Robbing orchards, gardens, etc.**—If any person shall take or carry away from the farm, orchard, garden or vineyard of another, without his consent, any fruit, melons or garden vegetables, he shall be fined in any sum not exceeding one hundred dollars. [Act Apl. 4, '74, p. 55.]

Indictment, *Willson's Cr. Forms*, 433.

§1175—**ART. 683.—Destroying fruit, corn, etc.**—If any person shall willfully and mischievously injure or destroy any growing fruit, corn, grain, or other like agricultural products, or if any person shall willfully or mischievously injure or destroy any real or personal property of any description whatever, in such manner as that the injury does not come within the description of any of the offenses against property otherwise provided for by this code, he shall be punished by fine not exceeding one thousand dollars:

*Provided*, That when the value of the property injured is fifty dollars or less, then in that event he shall be punished by fine not exceeding two hundred dollars. [O. C. 716. See also Post art. 740.] See Acts 1889, Leg. 21, Chap. 40, pp. 35-36. which should take the place of Art. 683.

Indictment, Willson's Cr. Forms, 434.

§1176—**Decisions under preceding article.**—It has been held that tearing down and removing a house came within the meaning of the preceding article. *Ritter v. S.* 33 Tex. 608. And injury to merchandise. *Rose v. S.* 19 App. 470. But see the case of *Murray v. S.* 21 App. 620, where it was held that the preceding article protects *agricultural* products or property only, and does not relate to any other kind of property, such as a railroad engine. The subject is fully discussed in said decision. See also the subsequent case of *Beeson v. S.* 23 App. 406.

§1177—**ART. 683a.—Injuring, etc., baggage.**—That any baggagemaster, express agent, stage or hack-driver, or other common carrier, whose duty it is to handle, remove, transfer or take care of trunks, valises, boxes or other baggage while loading, transporting, unloading, transferring, delivering, storing or handling the same, whether or not in the employ of any transportation company or common carrier, who shall maliciously or carelessly or recklessly break, injure or destroy the said baggage, shall be deemed guilty of a misdemeanor, and, on conviction, be fined in a sum not exceeding one hundred dollars: *Provided*, That a prosecution for a misdemeanor, as provided in this section, shall not be a bar to a civil action for damages. [Act March 5, 1881, p. 17.] Indictment, Cr. Forms, 434a.

§1177a—**ART. 683b.**—See Acts 1889, p. 36.

§1178—**ART. 684.—Injuring fence, leaving open gates, etc.**—If any person shall break, pull down or injure the fence of another without his consent, or shall willfully and without the consent of the owner thereof open and leave open any gate leading into the inclosure of another, or shall knowingly cause any hogs, cattle, mules, horses or other stock to go within the inclosed lands of another without his consent; or shall tie or stake out, or cause to be tied or staked out, to graze within any inclosed lands not his own and without the consent of the owner, any horse, mule or other animal, he shall be fined in any sum not less than ten nor more than one hundred dollars, and, in addition thereto, may be imprisoned in the county jail not exceeding one year. [Act Apl. 23, '73, p. 41; see Acts 1889, Ch. 50.]

Indictment, Willson's Cr. Forms, 434b-435-436-437; Ante, § 701.

§1179—**Decisions under preceding article.**—The preceding article is intended to protect growing crops from depredation, and should be rigorously enforced. Its provisions extend such protection although the land is in one general inclosure, and the depredation is caused by the employee of a co-tenant. *Cleveland v. S.* 8 App. 44; *Jones v. S.* 18 App. 366. One joint owner of a division fence has no legal right to break such fence to the injury of the other joint owner, and without the consent of such other joint owner. *Hurlbut v. S.* 12 App. 252. But if no injury be done such other joint owner, it would be no offense to pull down the fence for a legitimate purpose. *Woodyard v. S.* 19 App. 516. A tenant in possession of leased premises is the owner thereof until the expiration of his lease, and where the indictment alleged the possession to be in the landlord, and the evidence showed it to be in the tenant, it was held a fatal variance. Where there is more than one owner of the fence, the want of consent to the breaking, etc., of each owner must be shown. *Brumley v. S.* 12 App. 609; *Zallner v. S.* 15 App. 23. In a trial for this offense, the inquiry in regard to possession should be confined to the actual, quiet and peaceable possession, and should not extend to the rightful possession of the fence. *Behrens v. S.* 14 App. 121; *Carter v. S.* 18 App. 573; *Jenkins v. S.* 7 App. 146. The overseer of a public road is not only authorized, but required to remove all obstructions therefrom, and if a fence is placed across his road he may remove it without violating the preceding article. *Schott v. S.* 7 App. 616. And any citizen would also have the right to remove such obstruction peaceably. But where the road is not a public road, and is obstructed by a gate or fence, it would be a violation of the preceding article to leave open the gate or pull down the fence. The owner of land over which a public road of the third class passes has the right to erect and maintain gates across such road, and it is a penal offense to leave open such gates, but it is not the offense denounced in the preceding article, but is the one denounced in article 413, Ante, and a conviction cannot be had therefor under an indictment brought under article 684. *Jolly v. S.* 19 App. 76. A tenant has the right during the continuance of his lease, and when there is no stipulation in the lease contract forbidding to pasture his horses upon the leased land, after the crops have been gathered. *Coggins v. S.* 12 App. 109; *Jones v. S.* 18 App. 306. The preceding article 684 was not repealed by the act of February 6, 1884, which is the succeeding article, 684a. *Roberts v. S.* 17 App. 148.

**§1180—ART. 684a. —Wantonly and willfully, etc., cutting, etc., fence.**— That any person who shall wantonly, or with intent to injure the owner, and willfully cut, injure or destroy any fence, or part of a fence, (without such fence is the property of the person so cutting, injuring or destroying the same,) shall be deemed guilty of an offense, and upon conviction therefor shall be punished by confinement in the State penitentiary for a term not less than one year nor more than five years. A fence within the meaning of this act is any structure of wood, wire, or of both, or of any other material, intended to prevent the passage of cattle, horses, mules, asses, sheep, goats or hogs; *provided, however,* that it shall constitute no offense for any person owning and residing upon land enclosed by the fence of another, who refuses permission to such person or persons so residing within said enclosure, free egress and ingress to their said land, for such person or persons to open a passage way through said enclosure. [Act Feb. 6, 1884, p. 34. This statute did not repeal article 684, but creates another and different offense. *Roberts v. S.* 17 App. 148.]

Indictment, Willson's Cr. Forms, 441.

**§1181 — ART. 685. — Dogging stock when fence insufficient.**— Any owner, proprietor, lessee, or other person in charge of cleared and cultivated land surrounded with an insufficient fence, or the agent or employee of such person, who shall with fire-arms, dogs or otherwise, maim, wound or kill any cattle, horses or hogs of another within such inclosure, or who shall cause or procure the same to be done, shall be fined not less than ten nor more than two hundred dollars. [Act Oct. 18, 1871, p. 10.]

Indictment, Willson's Cr. Forms, 438. This is a different offense from that denounced by art. 680. *Payne v. S.* 17 App. 40; *McRay v. S.* 18 App. 331.

**§1182 — ART. 686. — “Insufficient fence” defined.**— An “insufficient fence,” as used in the preceding article, means a fence less than five feet high, or with openings or crevices in some part thereof sufficiently large for the passage of the animal so maimed, wounded or killed. [Added in revising.]

**§1183 — ART. 637. — Removing rock, earth, etc., from premises of another.**— If any person shall knowingly enter upon the land or premises of another, and take or remove therefrom any rock, earth, sand, coal, slate or mineral of any description, without the consent of the owner of such land or premises, he shall be fined in any sum not exceeding one thousand dollars. [Act June 24, 1876, p. 28.]

Indictment, Willson's Cr. Forms, 439.

Articles 688 and 689 submitted by the revisers were not adopted, but were stricken out by the legislature.

**§1184 — ART. 690. — Herding stock in half mile of residence.**— If any person shall herd any drove of horses, mules, cattle, sheep, goats or hogs, numbering more than five head, upon any land not his own, and within one-half mile of the residence of any citizen of this State, whenever the owner, lessee or legal representative of such land shall forbid such herding and shall fail, neglect or refuse to remove such drove at once upon request of such owner, lessee or legal representative, he shall be fined in any sum not exceeding one hundred dollars. [Act March 13, 1885, p. 29.]

Indictment, Willson's Cr. Forms, 440; *Caldwell v. S.* 2 App. 53. But *Linney v. S.* 5 App. 344, is not applicable, the statute being different.

**§1185 — Changes made in preceding article.**— The preceding article was originally enacted by Act June 2, 1873, p. 186, and as adopted in the Revised Code reads as follows:—

“ART. 690. If any person shall herd any drove of horses or cattle, numbering more than twenty-five head, upon land not his own and within one-half mile of the residence of any citizen of this State, and shall fail, neglect or refuse to remove such drove at once upon the request of such citizen, he shall be fined not exceeding one hundred dollars.”

By act April 4, 1881, p. 104, it was amended so as to read as follows: —

**“ART 690.** If any person shall herd any drove of horses, cattle, sheep, goats or hogs, numbering more than twenty-five head, upon any land not his own, and within one-half mile of the residence of any citizen of this State, or if any person shall herd any drove of sheep or goats, numbering more than twenty-five, upon any land not his own, whenever the owner, lessee or legal representative of such land shall forbid such herding, and shall fail, neglect or refuse to remove such drove at once upon request of such citizen, owner, lessee or legal representative, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not exceeding one hundred dollars.”

**§1186—ART. 691.** Each hour a separate offense. — Each hour of delay after notice given or request made, shall constitute a separate offense under the preceding article. [Act June 2, 1873, p. 186.]

**§1187—ART. 691a.—Fishing and hunting on enclosed lands of another.—**  
**§ 1.** That any person who shall enter upon the enclosed and posted land of another, without the consent of the owner, proprietor or agent in charge, and therein hunt with fire-arms, or therein catch or take any fish from any pond, lake or tank, shall be punished by fine of not less than five nor more than one hundred dollars. [Act March 31, 1885, p. 80.]

**§1188—ART. 691b.—Not an offense, unless, etc.—**  
**§2.** No one shall be liable to the penalty prescribed in section 1 unless the owner or proprietor of such enclosure shall at each entrance thereto keep a board in a conspicuous place, with the word “posted” plainly marked thereon, which shall constitute posting within the meaning of this act; *provided, further*, that this act shall not apply to enclosures including two thousand acres in one enclosure. [Act March 31, 1885, p. 80.]

**§1189—Enclosing land of another.—** By act of Feb. 7, 1884, pp. 68-69, it is made an offense to knowingly make or permit to remain any fence on and around the land of another, without the written consent of the owner, etc. See the act in full, Ante, § 716.

**§1190—ART. 691c.—Preventing the moving, etc., of railroad trains.—**  
**§1.** That any person or persons who shall, by force, threats, or intimidation of any kind whatever, against any railroad engineer or engineers, or any conductor, brakeman, or other officer or employee, employed or engaged in running any passenger train, freight train, or construction train running upon any railroad in this State, prevent the moving or running of said passenger, freight, or construction train, shall be deemed guilty of an offense, and upon conviction thereof each and every person so offending shall be fined in a sum not less than one hundred dollars nor more than five hundred dollars, and also imprisoned in the county jail for any period of time not less than three months nor more than twelve months. [Act March 30, 1887, pp. 72-73.]

Indictment, Willson's Add. Forms, No. 426a.

**§1191—ART. 691d.—Each day a separate offense.—**  
**§2.** Each day said train or trains mentioned in section one of this act are prevented from moving on their road as specified in section one of this act, shall be deemed a separate offense, and shall be punished as prescribed in section one of this act. [Act March 30, 1887, pp. 72-73.]

**§1192—ART. 691e.—Willfully injuring railroad, etc.—**  
**§3.** Any person who shall willfully injure any railroad, locomotive-engine, or tender, or baggage, passenger, or freight car, of any railroad in this State, so as to prevent the use of the same, shall be punished by fine in any sum not less than one hundred dollars, and imprisoned in the county jail not less than three nor more than twelve months. [Act March 30, 1887, pp. 72-73; Ante, 1159.]

Indictment, Willson's Add. Forms, No. 427a.

## CH. 4. — OF INFECTIOUS DISEASES AMONG ANIMALS.

ART.	SEC.	ART.	SEC.
692. Failing to confine horses with glanders or farcy.	1193	Preceding article repealed to a certain extent.	1196
693. Using horse with glanders or farcy	1194	Act of March 25, 1879.	1197
694. Permitting sheep with scab to run at large.	1195	694a. Act of April 4, 1883.	1198
		695. Or to graze along public road.	1199
		696. Importation of sheep with scab.	1200

**§1193 — ART. 692. — Failing to confine horses with glanders or farcy.** — If any person shall willfully and knowingly fail, neglect or refuse to place and keep in secure confinement, separate and apart from all other stock, any animal of the horse or ass species diseased with glanders or farcy, belonging to him or subject to his control, he shall be fined not less than twenty-five nor more than two hundred dollars, or imprisoned in the county jail not less than ten days nor more than three months. [Act. Aug. 19, 1876, p. 211.]

Indictment, Willson's Cr. Forms, 442.

**§1194 — ART. 693. — Using horse with glanders or farcy.** — If any person shall ride, drive, or in any manner use any animal of the horse or ass species diseased with glanders or farcy, knowing the same to be so diseased, he shall be punished as prescribed in the preceding article. [Act. Nov. 8, 1866, p. 102.]

Indictment, Willson's Cr. Forms, 443.

**§1195 — ART. 694. — Permitting sheep with scab to run at large.** — If any person owning or controlling sheep affected with the scab or other infectious or contagious disease, shall permit such sheep to run at large or in charge of any one beyond the limits of his own land, he shall be fined not exceeding one thousand dollars. [Act Dec. 28, 1861, p. 21.]

Indictment, Willson's Cr. Forms, 444.

**§1196 — Preceding article repealed to a certain extent.** — The preceding article has been held to have been repealed by implication by the act of April 4, 1883, p. 42, except as to the counties specially exempted in said act from its operation. See said act in full, Post, § 1198. Harold v. S. 16 App. 157.

**§1197 — Act of March 25, 1879.** — The act of March 25, 1879, pp. 63-64-65, is also impliedly repealed by the act of April 4, 1883, p. 42, as the latter act embraces the entire subject matter of the former, and hence said repealed act is not here inserted.

**§1198 — ART. 694a. — Act of April 4, 1883.** — The penal provisions of the act of April 4, 1883, pp. 42-43-44, are so interwoven with, and dependent upon, the other provisions of the act, that it is deemed best to here insert the entire statute, and it is as follows:—

*An Act for the protection of the wool growing interests of the State of Texas.*

**§1. Inspector of sheep appointed, how and when.** — Be it enacted by the Legislature of the State of Texas: That whenever it appears from the assessor's rolls, that there are as many as five hundred sheep owned and assessed for taxes in any county of this State, it shall be the duty of the commissioners' court of said county upon the application of one or more resident owners of sheep of said county, to appoint an inspector of sheep, who shall be a resident citizen of the county, and well versed in the scab and other diseases which usually affect sheep; and said inspector shall hold his office for two years, or until his successor is qualified. Said inspector may appoint one or more deputies who shall take the oath of office prescribed by the constitution, and may lawfully perform the same acts as the inspector of sheep, who may require of his deputies bonds for the faithful performance of duty.

**§2. Bond of inspector.** — Said inspector of sheep shall, within twenty days after receiving notice of said appointment, and before entering upon the duties of his office, execute a bond with two or more good and sufficient sureties, in a sum to be fixed by the commissioners' court, not less than one thousand, nor more than five thousand dollars, payable to the county judge and his successors in office, conditioned that he will faithfully and impartially dis-

charge, and perform all the duties incumbent upon him as inspector of sheep. Said bond shall be approved by the commissioner's court, and recorded in the office of the county clerk of said county.

§3. **Duty of inspector.** — It shall be the duty of the inspector of sheep, or his deputy, to carefully and minutely examine and inspect, at any time, sheep in his county, or which may be driven into or through his county, and which he has reason to believe, or is informed in writing by one or more sheep owners of the county, is affected with scab, or any other infectious or contagious disease.

§4. **Fees of inspector.** — The inspector shall be entitled to receive the sum of two cents per head, unless otherwise provided in this act, for all sheep inspected under the provisions of this act; *provided*, the inspector shall be entitled to only one cent per head for any number he may inspect for any one person in excess of two thousand head; in no case shall his fees exceed fifty dollars. Such fees to be paid by the owner or person in charge of the sheep inspected; *provided*, that when an inspector shall inspect any sheep and find no scab to exist in the flock of sheep so inspected, then the fees for such services shall be paid by the party at whose instance such services were performed; and *provided* further, that the inspector shall have a lien for his fee, upon all sheep inspected by him and found to be diseased with scab; *also provided*, that if any owner or person in charge of sheep affected with scab, report in writing to the county inspector or his deputy, that his sheep are so affected, and that he proposes to take means forthwith to cure the same, it shall not be lawful for the inspector to inspect such flock, or receive any fees for the same within twenty days after said report; *provided*, the inspector in such cases shall prescribe limits for said flock; *provided*, that if after the expiration of the twenty days aforesaid, the inspector has received no notice in writing as hereinafter provided, from the party in charge of said flock, that he has thoroughly dipped his flock to cure the same as proposed, then the inspector shall be entitled to receive from such parties in charge of such sheep, the same fee as though he had inspected said flock and found the same diseased; *provided* further, that no person shall be required to dip his ewe sheep, if pregnant with lamb, at any time within twenty days before or after lambing, but such person shall, nevertheless, be required to hold such sheep within the portion of country prescribed by the county inspector for such sheep to be held in, during the time they are so affected with scab.

§5. **Treatment of diseased sheep.** — Whenever any flock of sheep, in any county of this State, has been inspected and found to be afflicted with scab, it shall be the duty of the owner, or person in charge of such flock, to thoroughly dip the same within twenty days from such inspection, and report such fact in writing to the inspector; and if no such report be made by the said owner or person in charge of said flock, then it shall be the duty of the inspector to again inspect said flock, and may receive his fees as hereinbefore provided.

§6. **Reinspection of diseased sheep.** — It shall be the duty of the inspector, or his deputy, after the expiration of ninety days from the date of notification in writing, that any flock that is diseased, as provided in section 4, or from the date of inspection of any diseased flock, or at any time they have reason to suspect said flock is afflicted with scab, to again carefully and minutely examine and inspect such flock or flocks, and if scab is still found to exist in said sheep, then the owner or person in charge of such sheep shall be required to again dip such sheep, as is required in the preceding section of this act.

§7. **Prescribed limits for herding.** — Whenever by examination, inspec-

tion or otherwise, scab is found to exist in any flock of sheep in any county, the inspector shall at once notify the owner, or person in charge thereof, of said fact, and shall prescribe certain limits within which said flock shall be herded until cured; *provided*, no person shall be so limited as to prevent him from herding or keeping his sheep on his own lands, or lands lawfully controlled by him, if the tracts of said land be so contiguous to each other, that in herding or driving the sheep, that the same will not go or be upon any tract or tracts of land of some other person; *also, provided*, that the liberty given any person to hold diseased sheep anywhere upon lands lawfully controlled by him, shall not in any way be construed to exempt him from the provisions of sections 5 and 6 of this act.

§8. **Notify other sheep owners.** — It shall be the duty of any owner or person in charge of sheep in which scab is found to exist, to immediately notify all persons in charge of sheep in vicinity of said flock. And until he shall have obtained a certificate from the inspector of his county, that his flock is cured, he shall not remove the same from the limits prescribed by said inspector.

§9. **Any sheep being driven into or through any county in this State,** shall be accompanied by a certificate from some inspector to the effect, that such sheep are free from scab; it shall state the date of inspection, and shall not be older than sixty days, and any person through whose range such sheep are being driven, or about to be driven, shall have the right to see said certificate upon request, and upon refusal to produce the same upon request, the party so refusing shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not exceeding one hundred dollars; *provided, however*, that said certificate shall not exempt said sheep from inspection at any time.

§10. **Fee for certificate.** — For inspections made under the provisions of the preceding section, the inspector shall be entitled to receive the sum of one cent for each head of sheep covered by the certificate.

§11. **Any sheep brought into Texas by rail, or other means of transportation,** shall be disinfected by dipping or otherwise, before being removed from within a limit which shall be prescribed by the county inspector at point of disembarkation, if infected with scab.

§12. **Any inspector of sheep, who shall fail to comply with any of the provisions of this act, or who shall willfully and knowingly give a false certificate in any case where he is required to give a certificate, or who shall willfully, and with intent to harass, or put to expense any owner or person in charge of sheep notify said owner or person in charge, that his flock is diseased, or who shall willfully demand or receive any fee or compensation where none is allowed by law, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than one hundred nor more than two hundred dollars, and thereupon the office shall be deemed vacant, and the commissioners' court may appoint another inspector for such county.**

§13. **Any owner or person in charge of sheep, who shall willfully and knowingly violate any of the provisions of this act, where the penalty is not otherwise provided by this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than one hundred, nor more than two hundred dollars.**

§14. **Old laws repealed.** — That all laws and parts of laws in conflict with this act, be and the same are hereby repealed.

§15. **Emergency clause.** — The present law upon the disease of scab being wholly insufficient for the protection of the wool growers of this State, and the necessity for a more efficient law upon the subject, creates an imperative public



necessity and an emergency that the constitutional rule requiring this bill to be read on three several days be suspended, and that this act take effect and be in force from and after its passage, and it is so enacted.

§16. **Exempt counties.** — The counties of Grayson, Freestone, Gonzales, Cooke, Bell, Coryell, Hamilton, Lampassas, Morris, Titus, Cass, Marion and Bowie, are hereby exempted from the operation of this law.

Approved April 4, 1883.

Takes effect after passage.

For indictments under preceding statute, see Willson's Cr. Forms, 447-451.

§1199 — **ART. 695. — Or to graze along public road.** — If any person shall drive or graze, or cause to be driven or grazed, along or upon any public road in this State, any sheep affected with scab, knowing the same to be so affected, he shall be fined not exceeding one thousand dollars. [Act Aug. 21, 1876, p. 227.]

Indictment, Willson's Cr. Forms, 445.

§1200 — **ART. 696. — Importation of sheep with scab.** — If any person shall drive, or cause to be driven, into this State, from any other State or country, any sheep affected with scab or any other infectious or contagious disease, knowing the same to be so affected, he shall be fined not exceeding one thousand dollars. [Act Dec. 28, 1861, p. 21.]

Indictment, Willson's Cr. Forms, 446. See Ante, §§ 1195 and 1196.

## CH. 5. — OF CUTTING AND DESTROYING TIMBER.

ART.	SEC.	ART.	SEC.
697. Punishment for.	1201	703. Destroying pecan or walnut timber	1211
698. "Timber" and "owner" include what.	1202	703a. Person floating timber shall brand same.	1212
699. "Timber" — Decisions as to.	1203	703b. Shall have brand recorded.	1213
699. Procedure in prosecutions.	1204	703c. Shall make report of logs cut, etc.	1214
Indictment.	1205	703d. Certificate of clerk, evidence of ownership.	1215
700. Modes of proving ownership.	1206	703e. Offenses and punishment—Definitions.	1216
Evidence.	1207	703f. Venue.	1217
Charge of the court.	1208		
701. Road repairs, etc., not included.	1209		
702. If the offense is theft, punishable as such.	1210		

§1201 — **ART. 697. — Punishment for.** — If any person, without the consent of the owner, shall knowingly cut down or destroy any tree or timber upon any land not his own; or shall knowingly, and without such consent,

carry away any such timber, he shall be fined not less than ten nor more than five hundred dollars. [O. C. 717.]

Indictment, Willson's Cr. Forms, 452.

§1202 — ART. 698. — “**Timber**” and “**owner**” include what. — The word “timber,” as used in the preceding article, includes rails or other articles manufactured from timber; and the word “owner” includes the State and any corporation, public or private, owning lands within this State. [Added in revising.]

Before the adoption of the preceding article it was held that it was no offense to cut timber from State lands. *S. v. Howard*, 21 Tex. 416.

§1203 — “**Timber**” — **Decisions as to.** — The word “timber,” as used in the preceding article, is that sort of wood which is proper for building, or for tools, utensils, furniture, carriages, fences, ships, and the like, usually said of fallen trees, but sometimes of those standing. Wood suitable only for *fuel* does not come within the meaning of the word “timber.” *Wilson v. S.* 17 App. 393. Before the enactment of the preceding article, “fence rails” were held not to be “timber” within the meaning of article 697. *McCauley v. S.* 48 Tex. 374.

§1204 — ART. 699. — **Procedure in prosecutions.** — In any prosecution under article 697, the indictment or information need not allege the name of the owner of the timber, but it shall be sufficient for it to state that the timber was not the property of the accused; and it shall be sufficient to describe the land by the name of the owner, or of the original grantee, or by any name or names by which it may be commonly known in the neighborhood in which the alleged offense was committed. [O. C. 718.]

§1205 — **Indictment.** — The indictment may charge conjunctively that the defendant cut down and carried away the timber, and proof that he did either will support the charge. It must be alleged that the act was “knowingly” committed. To allege merely that it was “unlawfully” committed will not be sufficient. *S. v. Stalls*, 37 Tex. 440; *Welsh v. S.* 11 Tex. 368. Nor is it sufficient to charge that the act was done “willfully.” *S. v. Arnold*, 39 Tex. 74. It is not necessary to allege the name of the owner of the timber, but there should be some designation of the land from which the timber was cut, etc. “Upon land not his own, but which was the property of one Thomas Reid,” was held to be sufficient. *S. v. Warren*, 13 Tex. 45. A variance between the complaint and the information as to ownership will be fatal. *Calvert v. S.* 8 App. 538.

§1206 — ART. 700. — **Modes of proving ownership.** — Upon the trial of any case coming within the provisions of article 697, the State may prove the ownership of the land to be in some person other than the defendant by either of the following modes: —

1. By the copy of a grant duly certified from the general land office.
2. By a deed, or a copy of a deed, or other evidence of title, duly certified, from the office of the clerk of the county court of the county where the prosecution is pending.
3. By a certificate from the comptroller's office, or from the assessor and collector of the county, that some person other than the defendant pays taxes on the land.
4. By verbal testimony of title, or of notorious use and possession of the land by some person other than the defendant; and such proof shall be held sufficient, until contradicted by competent evidence on the part of the defendant, that he is the owner of the land. [O. C. 718a, added by Act Feb. 12, 1858, p. 179.]

§1207 — **Evidence.** — *Prima facie* proof is all that is requisite to throw on the defendant the *onus* of proving license, or superior title. But the burden is upon the State to prove *prima facie* that the timber was knowingly cut, etc. by the defendant from land not his own. *Belverman v. S.* 16 Tex. 130; *White v. S.* 14 App. 449. But the State is not required to prove that the defendant committed the act without the consent of the owner. It is for the defendant to show that he had the consent of the owner. *Welsh v. S.* 11 Tex. 368. Proof of possession is sufficient *prima facie* proof of ownership and such proof may be made by parol. *Phillips v. S.* 17 App. 169; *May v. S.* 15 App. 430. Admissions of the defendant that the ownership was as alleged in the indictment sufficiently proves that fact. *Welsh v. S.* 11 Tex. 368. But the declarations of a third person as to ownership are not evidence. *Belverman v. S.* 16 Tex. 134.

§1208 — **Charge of the court.** — For a charge correctly defining “timber” see *Wilson v. S.* 17 App. 393; *Ante*, §1203. Where the evidence showed that the title to the land was in dispute and that the defendant had purchased the timber from one of the disputants, it was held that

the court should have instructed the jury that if they believed from the evidence that the defendant purchased the timber believing it to be the property of the person from whom he purchased it, and made such purchase in good faith, he would not be guilty of this offense. *Lackey v. S.* 14 App. 164. Where the evidence showed that the land from which the timber was cut was in the possession of the defendant as well as of the alleged owner thereof, the court should have instructed the jury that if they believed from the evidence that at the time of cutting the timber the defendant had notorious possession and use of the land, evidence that another person also had notorious possession and use thereof would not be sufficient proof that the defendant was not the owner of the land. *White v. S.* 14 App. 449. Where the facts demand it the court should instruct the jury that the husband has the legal right to use, manage and control the land of the wife, and to cut timber therefrom. *White v. S.* 14 App. 449.

§1209—ART. 701. — **Road repairs, etc., not included.** — Nothing in the foregoing articles of this chapter contained shall render any person guilty of an offense who cuts or uses timber for the purpose of making or repairing any public road or bridge passing over, or immediately adjacent to, the land on which such tree or timber may be found, or who uses a reasonable amount of wood standing outside of an inclosure for the purpose of making fires while traveling upon the road. [O. C. 722; Rev. Stat. art. 4419.]

§1210—ART. 702. — **If the offense is theft, punishable as such.** — Nothing contained in the foregoing articles of this chapter shall exempt a person from the penalty affixed to the offense of theft, whenever timber is taken in such manner as to come within the definition of that offense. [O. C. 723.]

§1211—ART. 703. — **Destroying pecan or walnut timber.** — If any person shall cut down or otherwise destroy or injure any pecan or walnut tree on land not his own, without authority in writing from the owner of such pecan or walnut tree, he shall be punished by fine of not less than twenty-five nor more than fifty dollars. [Act April 20, 1871, p. 42.]

Indictment, Willson's Cr. Forms, 453.

§1212—ART. 703a. — **Person floating timber shall brand same.** — That any person engaged in floating or rafting timber upon the waters of any river or creek of this State, shall have a log brand with which to brand every log or stick that he may float or haul and put into the waters for sale or market, the same to be distinctly branded. [Act April 7, 1879, p. 81, § 1.]

§1213—ART. 703b. — **Shall have brand recorded.** — That he shall have said brand recorded in every county in which he cuts any of said timber, and in the county where he proposes to sell or market said timber, by the county clerk in a book to be kept by said clerk for that purpose, for which said clerk shall receive a fee the same as is by law allowed for recording stock brands. [Act April 7, 1879, p. 81, § 2.]

§1214—ART. 703c. — **Shall make report of logs cut, etc.** — Any persons who float any logs or timber in this State shall, on the first day of April, first day of July, first day of October and the first day of January of each year, or within fifteen days of said dates, make a written report, under oath, showing the number of logs cut or floated during the next preceding three months, the survey or surveys of land from which they were cut or carried, and the number cut from each, and a description of the brand placed thereon, and shall file the same with the county clerk of the county in which the timber was cut, and such clerk shall record the same in a book kept for that purpose, and index it, and receive therefor the sum of fifty cents from the party presenting the same; *provided*, this act shall not apply to pickets, posts, rails or firewood. [Act April 7, 1879, p. 81, § 3.]

§1215—ART. 703d. — **Certificate of clerk, evidence of ownership.** — That a certificate, under the hand of the county clerk, containing a description of a log brand and the name of the owner thereof, with a transfer on the back of it signed and acknowledged by such owner or proved as other instruments for record, shall be *prima facie* evidence that the person to whom the transfer is made owns the logs described thereon. [Act April 7, 1879, p. 81, § 5.]

§1216 — ART. 703e. — **Offenses and punishment — Definitions.** — That any person who shall buy or sell any timber or log floating or that has been floated in this State, before the same has been branded, shall be guilty of a misdemeanor, and upon conviction, shall be fined not more than ten dollars for each log or piece of timber so purchased, sold or traded for. That any person who shall float any unbranded log or timber for market, or who shall fail to make the reports required by this act, or any person who shall brand any log or timber of another without his authority, or any person who shall deface any brand on any log or timber otherwise than when it is in the act of being sawed or manufactured into lumber or other commodity for use in building, or any person, not an employee of the owner, who shall, without the written consent of the owner take into possession any branded or unbranded log or timber cut for floating or sawing, or any sawed timber, lumber or shingle floating in any of the waters of this State, or deposited upon the banks of any river or stream in this State, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by fine not exceeding two hundred dollars for each offense. That by "lumber" is meant lumber attached or bound together in some way for floating, and not loose lumber, and by "shingles" is meant shingles in bunches or bundles, and not loose shingles. [Act April 7, 1879, p. 81, § 5.]

Indictment, Willson's Cr. Forms, 454-459.

§1217 — ART. 703f. — **Venue.** — The courts of the county in which the timber or lumber was deposited in the water, or in which it was unlawfully taken into possession or unlawfully defaced, sold, purchased or branded, as the case may be, shall have jurisdiction of the violation of the act or omission complained of or constituting an offense under this act. [Act April 7, 1879, p. 81, § 6.]

## CH. 6. — OF BURGLARY.

ART.	SEC.	ART.	SEC.
704. "Burglary" defined.	1218	712. Other offenses committed after entry	
705. Same subject.	1219	punishable.	1230
Indictment.	1220	713. Same subject.	1231
706. "Entry" defined.	1221	Decisions under two preceding arti-	
707. Further defined.	1222	cles.	1232
Decisions relating to "entry."	1223	714. Actual breaking necessary in case of	
708. "Breaking" defined.	1224	domestic.	1233
Decisions as to "breaking."	1225	Decisions under preceding Article.	1234
709. "House" defined.	1226	715. Attempt at burglary, how punished.	1235
Decisions as to "house."	1227	716. "Attempt" defined.	1236
710. "Daytime" defined.	1228	Evidence.	1237
711. Punishment.	1229	Charge of the court.	1238

§1218 — ART. 704. — “**Burglary**” defined. — The offense of “burglary” is constituted by entering a house by force, threats or fraud, at night, or in like manner by entering a house during the day, and remaining concealed therein until night, with the intent, in either case, of committing felony or the crime of theft. [O. C. 724, amended by Act Aug. 21, 1876, p. 231. The amendment being to add after the word “felony,” the words “or the crime of theft.”]

Indictment, Willson's Cr. Forms, 460-464.

§1219 — ART. 705. — **Same subject.** — He is also guilty of burglary who, with intent to commit a felony or theft, by breaking, enters a house in the day-time. [O. C. 725, amended by Act Aug. 21, 1876, p. 231. The amendment being to insert the words “or theft” after the word “felony.”]

§1220 — **Indictment.** — The “intent” with which the act was committed must be expressly averred. *Reeves v. S.* 7 App. 276. And the particular offense intended to be committed must be described in the indictment, with all its statutory ingredients. A general charge that the entry was with intent to commit a felony, although the felony be named, will not be sufficient. And so it is insufficient to allege that the intent was to commit theft. The statutory elements of the offense intended to be committed must be set forth with the same completeness and particularity as would be requisite in an indictment for such intended offense. *S. v. Portwood*, 29 Tex. 47; *S. v. Williams*, 41 Tex. 98; *Wilburn v. S.* Id. 237; *White v. S.* 1 App. 211; *Conoly v. S.* 2 App. 412; *Webster v. S.* 9 App. 75; *Rodriguez v. S.* 12 App. 552; *Reed v. S.* 14 App. 662; *Treadwell v. S.* 16 App. 643; *Taylor v. S.* 23 App. 639. But where the indictment is for burglary with intent to commit theft it is not necessary to describe the property intended to be stolen, or to specify it. *Black v. S.* 18 App. 124; *Washington v. S.* 17 App. 197; *Summers v. S.* 9 App. 396; *Neiderluck v. S.* 23 App. 38; *Martin v. S.* 1 App. 525; *Coleman v. S.* 2 App. 512. Nor in such case need the value of the property intended to be stolen be alleged. *Green v. S.* 21 App. 64; *Sullivan v. S.* 13 App. 462; *Collins v. S.* 20 App. 197. In such case also an allegation that the property intended to be stolen was “then and there being found” sufficiently charges that said property was in the house entered. *Sullivan v. S.* 13 App. 462. It must be alleged that the property was taken or intended to be taken from the possession of the owner thereof, or from the possession of some one holding the same for him. *Reed v. S.* 14 App. 662. And “without the consent of the owner.” *Treadwell v. S.* 16 App. 643. And when there are two or more owners, the want of consent of *each* must be alleged. *Taylor v. S.* 23 App. 639. Both burglary and theft may be charged in the same indictment, and in the same count. But in such case a conviction cannot be had for both offenses. *Turner v. S.* 22 App. 42; *Miller v. S.* 16 App. 417; *Dunham v. S.* 9 App. 330; *Howard v. S.* 8 App. 447. And in such case the indictment may be bad for the burglary and good for theft and a conviction had for the latter offense. *Dunham v. S.* 9 App. 330. The indictment may properly charge conjunctively that the offense was committed by all three of the means named in the statute, viz., *force, threats and fraud*, or it may allege only one of said means, but the evidence and charge of the court must be confined to the means alleged. *Buntain v. S.* 15 App. 485; *Sullivan v. S.* 13 App. 462; *Weeks v. S.* Id. 466; *Lott v. S.* 17 App. 598; *Summers v. S.* 9 App. 396; *Sheppard v. S.* 42 Tex. 501; *Hobbs v. S.* 44 Tex. 353. But some one or more of the means named must be alleged. *Hamilton v. S.* 11 App. 116; *Brown v. S.* 7 App. 619. Where a burglary with intent to commit rape was charged, and the allegation was “to commit the crime of rape upon the person of her the said Rachel P.” etc., it was held there need be no allegation that Rachel was a woman. *S. v. Williams*, 41 Tex. 98. Nor is it necessary in such case to allege that the female intended to be raped was in the house. *Burke v. S.* 5 App. 74. It is not essential to allege that the entry was without the consent of the owner or occupant of the house, or of one authorized to give such consent. *Taylor v. S.* 23 App. 639; *Smith v. S.* 22 App. 350; *Black v. S.* 18 App. 124; *Langford v. S.* 17 App. 445; *Buntain v. S.* 14 App. 485; *Reed v. S.* 14 App. 662; *Mace v. S.* 9 App. 110; *Sullivan v. S.* 13 App. 462, overruling upon this point, *Brown v. S.* 7 App. 619. It need not be alleged that the offense was committed “feloniously” or “burglariously.” *Reed v. S.* 14 App. 662; *Sullivan v. S.* 13 App. 462. Where an indictment in one count charged a burglary in the day-time, and in another count charged a burglary in the night-time, it was held error to require the State to elect upon which count the defendant should be tried. *Gonzales v. S.* 12 App. 657. Where an indictment charged the entry to have been effected by “breaking,” it was held not bad for not charging that it was effected in the night-time, or by entering in the day-time and remaining concealed, etc. Such an indictment is good for a daylight breaking, but to sustain a conviction in such case the evidence must prove an *actual* breaking. *Summers v. S.* 9 App. 396. An indictment which charges an entry by force, but does not aver that the entry was at night, or that it was made in the day-time by the defendant who remained concealed in the house until night, charges a daylight burglary. *Bravo v. S.* 20 App. 188. But where the indictment charges that the defendant did “break and enter” the house, a conviction may be had thereunder, whether the offense was committed in the day-time or in the night-time, if the proof shows that the breaking and entry were effected by force applied to the house, but proof that force was used, but not upon the building, would not support a conviction under such an indictment. *Carr v. S.* 19 App. 635; *Martin v. S.* 21 App. 1. The better practice is to allege the time of the burglary, that is, whether it was committed in the day-time or in the night-time. *Conoly v. S.* 2 App.

412. An indictment which described the house entered, as "a certain house then and there occupied and controlled by" a named person, was held to sufficiently designate the house. *Sullivan v. S.* 13 App. 462. For indictments held good, see *Mace v. S.* 9 App. 110; *Summers v. S. Id.* 396; *Lawson v. S.* 13 App. 264; *Ross v. S.* 16 App. 554.

§1221 — ART. 706. — "Entry" defined. — The "entry" into a house, within the meaning of article 704 includes every kind of entry but one made by the free consent of the occupant, or of one authorized to give such consent; it is not necessary that there should be any actual breaking to constitute the offense of burglary, except when the entry is made in the day-time. [O. C. 725a.]

§1222 — ART. 707. — Further defined. — The entry is not confined to the entrance of the whole body; it may consist of the entry of any part for the purpose of committing a felony; or it may be constituted by the discharge of fire-arms or other deadly missile into the house, with intent to injure any person therein; or it may be constituted by the introduction of any instrument for the purpose of taking from the house any personal property, although no part of the body of the offender should be introduced. [O. C. 726.]

§1223 — Decisions relating to "entry." — Entry does not signify the entrance of the whole body. *Nash v. S.* 20 App. 384; *Burke v. S.* 5 App. 74; *Franco v. S.* 42 Tex. 276. To constitute a burglarious entry, the house must be entered by force, or by threats, or by fraud, whether the entry be in the day-time or in the night-time. *Ross v. S.* 16 App. 554. To constitute burglary in the day-time the entrance into the house must be effected by actual force applied to the building. An entry in the day-time effected by threats or fraud, or by force, if such force be not upon the building, is not a burglarious entry. But if the entry be made at night, and be effected by force whether used upon the building or otherwise, or by threats, or by fraud, it is a burglarious entry. *Carr v. S.* 19 App. 635; *Martin v. S.* 21 App. 1; *Martin v. S.* 1 App. 525. The intent with which the entrance was made is the essential element of burglary. The intent must be to commit a felony or theft. *Collins v. S.* 20 App. 197; *S. v. Robertson*, 32 Tex. 159; *Allen v. S.* 18 App. 120. And such intent must exist at the very time the house is entered. *Harris v. S.* 20 App. 652. And in case of burglary with intent to commit theft, such intent must be to permanently appropriate the property intended to be stolen. *Wilson v. S.* 18 App. 270. But it is not material whether the intent is actually carried into effect. *Wilburn v. S.* 41 Tex. 237. Where the entry was made with the consent of the owner of the house, such consent being given by detectives, acting for said owner, it was held to be not a burglarious entry. *Spelden v. S.* 3 App. 156. But where detectives merely facilitated the entry without suggesting the offense or originating the intent, the entry was held to be burglarious. *Johnson v. S.* 3 App. 590. As to an entry effected by fraud see *Neiderluck v. S.* 23 App. 38. Post, §§ 1225-1232-1233.

§1224 — ART. 708. — "Breaking" defined. — By the term "breaking," as used in article 705, is meant that the entry must be made with actual force. The slightest force, however, is sufficient to constitute breaking; it may be by lifting the latch of the door that is shut, or by raising a window, the entry at a chimney, or other unusual place, the introduction of the hand or any instrument to draw out the property through an aperture made by the offender for that purpose. [O. C. 727.]

§1225 — Decisions as to "breaking." — The word "breaking" implies actual force, but not such force as must necessarily amount to violence. *S. v. Robertson*, 32 Tex. 159; *Anderson v. S.* 17 App. 305; *Franco v. S.* 42 Tex. 276. "Breaking" is constituted by an entry with actual force, which to constitute burglary in the day-time must be applied to the building. A day-time burglary cannot be committed by force not applied to the building, nor by threats or fraud. But a burglary in the night-time may be committed by force whether applied to the building or not, or by threats, or by fraud. *Carr v. S.* 19 App. 635; *Martin v. S.* 21 App. 1. When the entry is at night an actual breaking is not necessary. And breaking a room in the house, after entering the house by an open door, may be burglary. *Anderson v. S.* 17 App. 305; *Martin v. S.* 7 App. 525. As to what will constitute a breaking by fraud, see *Neiderluck v. S.* 23 App. 38. Ante, 1223; Post, §§ 1232, 1233.

§1226 — ART. 709. — "House" defined. — A "house," within the meaning of this chapter, is any building or structure erected for public or private use, whether the property of the United States, of this State, or of any public or private corporation or association, or of any individual, and of whatever material it may be constructed. [O. C. 728.]

§1227 — Decisions as to "house." — A "house" is any "building" or "structure" of whatever material it may be constructed. A "building" is a fabric, or edifice constructed; a thing built, as a house, a church, etc. A "structure" is a building of any kind, but chiefly a building of some size, or of magnificence; an edifice. An "office" is a place where a particular

kind of business, or service, for others is transacted; a *house*, or apartment in which public officers and others transact business; as the register's office; a lawyer's office. Under these definitions an apartment constructed of pickets, and situated in one corner of a hardware house, and used to keep the account books, money, etc., of a lumber company, and to transact the business of said company in, was held to be a "house" within the meaning of the preceding article. *Anderson v. S.* 17 App. 305.

§1228 — ART. 710. — "**Day-time**" defined. — By the term "**day-time**" is meant any time of the twenty-four hours from thirty minutes before sunrise until thirty minutes after sunset. [O. C. 737.]

§1229 — ART. 711. — **Punishment.** — The punishment for burglary shall be imprisonment in the penitentiary not less than two nor more than twelve years.

The preceding article fixing the same punishment for all kinds of burglary was framed by the revisers from articles 730-731-732-733, which prescribed different punishments for different kinds of burglary; such as burglary of a dwelling house, burglary by force, burglary by the discharge of fire arms, etc.

§1230 — ART. 712. — **Other offenses committed after entry punishable.** — If a house be entered in such manner as that the entry comes within the definition of burglary, and the person guilty of such burglary shall, after so entering, commit theft, or any other offense, he shall be punished for burglary, and also for whatever other offense is so committed. [O. C. 734, amended by Act Feb. 12, 1858, p. 180.]

§1231 — ART. 713. — **Same subject.** — If the burglary was effected for the purpose of committing one felony, and the person guilty thereof shall, while in the house, commit another felony, he shall be punishable for any felony so committed as well as for the burglary. [O. C. 735.]

§1232 — **Decisions under two preceding articles.** — A conviction cannot be had under the same indictment for both burglary and the felony or theft committed after entry into the house. Convictions for each offense can only be had under separate indictments. *Howard v. S.* 8 App. 447; *Shepherd v. S.* 42 Tex. 501; *Robertson v. S.* 6 App. 669; *Struckman v. S.* 7 App. 581; *Smith v. S.* 22 App. 350. And when the indictment charges burglary, and also charges the commission of theft, a conviction of the burglary operates as a bar to any further prosecution for the theft. *Turner v. S.* 22 App. 42; *Miller v. S.* 16 App. 417; *Howard v. S.* 8 App. 447. Article 712 is constitutional. *Smith v. S.* 22 App. 350.

§1233 — ART. 714. — **Actual breaking necessary in case of domestic.** — An entry into a house for the purpose of committing theft, unless the same is effected by actual breaking, is not burglary when the same is done by a domestic servant, or other inhabitant of such house; but a theft committed by such person after entering a house is punishable as in other cases. [O. C. 736.]

§1234. — **Decisions under preceding article.** — "Domestics" are those who reside in the same house with the master they serve; the term does not extend to workmen and laborers employed out of doors. A domestic is a servant or hired laborer residing with a family. An "inhabitant" is one who has a fixed residence, as distinguished from an occasional lodger or visitor. The preceding article includes both domestics and inhabitants, and does not extend to a servant whose employment is out of doors, and not in the house, or to a lodger or visitor, as distinguished from an inhabitant. *Wakefield v. S.* 41 Tex. 556. A farm-hand who sleeps and eats outside of the master's house, though he performs chores inside of the house, when directed, is not a domestic servant. *Waterhouse v. S.* 21 App. 663. A "boarder" is not an inhabitant. *Ullman v. S.* 1 App. 220. To constitute burglary by a domestic servant, or an inhabitant of the house, there must be an actual breaking. The mere lifting of a latch to effect an entry, is, in such case, not an actual breaking. But where such servant or inhabitant is acting with others in entering the house, an actual breaking is not necessary to constitute burglary as to him, and as to those acting with him. *Neiderluck v. S.* 23 App. 38. Ante, §§ 1223-1225.

§1235 — ART. 715. — **Attempt at burglary—How punished.** — If any person shall attempt to commit the crime of burglary, he shall be punished by confinement in the penitentiary not less than two nor more than four years. [O. C. 737a, added by Act Feb. 11, 1860, pp. 100-101.]

Indictment, Willson's Cr. Forms, 465.

§1236 — ART. 716. — "**Attempt**" defined. — An "attempt," in the sense in which the word is used in the preceding article, is an endeavor to

accomplish the crime of burglary carried beyond mere preparation, but falling short of the ultimate design in any part of it. [O. C. 737b, added by Act Feb. 11, 1860, pp. 100-101.]

Lovett v. S. 19 Tex. 174.

§1237 — Evidence. — There are three modes by which a burglary may be committed; 1, by force; 2, by threats; 3, by fraud. There are three separate and distinct kinds of burglary contained in the statutory definition. 1. An entry made at night with the intent to commit felony or theft; 2. An entry in the daytime and remaining concealed in the house until night, with like intent, and 3. An entry in the daytime with like intent. Conoly v. S. 2 App. 412. The intent with which the house was entered must be proved as alleged in the indictment. Hamilton v. S. 11 App. 116; S. v. Robertson, 32 Tex. 159. But it is not material whether such intention was actually carried into effect; or only demonstrated by the attempt, or by some overt act, to be decided by the jury from the facts in evidence. Wilburn v. S. 41 Tex. 237. The means used in effecting the entrance must be proved as charged in the indictment. Thus, if *force* alone be charged, the evidence must be confined to, and must show an entrance by that means. Summers v. S. 9 App. 396; Hamilton v. S. 11 App. 116; Sullivan v. S. 13 App. 462; Weeks v. S. Id. 466; Buntain v. S. 15 App. 485; Lott v. S. 17 App. 598. Where the indictment charged a burglary by "breaking and entering," but did not charge that the means used was either force, threats or fraud, and did not charge whether the offense was committed in the daytime or in the night-time, it was held that such indictment was sufficient to support a conviction for burglary by day or night, if the proof showed that the means used was *force applied to the building*; but if the burglary was in the daytime, no other force, except such as was applied to the building, would support a conviction. Carr v. S. 19 App. 635; Martin v. S. 21 App. 1. Where the burglary charged is with intent to commit theft, the value of the property intended to be stolen need not be proved. Green v. S. 21 App. 64; Sullivan v. S. 13 App. 462; Collins v. S. 20 App. 197. Recent unexplained possession of property burglariously taken is admissible against the defendant, to be considered by the jury with other facts and circumstances in evidence. Prince v. S. 44 Tex. 480; Payne v. S. 21 App. 184. Also his explanation of such possession is admissible in his behalf. Bond v. S. 23 App. 180. Where the evidence showed that the defendant took off his shoes and entered the house through an open door, without the consent of any one, it was held that it did not show an entry by means of *fraud*, that being the means charged in the indictment. Hamilton v. S. 11 App. 116. Where the intent alleged was to commit a rape by force, and the evidence was that one of three females in the house was awakened by some one touching her foot, and screamed, and a man ran out of the house when she screamed, it was held insufficient to prove an intent to commit rape. Hamilton v. S. 11 App. 116. Evidence that certain shoes of the accused would have made such tracks as the owner of the burglarized premises had described to the witness, was not only hearsay, but the opinion of the witness, and inadmissible. Bluit v. S. 12 App. 39. It was held competent for the State to prove declarations made by defendant on the same night, but before the burglary was committed, and also to prove certain interviews on the day after the burglary between defendant and the person in whose possession certain property burglariously taken from the house was found on the day after the burglary. Langford v. S. 17 App. 445. The statements of a detective acting with the defendant as a sham conspirator in the commission of the burglary, as to what another detective acting in the same capacity had told him, are hearsay, and inadmissible against the defendant. Spelden v. S. 3 App. 156. It was held error to permit the owner of the house to testify that his house had been broken open and robbed previously, and that he believed the defendant and his wife were the guilty parties. Wilburn v. S. 41 Tex. 237. Where an indictment for burglary with intent to commit theft unnecessarily designates the particular property which the defendant intended to steal, a conviction may be had, although the evidence shows that the defendant knew nothing about such articles, if it clearly appears that he entered the house with the intent to commit theft. But where the indictment charges the theft of specific articles, the proof must correspond with the allegation or there will be a fatal variance. Black v. S. 18 App. 124. For evidence held sufficient to support a conviction, see Rogers v. S. 43 Tex. 406; Langford v. S. 17 App. 445; Green v. S. 21 App. 64; Payne v. S. Id. 184; Waterhouse v. S. Id. 662; Smith v. S. 22 App. 350. For evidence held insufficient, see Buntain v. S. 15 App. 485; Zollicoffer v. S. 16 App. 312; Ross v. S. Id. 554; Neiderluck v. S. 23 App. 88.

§1238 — Charge of the court. — The charge must conform to, and be limited by the specific offense set forth in the indictment. Thus, where the indictment charges a burglary by means of *force* alone, it is error to charge with reference to a burglary committed by means of threats, or fraud. Lott v. S. 17 App. 598; Sullivan v. S. 13 App. 462; Weeks v. S. Id. 466; Buntain v. S. 15 App. 485; Levine v. S. 22 App. 683. So, where the indictment charges a burglary committed in the day-time, it is error to instruct as to a burglary in the night-time. Bravo v. S. 20 App. 188; Mace v. S. 9 App. 110. Where the indictment charges a burglary with intent to commit theft, the charge must give the law of theft, as well as that of burglary. Castenada v. S. 11 App. 390; Sims v. S. 2 App. 110; Struckman v. S. 7 App. 581. Where a blacksmith shop was burglarized and a brace taken therefrom, and the evidence tended strongly to show that the brace was not taken with intent to permanently appropriate it to the taker's use, but merely for the temporary purpose of using it in effecting an entry into a storehouse which was burglarized on the same night, it was held that it was material error to fail to instruct the jury upon this phase of the case, that is, that to constitute the intent to commit theft, there must have been an intent to appropriate the property *permanently* to the taker's use and benefit. Wilson v. S. 18 App. 270. Where the indictment charges burglary with intent to commit theft, it was held that the court erred in refusing to instruct the jury that the intent to commit theft must have existed in the



mind of the defendant at the very time he entered the house, and that if he first conceived such intent after entering the house he must be acquitted of burglary. *Harris v. S.* 20 App. 652. Where the indictment charged a burglary with intent to commit rape by fraud, the court charged, "fraud must consist in the use of some stratagem, as an attempt to have carnal intercourse with a woman when she is asleep." Held erroneous, because it announces in effect that an attempt to have carnal intercourse with a woman when she is asleep, *per se*, constitutes *fraud*, which is not correct, and because the stratagem referred to in art. 531 of the Penal Code, applies only in case the woman is married. *King v. S.* 22 App. 650. Where the indictment charged burglary and the theft of oats, and the defense relied upon was, that defendant had purchased the oats, which were found in his possession recently after the burglary, and there was evidence tending to show such a purchase, it was held that the court should have affirmatively and pertinently expounded to the jury the law in regard to this defense. *Bond v. S.* 23 App. 180; *Shuler v. S.* Id. 182.

## CH. 7. — OF OFFENSES ON BOARD OF VESSELS, STEAMBOATS AND RAILROAD CARS.

ART.	SEC.	ART.	SEC.
717. Burglarious entry on board of vessel.	1239	720. Rules, etc., of burglary applicable.	1242
718. By actual breaking, in day-time.	1240	721. Theft by a servant on board punishable as such.	1243
719. Other offense committed after entry punishable.	1241		

§1239 — ART. 717. — **Burglarious entry on board of vessel.** — If any person, by any of the means enumerated in article 704, shall at night enter any vessel, steamboat or railroad car, with intent to commit a felony or theft, he shall be punished by confinement in the penitentiary not less than two nor more than five years. [O. C. 738.]

Indictment, Willson's Cr. Forms; note following form 465.

§1240 — ART. 718. — **By actual breaking in day-time.** — If any person shall, by breaking, enter a vessel, steamboat or railroad car in the day-time, with intent to commit a felony or theft, he shall be punished as prescribed in the preceding article. [O. C. 739.]

§1241 — ART. 719. — **Other offense committed after entry punishable.** — If a vessel, steamboat or railroad car be entered in such manner as that the entry, if made in a house, would be burglary, and the person so entering shall commit theft or any other offense after entry, he shall be punished for the offense defined in article 717, and also for whatever other offense he may so commit. [O. C. 740; Ante § 1232.]

§1242 — ART. 720. — **Rules, etc., of burglary applicable.** — The definitions, rules and explanations of terms in the preceding chapter are applicable to such terms in this chapter; and the rules prescribed in articles 704, 705, 706, 707 and 708 of the preceding chapter shall also apply to similar cases on board of a vessel, steamboat or railroad car. [O. C. 741.]

§1243 — ART. 721. — **Theft by a servant on board punishable as such.** — A theft on board a steamboat, vessel or railroad car, committed by a servant or employee, except in cases where there has been an actual breaking in, is punishable simply as theft. [O. C. 742.]

## CH. 8. — OF ROBBERY.

ART.	SEC.	ART.	SEC.
722. Robbery defined and punished.	1244	Indictment under article 722.	1248
Changes made in preceding article.	1245	Indictment under article 723.	1249
Effect of amendment of 1883.	1246	Evidence.	1250
723. Fraudulent acquisition of property by threats.	1247	Charge of the court.	1251

§1244 — ART. 722. — **Robbery defined and punished.** — If any person by assault or violence, or by putting in fear of life or bodily injury, shall fraudulently take from the person or possession of another any property with intent to appropriate the same to his own use, he shall be punished by confinement in the penitentiary for life or for a term not less than five years; and when the offense is committed by two or more persons acting together, and a fire arm or other deadly weapon is used or exhibited by either of them in the commission of the offense the person or persons so using or exhibiting the fire arm or other deadly weapon shall be punished by imprisonment in the penitentiary for life or for a term not less than five years. [O. C. 743, amended by Act Nov. 12, 1866, p. 202. Again amended by Act April 12, 1883, pp. 80-81.]

Indictment, Willson's Cr. Forms, 466. The form cited should allege the *ownership* of the property taken. Post, § 1248.

§1245 — **Changes made in preceding article.** — The preceding article was article 743 of the original Code, and read as follows:—

“ART. 743. If any person, by assault or by violence, and putting in fear of life or of bodily injury, shall fraudulently take from the person of another any property, with intent to appropriate the same to his own use, he shall be punished by confinement in the penitentiary, for a term not less than two, nor more than ten years.”

It was amended by Act of November 12, 1866, and as then amended was adopted in the Revised Code as follows:—

“ART. 722. If any person by assault, or by violence and putting in fear of life or bodily injury, shall fraudulently take from the person or possession of another, any property, with intent to appropriate the same to his own use, he shall be punished by confinement in the penitentiary not less than two nor more than ten years.”

And thus the article remained until amended by the Act of April 12, 1883 — the law now in force. The article as it now reads, is unnecessarily lengthy, as the punishment prescribed in the latter portion of it is precisely the same as that prescribed in the first portion.

§1246 — **Effect of amendment of 1883.** — The effect of the amendment of February 12, 1883, of article 722, is to prescribe three separate, distinct and independent modes in which the offense of robbery may be committed: 1, by assault; 2, by violence; 3, by putting in fear of life, or bodily injury. Violence, without the concurrence of either one of the others, is a mode in which the offense may be committed. Bond v. S. 20 App. 421; Leonard v. S. Id. 422.

§1247 — ART. 723. — **Fraudulent acquisition of property by threats.** — If any person, by threatening to do some illegal act injurious to the character, person or property of another, shall fraudulently induce the person so threatened to deliver to him any property, with intent to appropriate the same to his own use, he shall be punished by confinement in the penitentiary not less than two nor more than five years. [O. C. 744, amended by Act Feb. 12, 1858, p. 180.]

Indictment, Willson's Cr. Forms, 467. The Form cited should allege the *ownership* of the property acquired. Post, § 1249.

§1248 — **Indictment under article 722.** — An indictment under article 722 which substantially pursues the common law precedents for the offense of robbery, will be sufficient. Trimble v. S. 16 App. 115; Burns v. S. 12 App. 269. See the last cited case for an indictment held good, and the first cited case for an indictment held bad. See, also, Reardan v. S. 4 App. 602. Where the indictment charges several as principals in the commission of the offense, it need not allege that

they "acted together" in the commission of the offense, or that they conspired together to commit it. *Bell v. S.* 1 App. 598. An essential element in the offense of robbery is, that the property was taken with the intent on the part of the taker to appropriate it to his own use, and an allegation of such intent is indispensable to the sufficiency of an indictment for this offense. *Morris v. S.* 18 App. 65. Under article 722 as it read before last being amended, it was held that an indictment which charged that the robbery was perpetrated by putting the party robbed in fear of his life, etc., but did not allege that the putting in fear was accomplished by *violence*, was insufficient. *Kimble v. S.* 12 App. 420. See, also, *Williams v. S.* Id. 240. Under the article as it now is, such an indictment would be sufficient, the "putting in fear," etc., being of itself sufficient, without *violence*, to constitute a means of committing the offense. *Bond v. S.* 20 App. 421; *Leonard v. S.* Id. 422; *Ante*, § 1246. It is not necessary to allege the value of the property taken or involved in the robbery. *Williams v. S.* 10 App. 8; *Winston v. S.* 9 App. 143. The indictment must charge an assault, or violence upon the person, and must be so certain as to the party against whom the offense was committed, as to enable the defendant to understand who that party is. *Parker v. S.* 9 App. 351. The indictment should describe the property taken as in theft. See a description held insufficient. *Winston v. S.* 9 App. 143. It must be shown by appropriate averment that the property taken belonged to some person other than the accused, or that the person deprived of its possession was entitled thereto as against the accused. *Barnes v. S.* 9 App. 128; *Smedley v. S.* 30 Tex. 214. *Willson's Cr. Forms*, 466 and 467, are, in this respect, defective, as they contain no allegation as to the ownership of the property. An indictment for this offense will not support a conviction for an assault with intent to murder. *Munson v. S.* 21 App. 329. An indictment which charges the defendant as a principal will not warrant his conviction as an accessory. *Golden v. S.* 18 App. 637.

§1249—**Indictment under article 723.**—To constitute the offense defined by article 723 it must appear: 1. That the accused threatened to do some illegal, act injurious to the character, person or property of another, and the indictment should aver the threats, and the illegal act threatened, with reasonable certainty. 2. That by means of such threats the accused fraudulently induced the person threatened to deliver to him certain property, which property should be described in the indictment as in an indictment for theft, alleging the ownership thereof, except that its value need not be alleged. 3. That the accused so obtained the property with the intent to appropriate the same to his own use. *Williams v. S.* 13 App. 285. Form 467 of *Willson's Cr. Forms* for this offense is defective in that it does not allege the ownership of the property acquired. *Ante*, § 1248.

§1250—**Evidence.**—It must be proved that the property taken belonged to some other person than the defendant. A party cannot be guilty of robbery in taking his own property, or property which he *bona fide* believes to belong to him. *Smedley v. S.* 30 Tex. 214; *Barnes v. S.* 9 App. 128. The injured party may testify that he surrendered the property because he believed he would be shot if he did not. *Dill v. S.* 6 App. 113. Remote evidence tending to identify the defendant as the perpetrator of the robbery, is admissible. *Reardon v. S.* 4 App. 602. The mere presence of the accused at the robbery will not be sufficient evidence to warrant his conviction of the offense. *Ring v. S.* 42 Tex. 282. For evidence held sufficient to secure a conviction, see *Fields v. S.* 41 Tex. 25; *Odle v. S.* 13 App. 612; *Makinson v. S.* 16 App. 133; *Bond v. S.* 20 App. 421. For evidence held insufficient, see *Kimble v. S.* 12 App. 420; *Barnett v. S.* 17 App. 191; *Golden v. S.* 18 App. 637.

§1251—**Charge of the court.**—A charge which incorrectly instructs the jury as to the penalty for the offense is fundamental error, although such instruction be favorable to the defendant. Thus, where the offense was committed *after* the last amendment of article 722, and the court instructed the jury to assess the penalty prescribed by said article before it was amended, the error was held to be fundamental. *Gardenhire v. S.* 18 App. 565; *Turner v. S.* 17 App. 587. It was held error to charge the jury under an indictment for robbery that they might convict the defendant of an assault with intent to murder. *Munson v. S.* 21 App. 329. Where the defense was an *alibi* and the evidence was conflicting, it was held not to be material error to charge "if the accused did commit the robbery as charged in the indictment, or participated in the same, you will find him guilty," etc. *Reardon v. S.* 4 App. 602.

## CH. 9. — OF THEFT IN GENERAL.

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724. "Theft" defined.	1252	736. Petty theft, how punished.	1283
Indictment — Venue of the offense.	1253	737. General penalties not applicable, when.	1284
Same — "Fraudulently taken."	1254	Decisions as to value.	1285
Same — Intent.	1255	738. Voluntary return of stolen property.	1286
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Same — What offenses included in.	1263	Same — Taking and asportation.	1294
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725. Property must have some value.	1265	Same — Identity of the property, alleged to have been stolen.	1296
726. Asportation not necessary.	1266	Same — Ownership and possession.	1297
Decisions as to asportation.	1267	Same — Want of owner's consent.	1298
727. The taking must be wrongful.	1268	Same — Possession of stolen property.	1299
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733. Animals of domestic breed included.	1279		
Decisions as to "property."	1280		
734. Particular penalties exclude general punishment.	1281		
735. Theft of twenty dollars and over, how punished.	1282		

§1252 — ART. 724. — "Theft" defined. — "Theft" is the fraudulent taking of corporeal personal property belonging to another from his possession, or from the possession of some person holding the same for him, without his consent, with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person taking. [O. C. 745.]

Indictment, Willson's Cr. Forms, 468.

§1253 — Indictment — Venue of the offense. — The indictment may allege the venue of the offense to be in the county of the prosecution, and such allegation will be sustained by proof that the property was stolen in any other county in the State, and brought by the thief into the county of the prosecution. C. C. P. art. 216. Cox v. S. 41 Tex. 1; Connell v. S. 2 App. 422; Cameron v. S. 9 App. 332; Roth v. S. 10 App. 27; Dixon v. S. 15 App. 480. This rule applies to all species of theft. Shubert v. S. 20 App. 320; McElmurray v. S. 21 App. 691; Clark v. S. 23 App. 612. Except theft from the person, in which case the prosecution can be maintained only in the county where the property was originally taken. Gage v. S. 22 App. 123. For other decisions relating to allegations of venue, see C. C. P. art. 424, and notes following same. As to stolen property brought into this State from another State, etc., see Post, art. 798.

§1254 — Same — "Fraudulently taken." — It is indispensably essential to allege that the property was *fraudulently* taken. An allegation that it was *feloniously* taken will not be sufficient. The statute defining the offense uses the word "fraudulent" to characterize the *taking*. Ware v. S. 19 App. 13; Spain v. S. Id. 469; Sloan v. S. 18 App. 225, overruling upon this point, Musquez v. S. 41 Tex. 226; Ortis v. S. Id. 282; McPherson v. S. 20 App. 194; Muldrew v. S. 12 App. 617; S. v. Earp, 41 Tex. 487.

§1255 — Same — Intent. — In addition to the allegation that the property was *fraudulently taken*, it must be alleged that it was taken with the *intent* to deprive the owner of the *value* of the same, and to appropriate it to the use and benefit of the person taking. Peralto v. S. 17 App. 573; Tallant v. S. 14 App. 234; Jones v. S. 12 App. 424; Ridgeway v. S. 41 Tex. 231; S. v. Sherlock, 26 Tex. 106. Where the allegation was that the property was taken with intent to deprive the owner of the value of the same, and to appropriate the *value* of the same, etc., using

the word "value" in place of the statutory word "it," the allegation was held to be sufficient, though it would have been better to have followed the exact language of the statute. *Thompson v. S.* 16 App. 74; *Barrett v. S.* 18 App. 64. See C. C. P. art. 423. In charging the *intent*, it is not necessary to aver time and place separately to each intent, as "then and there to deprive the owner," etc., and "then and there to appropriate," etc. *Harris v. S.* 2 App. 102.

§ 1256—**Same—Description of property.**—A general description of the property by name, kind, quality, number and ownership, if known, is sufficient. P. C. Art. 427. Thus, when the property was described as "one twenty dollar gold piece of the value of twenty dollars, current money of the United States, and one five dollar bill in money of the value of five dollars and one pocket knife of the value of fifty cents, of the corporeal personal property of J. W. McKnight," it was held to be sufficient. Article 427 of the Code of Criminal Procedure is a new provision added by the revisers, and dispenses with the great particularity required prior thereto in the description of property, especially money. *Bryant v. S.* 16 App. 144; *Bravo v. S.* 20 App. 177. When the indictment described the property as "two United States National ten dollar currency bills, of the value, then and there separately, of ten dollars, and of the aggregate value, then and there, of twenty dollars; one of said bills is described more particularly, as follows, to wit, No. 1375, from the Chatham National Bank of New York," etc., the description was held sufficient, and it was further held that it was no variance that the bill particularly described was on the "Chatham" instead of "Chatam" National Bank of New York, the words "Chatam" and "Chatham" being *idem sonans*. *Roth v. S.* 10 App. 27. Where money was described as "ten dollars, lawful money," the description was held to be sufficient, but requires proof of *coin*. It was further held that it was unnecessary to allege the value of the money. *Warren v. S.* 29 Tex. 369. But it was afterwards held that the value of the money must be alleged. *Boyle v. S.* 37 Tex. 359, and such is the rule at present. But where the property taken was described as "eight dollars, the same being the personal property of John Schell," the description was held insufficient. *Dukes v. S.* 22 App. 192. For other decisions rendered prior to the enactment of article 427 C. C. P., involving descriptions of money, see *Davieson v. S.* 12 App. 214; *Boyle v. S.* 37 Tex. 359; *Martinez v. S.* 41 Tex. 164; *Ridgeway v. S.* Id. 231; *Wells v. S.* 4 App. 20; *Cook v. S.* Id. 265; *Williams v. S.* 5 App. 116; *Statum v. S.* 9 App. 273; *Lavarre v. S.* 1 App. 685. It need not be averred, as at common law, that the property is "goods and chattels." *S. v. Odum*, 11 Tex. 12. A particular description of the property is not necessary—giving it its common name will answer, as a book of a certain value, a title bond, etc. See description of a title bond held to be sufficient. *Dignowitty v. S.* 17 Tex. 521. For a description of miscellaneous articles of clothing held to be sufficient, see *Ware v. S.* 2 App. 547. Where the description of the property was, "one chest or trunk, containing various articles of clothing, jewelry, etc.," it was held bad for uncertainty. "Trunk" and "chest" are not synonymous, and the articles of clothing, jewelry, etc., should have been more definitely described. *Potter v. S.* 39 Tex. 388. The property need not be described as "corporeal personal property." It is sufficient to allege that it is "property." *Sansbury v. S.* 4 App. 99. For description of *animals*, see Post, §§ 1314-1316-1318.

§ 1257—**Same—Value.**—Property, to be the subject of theft, must have some specific value. Post § 1265. The value of the property stolen must be alleged, except where the theft of particular kinds of property is declared an offense, as in the case of certain animals, and also except in the case of theft from the person. It is only in cases where the character of the offense and its punishment are made dependent upon the value of the property that it is necessary to allege value. *Shaw v. S.* 23 App. 493; *Collins v. S.* 20 App. 197; *Hall v. S.* 15 App. 40; *Pittman v. S.* 14 App. 576; *Cady v. S.* 4 App. 238; *Radford v. S.* 35 Tex. 15; *Boyle v. S.* 37 Tex. 359; *Sheppard v. S.* 1 App. 522; *Lunn v. S.* 44 Tex. 85; *Cook v. S.* 2 App. 290; *Lopez v. S.* 20 Tex. 780; *Johnson v. S.* 29 Tex. 492. An indictment for the theft of a watch left with a jeweler to be repaired, need only allege the value of the watch, not the value of the repairs. *S. v. Stephens*, 32 Tex. 155. An indictment charging the theft of several articles may allege an aggregate value to the whole; but if the value affects the penalty it is better to allege the value of each article, and thus provide against a possible failure to prove the theft of some of them. *Myer v. S.* 4 App. 121; *Doyle v. S.* Id. 253; *Ware v. S.* 2 App. 547; *Thompson v. S.* 43 Tex. 270. The allegation of value has reference to the market value of the property in the county of the prosecution. *Clark v. S.* 23 App. 612; *Saddler v. S.* 20 App. 195; *Martinez v. S.* 16 App. 122. See Post, § 1284.

§ 1258—**Same—Ownership and possession.**—"Where one person owns the property, and another person has the possession, charge or control of the same, the ownership thereof may be alleged to be in either. Where property is owned in common, or jointly, by two or more persons, the ownership may be alleged to be in all or either of them. When the property belongs to the estate of a deceased person, the ownership may be alleged to be in the executor, administrator or heirs of such deceased person, or in any one of such heirs. Where it is the separate property of a married woman, the ownership may be alleged to be in her or in her husband. Where the ownership is unknown to the grand jury, it shall be sufficient to allege that fact." C. C. P. article 426. The article above quoted was added in revising. With regard to property which may be the subject of theft, two kinds of ownership are recognized, 1 a general, 2 a special. Both depend upon "possession," and really "ownership" and "possession" in the statute of theft mean the same thing. A general ownership is where the possession is in the *actual* owner—a special ownership is where the possession is in a person who is not the *actual* owner but is holding possession for such actual owner. It is not necessary that the possession and actual or general ownership should be in the same person at the time of the taking of the property, to constitute theft. Post, article 728. "Possession" is constituted by the exercise

of actual control, care or management of the property, whether the same be lawful or not." Post §§ 1272-1273. The word "and" instead of the word "or" should be used in construing the above definition of "possession" so as to make it read "actual control, care and management." Therefore, to constitute *possession*, there must be combined actual control, actual care, and actual management of the property at the time it was taken. *Frazier v. S. 18 App. 434*, overruling upon this point, *Erskine v. S. 1 App. 405*. With regard to the allegations of ownership and possession, the following rules are deducible from the decisions: 1. The facts as they exist should be alleged, and if the facts be doubtful the pleader should resort to different counts, and thus meet the proof in whatever shape it may be adduced. 2. If A be the actual or general owner of the property, and had the same in his actual control, care and management at the time it was stolen, both ownership and possession should be alleged to be in him, notwithstanding the property was in care of, and being used by the agent or servant of the owner. 3. If A, be the actual or general owner, but B, at the time of the theft, had the *actual* control, care and management of the property, the ownership may be alleged to be in either A or B, but the *possession* must be alleged to have been in B. In such case it is better to allege both the ownership and possession in B, the special owner. *Briggs v. S. 20 App. 106*; *Littleton v. S. Id. 168*; *Hall v. S. 22 App. 632*; *Frazier v. S. 18 App. 434*; *Bailey v. S. Id. 426*; *May v. S. 15 App. 430*; *Duren v. S. Id. 624*; *Wilson v. S. 12 App. 481*; *Hill v. S. 11 App. 132*; *Dreyer v. S. Id. 503*; *Peppin v. S. 9 App. 269*; *Walker v. S. Id. 88*; *Moore v. S. 8 App. 496*; *Skipworth v. S. Id. 135*; *West v. S. App. 485*; *Jinks v. S. 5 App. 68*; *Fore v. S. Id. 241*; *Trafton v. S. Id. 480*; *Crockett v. S. Id. 526*; *Gaines v. S. 4 App. 330*; *Garling v. S. 2 App. 44*; *King v. S. 43 Tex. 351*; *Blackburn v. S. 44 Tex. 457*. When property is owned in common, or jointly by two or more persons, the ownership may be alleged to be in all or either of them. *Terry v. S. 15 App. 66*; *Phillips v. S. 17 App. 169*. The ownership of the property *must* be averred, or it must be averred that the name of the owner is unknown to the grand jury. *Culbersod v. S. 2 App. 324*; *Stone v. S. 12 App. 193*; *Maddox v. S. 14 App. 447*. And the indictment is also fatally defective if it fails to charge from whose possession the property was taken. *Garner v. S. 36 Tex. 693*; *Garcia v. S. 26 Tex. 209*; *Watts v. S. 6 App. 263*; *Case v. S. 12 App. 228*; *Reed v. S. Id. 662*; *Bailey v. S. 18 App. 426*. An allegation that the owner of the property is to the grand jurors unknown is sufficient. *Taylor v. S. 5 App. 1*; *Culbersod v. S. 2 App. 324*; *S. v. Miller, 34 Tex. 535*; *McGee v. S. 43 Tex. 662*; *Jorrasco v. S. 6 App. 238*; *Lowe v. S. 11 App. 253*; *Williamson v. S. 13 App. 514*; *Mackey v. S. 20 App. 603*; *Atkinson v. S. 19 App. 462*; *McVay v. S. 23 App. 659*. And in such case the indictment need not allege that the defendant was not the owner of the property. *Thompson v. S. 9 App. 801*. Where possession is alleged to be in a person other than the owner of the property, it is not a valid objection to the indictment that it does not allege that the person in possession was holding the property for the owner. *Alexander v. S. 4 App. 261*. The name of the owner, or of the possessor of the property, should be alleged correctly, as the allegation must be proved as made. The given name may be stated by its initials. *S. v. Black 31 Tex. 560*; *Collins v. S. 43 Tex. 577*; *Wells v. S. 4 App. 20*; *Perry v. S. Id. 566*. A variance between the middle initial letter of the given name as alleged, and as proved will be immaterial. *Dixon v. S. 2 App. 531*; *Delphino v. S. 11 App. 30*. Where the proof showed that the owner was known by the name alleged in the indictment, as well as by his true name, it was held there was no variance. *Bird v. S. 16 App. 525*. When stolen property has been sold by the thief, and afterwards stolen from the purchaser, the ownership may be alleged to be either in the true owner, or in the purchaser. *King v. S. 43 Tex. 351*.

§1259 — **Same — Want of owner's consent.** — The indictment must allege that the property was taken *without the consent of the owner*. If the ownership of the property be alleged to be in A and the possession in B, the allegation must be that the property was taken without the consent of either A or B. *Schultz v. S. 20 App. 308*; *Williams v. S. 19 App. 277*; *Atterberry v. S. Id. 401*; *Bailey v. S. 18 App. 427*; *Frazier v. S. Id. 434*; *Bland v. S. Id. 12*; *Williams v. S. 12 App. 395*. When the indictment alleges a joint ownership of two or more persons, the non-consent of each owner must be alleged. It will not be sufficient to allege their want of consent jointly. *McIntosh v. S. 18 App. 284*; *Taylor v. S. Id. 489*. But where the indictment alleges the ownership to be in two or more persons not jointly, but separately, it is sufficient to allege that the property was taken without the consent of the owners. *Smith v. S. 21 App. 96*. The allegation as to want of consent should negative the consent of the alleged owner or owners, and the alleged possessor or possessors of the property, but it need not, and should not, negative the consent of persons not named in the indictment. It was formerly held that where there were both a general and special owner of the property it was essential to allege and prove the want of consent of both, and that where both ownership and possession were alleged to be in the special owner, it was essential to prove not only his want of consent, but also the want of consent of the general owner. *Jackson v. S. 7 App. 514*; *Wilson v. S. 12 App. 481*; *Bowling v. S. 13 App. 338*; *Erskine v. S. 1 App. 405*. But these decisions, in so far as they hold as above stated, were expressly overruled in *Frazier v. S. 18 App. 434*. In a prosecution under § 1292 Post, the indictment, instead of negating consent of the owner to the taking, should allege the facts of the bailment, and the fraudulent conversion, alleging that the conversion was without the consent of the owner, etc.

§1260 — **Same — Asportation.** — It need not be alleged that the property was *carried away*. It is sufficient to allege that it was *fraudulently taken*. *Conner v. S. 6 App. 455*; *Prim v. S. 32 Tex. 157*; *Austin v. S. 42 Tex. 345*; *Musquez v. S. Id. 345*; *Hall v. S. 41 Tex. 287*; *Walker v. S. 3 App. 70*. Post §§ 1266, 1267.

§1261 — **Same — "Feloniously."** — The word "feloniously" need not be used in the indictment. The word *fraudulently* characterizes the offense of theft, and is indispensable in charg-

ing the offense. *Prim v. S.* 32 Tex. 157; *Calvin v. S.* 25 Tex. 793; *Austin v. S.* 42 Tex. 345; *Conner v. S.* 6 App. 455; *Jorasco v. S.* Id. 238.

§1262—**Same—In general.**—In general the indictment must charge the acts, intents and omissions which enter into the definition of, and constitute the offense. *Williams v. S.* 12 App. 396; *Hodges v. S.* Id. 554; *Young v. S.* Id. 614; *Muldrew v. S.* Id. 617; *Insall v. S.* 14 App. 145. If two distinct offenses be charged in the same count, the indictment will be bad for duplicity. *Hickman v. S.* 22 App. 441; *Heineman v. S.* Id. 44. Where different articles are taken at the same time and place, although from different persons, such taking constitutes but one offense, and will support but one prosecution. *Wilson v. S.* 45 Tex. 76; *Quitow v. S.* 1 App. 48; *Hozier v. S.* 6 App. 542. Post § 1306.

§1263—**Same—What offenses included in.**—Under an indictment for theft in the usual form a conviction may be had for theft committed by means of false pretexts, as defined in article 727, Post. *Smith v. S.* 35 Tex. 738; *Maddox v. S.* 41 Tex. 205; *Quitow v. S.* 1 App. 65; *Davison v. S.* 12 App. 214; *Dow v. S.* Id. 843; *Reed v. S.* 8 App. 40; *Spinks v. S.* Id. 125; *Jones v. S.* Id. 648; *Hudson v. S.* 10 App. 215; *White v. S.* 11 Tex. 769; *Morrison v. S.* 17 App. 34; *Atterberry v. S.* 19 App. 401; *Hernandez v. S.* 20 App. 151; *Porter v. S.* 23 App. 295. It was formerly held otherwise. *Marshall v. S.* 31 Tex. 471. But, if the indictment sets out the false pretexts, etc., by which the theft was perpetrated, they must be proved as alleged. *Warrington v. S.* 1 App. 168. It has been held that under an ordinary indictment for theft, a conviction may be had for swindling. *Davison v. S.* 12 App. 214. But see *Huntsman v. S.* 12 App. 619. And it has also been held that under an ordinary indictment for theft a conviction may be had of the offense defined in article 749, Post, of "willfully taking into possession and driving, etc., live stock," etc. *Foster v. S.* 21 App. 80; *Turner v. S.* 7 App. 596; *Powell v. S.* Id. 467; *Marshall v. S.* 4 App. 549; *Campbell v. S.* 22 App. 262, Post § 1322. Theft of several animals belonging to different owners, and taken at the same time, may be prosecuted in one indictment. *Long v. S.* 43 Tex. 467; *Addison v. S.* 3 App. 40.

§1264—**Same—What offenses not included.**—"Theft from the person" is a distinct offense from general theft, and under an ordinary indictment for theft, a conviction cannot be had for theft from the person. *Gage v. S.* 22 App. 123; *Harris v. S.* 17 App. 132; *Kerry v. S.* Id. 178. A conviction for the offense of embezzlement cannot be had under an indictment for theft. *Huntsman v. S.* 12 App. 619 overruling *Whitworth v. S.* 11 App. 414. The decision in *Whitworth v. S.* supra was based upon article 714 of the Code of Criminal Procedure, which article was adopted in the revision of the Codes, but was held unconstitutional in *Huntsman v. S.* supra. Prior to the enactment of said article it had been held that a conviction for embezzlement could not be had under an indictment for theft. *Simco v. S.* 8 App. 406; *S. C.* 11 App. 338. A conviction for knowingly receiving stolen property, Post § 1308, cannot be had under an indictment for theft. *Brown v. S.* 15 App. 581; overruling *Parchmann v. S.* 2 App. 228; *McCampbell v. S.* 9 App. 124; *Vincent v. S.* 10 App. 330; *Dreyer v. S.* 11 App. 631. See in approval of *Brown v. S.* supra; *Chandler v. S.* 15 App. 537; *Gaither v. S.* 21 App. 527; *Counts v. S.* 37 Tex. 593, in so far as the overruled decisions state a contrary doctrine. Under an indictment for theft of an animal a conviction cannot be maintained for unlawfully, without the consent of the owner, killing the animal. *Beavers v. S.* 14 App. 541. Nor for a violation of the estray laws. *Hart v. S.* 14 App. 657.

§1265—**ART. 725.—Property must have some value.**—The property must be such as has some specific value capable of being ascertained. It embraces every species of personal property capable of being taken. [O. C. 746.]

As to allegation of value see Ante, § 1257. See other decisions as to value, Post § 1285.

§1266—**ART. 726.—Asportation not necessary.**—To constitute "taking" it is not necessary that the property be removed any distance from the place of taking; it is sufficient that it has been in the possession of the thief, though it may not be moved out of the presence of the person deprived of it; nor is it necessary that any definite length of time shall elapse between the taking and the discovery thereof; if but a moment elapse, the offense is complete. [O. C. 747; Post § 1294.]

§1267.—**Decisions as to asportation.**—For decisions as to allegation in indictment see Ante § 1260. In *Lott v. S.* 20 App. 230, it was held that though asportation of the property was not essential to complete the theft, still there must have been a fraudulent actual taking of the property, and the property must have passed into the possession of the thief. But this doctrine of the *Lott* case was expressly overruled in *Doss v. S.* 21 App. 505, which holds that a fraudulent taking constitutes and completes the crime of theft, and that it is not necessary that the property should have passed into the actual manual possession of the thief. See the last cited case for an elaborate discussion of the question and a review of previous decisions. See, also, *Dukes v. S.* 22 App. 192; *Coombes v. S.* 17 App. 259; *Madison v. S.* 16 App. 436; *Hall v. S.* 44 Tex. 287; *Flynn v. S.* 42 Tex. 801; *Hardeman v. S.* 12 App. 207. Post § 1294.

§1268—**ART. 727.—The "taking" must be wrongful, etc.**—The taking must be wrongful, so that if the property came into the possession of the person accused of theft by lawful means, the subsequent appropriation

tion of it is not theft, but if the taking, though originally lawful, was obtained by any false pretext, or with any intent to deprive the owner of the value thereof, and appropriate the property to the use and benefit of the person taking, and the same is so appropriated, the offense of theft is complete. [O. C. 748.]

§1269 — **Decisions under preceding article.** — When the *taking* of the property was originally *lawful*, that is, when the property came into the possession of the accused not *wrongfully*, but *lawfully*, a conviction for theft cannot be sustained unless it be shown that the accused obtained the property by some false pretext, or with the intent at the very time of obtaining the property, of depriving the owner of the value thereof, and of appropriating the property to the use and benefit of the person taking; and it must also further appear that the property was so appropriated. Porter v. S. 23 App. 295; Hornbeck v. S. 10 App. 408; Dow v. S. 12 App. 343; Morrison v. S. 17 App. 84; Atterberry v. S. 19 App. 401. See, also, Keonlo v. S. 4 App. 173; Berg v. S. 2 App. 148; Pitts v. S. 3 App. 148; Pitts v. S. 5 App. 122; Madden v. S. 1 App. 204. In order to establish the character of theft specified in the preceding article it must be proved by the State: 1st, That the possession of the property was obtained by false pretext; or 2d, that at the *very time* the possession of the property was obtained by the accused, there existed in his mind the fraudulent intent to deprive the owner of the value of the property, and to appropriate the same to his own use; and 3d, that he did so appropriate the property. The fraudulent intent must exist at the very time of acquiring the possession of the property. No subsequent fraudulent intent or appropriation of the property will suffice to constitute the original lawful taking theft. And the mere fact that subsequent to his lawful acquisition of the property, the accused appropriated it to his own use and benefit, is not sufficient to establish the falsity of the pretext by which he acquired possession, nor his fraudulent intent at the time of such acquisition. Hernandez v. S. 20 App. 151. Where property is taken with the consent of the owner, or with the consent of one owner where there are several, the taking is not *wrongful* but *lawful*. Taylor v. S. 18 App. 489. And so where it is taken with the consent of the agent or clerk of the owner. Powell v. S. 11 App. 401. As to consent of the owner for the purpose of entrapping the thief, see Spelden v. S. 8 App. 156; Johnson v. S. Id. 590; Allison v. S. 14 App. 122; Pigg v. S. 43 Tex. 108; Alexander v. S. 12 Tex. 540. See a new species of theft, where the property is taken with the consent of the owner, but fraudulently converted without his consent, Post, § 1292.

§1270 — **Lost property.** — Lost property, like any other, may be the subject of theft, although the finder come lawfully into possession of it. If, at the very time of finding and taking the lost property, the criminal intent to deprive the owner of the value of the property, and to appropriate it to the use and benefit of the taker, is formed in the mind of the taker, the taking will be theft. Statum v. S. 9 App. 273; Robinson v. S. 11 App. 403; Rhodes v. S. Id. 563. The time of the *taking* is the time of the *finding*, and if the fraudulent intent did not exist at the time of the taking, no subsequent fraudulent intent in relation to the property will constitute theft. The following would be a proper charge upon this issue: "If you believe from the evidence that the property was lost, and that the defendant found it, he cannot be convicted of the theft of it unless you believe from the evidence that at the time he found it, he fraudulently took it with the intent at that time to deprive the owner of the value of it, and to appropriate it to his own use or benefit. No fraudulent intent in the mind of the defendant in relation to the property, which was formed after he had taken the property, will authorize his conviction of the theft of such property." Martinez v. S. 16 App. 122; Warren v. S. 17 App. 207; Reed v. S. 8 App. 40; Wilson v. S. 14 App. 205.

§1271 — **ART. 728. — Possession and ownership need not be in same person.** — It is not necessary, in order to constitute theft, that the possession and ownership of the property be in the same person at the time of taking. [O. C. 749; Ante, § 1258.]

§1272 — **ART. 729. — Possession — How constituted.** — Possession of the person so unlawfully deprived of property is constituted by the exercise of actual control, care or management of the property, whether the same be lawful or not. [O. C. 750.]

§1273 — **Construction of preceding article.** — In the preceding article the word "or" between the words "care" and "management" should be read "and" in construing said article. To constitute *possession* within the meaning of said article, there must be combined, actual control, actual care, and actual management of the property. Frazier v. S. 18 App. 434, overruling upon this point Erskine v. S. 1 App. 405. And it is not necessary that such possession be lawful. Crockett v. S. 5 App. 526; Moore v. S. 8 App. 496; King v. S. 43 Tex. 351. "Possession" and "custody" are not synonymous or convertible terms, and if property be in the mere temporary custody of a ward, servant or other person, it is not in the *possession* of the ward, servant or other person, but is in the possession of the owner. Bailey v. S. 18 App. 426; Frazier v. S. Id. 434; Littleton v. S. 20 App. 168; Clark v. S. 23 App. 612; Thomas v. S. 1 App. 289; Burns v. S. 85 Tex. 724; Garling v. S. 2 App. 44. Animals on their accustomed range are in the possession of their owner. Diggs v. S. 7 App. 359; Jones v. S. 3 App. 498; Crockett v. S. 5 App. 526; Moore v. S. 8 App. 496; Cameron v. S. 44 Tex. 652. Where there is a special owner of animals, who has the actual control, care and management of them, they are in the possession of



such special owner while in their accustomed range, and not in the possession of the general owner. *Littleton v. S. 20 App. 168.* Where property is accidentally left in a particular place, it is still in the possession, constructively, of the owner. *Statum v. S. 9 App. 273.* Property left temporarily in the custody of another is in possession of the owner. And a joint owner who has exclusive possession is the owner. *Garling v. S. 2 App. 44.* The widow is the "owner" of unadministered community property in her actual custody. *Henry v. S. 45 Tex. 84.* As to allegations of ownership and possession in indictment, see *Ante*, § 1258.

**§1274 — ART. 730. — Theft of one's own property, when. —**No person can be guilty of theft by taking property belonging to himself, except in the following cases:—

1. Where the property has been deposited with the person in possession, as a pledge or security for debt.

2. Where it is in the possession of an officer of the law, by process from a court of competent jurisdiction.

3. Where the property is in the possession of an executor or administrator, for the purpose of administration.

4. In all other cases where the person so deprived of possession is, at the time of taking, lawfully entitled to the possession thereof as against the true owner. [O. C. 751.]

**§1275 — Decisions pertinent to the preceding article. —**At common law the taking of one's goods from a bailee was not larceny unless it operated to charge the bailee with their value, but it is otherwise under this Code. *Taylor v. S. 7 App. 659; S. v. Stephens, 32 Tex. 155.* A husband cannot commit theft of his wife's goods, unless there has been a divorce or a distinct separation, and he has clearly abandoned possession of her property and recognized her right to its exclusive possession. *Overton v. S. 43 Tex. 616.* "Croppers on shares" may commit the offense if they take cotton raised by them from the possession of the landlord without complying with their contract to repay advances before title should pass. *Connell v. S. 2 App. 422.* But if, by the contract, the landlord is not entitled to exclusive possession, it is not theft. *Bell v. S. 7 App. 25.* Where property has been taken under a claim of right, if the accused appears to have had any fair color of title, or if the title of the prosecutor be brought into doubt at all, the court will direct an acquittal, it being improper to settle such disputes in the form of process affecting men's liberties or reputation. *Harris v. S. 17 App. 177; Evans v. S. 15 App. 31; McNair v. S. 14 App. 78; Smith v. S. 42 Tex. 444; Boyd v. S. 18 App. 339; Benton v. S. 21 App. 554.* If property be taken under the belief at the time on the part of the taker that it belongs to him, it is not theft, although in fact the property does not belong to him. *Britt v. S. 21 App. 215; Owens v. S. Id. 579; Donahoe v. S. 23 App. 457; White v. S. Id. 643; Missildine v. S. 21 App. 335; Bray v. S. 41 Tex. 203; Johnson v. S. Id. 608; Smith v. S. 42 Tex. 444; Mullins v. S. 37 Tex. 337; Billard v. S. 30 Tex. 337.*

**§1276 — ART. 731. — Part owner cannot commit unless. —**If the person accused of the theft be part owner of the property, the taking does not come within the definition of theft, unless the person from whom it is taken be wholly entitled to the possession at the time. [O. C. 752.]

**§1277 — Decisions under preceding article. —**Where the defendant was charged with the theft of property belonging to A, and the proof showed that A had purchased the property from the half-brother of the defendant, and that said property was a portion of the estate of a deceased brother of the defendant and in which estate defendant owned an interest, and upon which estate there was no administration, it was held, that as the defendant had never parted with his inherited interest in said estate, and had not authorized the sale of said property, he was a part owner of said property, and his right to the possession thereof was as good as A's, the alleged owner's, and he was therefore not guilty of theft in taking said property. *Fairy v. S. 18 App. 814.* A rented land of B, it being the agreement that each should have an equal share of the crops produced when gathered, and that A's part of the crop should be bound for advances made to him by B. Before the crops were gathered or divided A, without the consent of B, sold a bushel of the corn raised. Held, not to be theft, as under the rental contract B was not entitled to the exclusive possession of the crops. *Bell v. S. 7 App. 25.* But when "croppers on shares" took from the gin yard of their landlord, cotton raised by them, but baled up and in the landlord's possession, and upon which the landlord had a lien for unpaid advances, it was held to be theft. *Connell v. S. 2 App. 422.* Where an owner or joint owner of property is not entitled to the possession of it, he cannot delegate to another person the right to take the same, and the consent of such owner or joint owner, will not protect the person taking the property from amenability for the theft of it. *Duren v. S. 15 App. 624.*

**§1278 — ART. 732. — "Property" defined. —**The term "property," as used in relation to the crime of theft, includes money, bank-bills, goods of every description commonly sold as merchandise, every kind of agricultural produce, clothing, any writing containing evidence of an existing debt, contract, liability, promise or ownership of property, real or personal, any re-

ceipts for money, discharge, release, acquittance, and printed book or manuscript, and in general any and every article commonly known as and called personal property, and all writings of every description, provided such property possesses any ascertainable value. [O. C. 753.]

§1279 — ART. 733. — **Animals of domestic breed included.** — Within the meaning of "personal property," which may be the subject of theft, are included all domesticated animals and birds, when they are proved to be of any specific value. [O. C. 755.]

§1280 — **Decisions as to "property"** — "Bank-bills" include "bank-notes," and where the indictment alleged the theft of a *bank-bill*, and the evidence proved the theft of a *bank-note*, there was no variance. Roth v. S. 10 App. 27. "Money" is property, and in an indictment a general description of it by name, kind, number of pieces and ownership will be sufficient. Davison v. S. 12 App. 214; Bryant v. S. 16 App. 144; C. C. P. art. 427. Doors, when severed from a house become personal property and the subject matter of theft. Ex parte Wilke, 84 Tex. 155. The common-law rule that the severance and asportation of things annexed to the realty must be distinct and several acts, does not obtain in this State. Thus taking rails from a fence may be theft. Harberger v. S. 4 App. 26. National bank-notes, and United States Treasury notes, are "money" and "property." Sansbury v. S. 4 App. 99. "Property" includes any and every article commonly known and designated as personal property. C. C. P. 789. Brown v. S. 23 App. 214. Property to be the subject of theft, must be such as has some specific value capable of being ascertained, and it embraces every species of personal property capable of being taken. Collins v. S. 20 App. 197. See also succeeding section. As to description of property in an indictment see Ante, § 1256.

§1281 — ART. 734. — **Particular penalties exclude general punishment.** — Theft of certain particular kinds of property, as of a horse, property wrecked, etc., have a punishment affixed, differing from the general punishment of the crime of theft; whenever, therefore, the law provides a particular punishment for theft, committed in regard to a special kind of property, theft of such property is not included within the law affixing a general penalty to the offense; but in other cases, whenever it is declared to be an offense to steal or otherwise fraudulently appropriate property, the provision is intended to include any and every species of personal property according to its general and broadest signification. [O. C. 754.]

§1282 — ART. 735. — **Theft of twenty dollars and over — How punished.** — Theft of property of the value of ~~twenty~~ <sup>twenty</sup> dollars or over, shall be punished by confinement in the penitentiary, not less than two nor more than ten years. [O. C. 756, amended by Act Feb. 12, 1858, p. 181.]

§1283 — ART. 736. — **Petty theft — How punished.** — Theft of property, under the value of ~~twenty~~ <sup>twenty</sup> dollars, shall be punished by imprisonment in the county jail not exceeding ~~one~~ <sup>one</sup> year, during which time the prisoner may be put to hard work, and by fine not exceeding five hundred dollars, or by such imprisonment without fine. [O. C. 757, amended by Act Aug. 21, 1876, p. 242.]

§1284 — ART. 737. — **General penalties not applicable when.** — The two preceding articles do not apply to theft of property from the person, nor to cases of theft of any particular kind of property, where the punishment is specially prescribed. [O. C. 758.]

§1285 — **Decisions as to value.** — As to allegations of value in the indictment, see Ante, § 1257. Where it is necessary to allege the value of property, it is also necessary to prove it. Radford v. S. 35 Tex. 15; Cady v. S. 4 App. 238; Cook v. S. 2 App. 290; Simpson v. S. App. 681; Pittman v. S. 14 App. 576; Hall v. S. 15 App. 40; Lunn v. S. 44 Tex. 85. "Value" means the market value of the property, if it have such value, and if it has no market value, then it means the amount it would take to replace it. In proving value, any evidence from which the jury can infer the value of the property is admissible; as for instance what the owner testifies of its value to him; the opinions of witnesses acquainted with like property; what such property has brought at actual sale, etc. Martinez v. S. 16 App. 122; Cannon v. S. 18 App. 172; Saddler v. S. 20 App. 195. Where property is stolen in one county and carried into another, and the prosecution is in the latter county, it is the value of the property in the county of the prosecution, and not its value in the county of the original taking, that is in issue, and must be proved. Clark v. S. 23 App. 612; Roth v. S. 10 App. 27; Gage v. S. 22 App. 123. Where an indictment charges the theft of several different articles and alleges the aggregate value of the property, but does not allege the separate value of the articles, the proof must establish the theft of each article, or the conviction will not be sustained. Thompson v. S. 43 Tex. 268; Meyer v. S. 4

App. 121; Doyle v. S. Id. 253; Ware v. S. 2 App. 547. But when the property taken was charged to be two hundred pounds of cotton of the aggregate value of six dollars, and the proof showed the theft of seventy-five pounds of the aggregate value of three dollars, it was held that this variance was immaterial, as the charge and conviction were for a misdemeanor. Duren v. S. 15 App. 624. On the trial of one jointly charged with others, it is only necessary to prove the value of the property taken by *all* of the parties committing the theft, without showing the value of the property taken by each one. And if the value of the property taken by all the thieves acting together in the theft amounts to twenty dollars, they are each guilty of a felony. Clay v. S. 40 Tex. 67. To sustain a felony conviction the proof must show that the value of the property taken was twenty dollars or over. Langford v. S. 8 Tex. 115; Simpson v. S. 10 App. 651; Putman v. S. 14 App. 576; Hall v. S. 15 App. 40; Moore v. S. 17 App. 176. And the proof must show that property of the value of twenty dollars or over was taken at *one time*. Lacey v. S. 22 App. 657. Where the accused, under the pretense of making change for a twenty dollar bill of the value of twenty dollars, after getting said bill in his possession stated to the person who had handed it to him that he could not change it, and pretending to return the said bill, fraudulently returns instead thereof a one dollar bill, it was held, that he had taken property of the value of twenty dollars and was guilty of felony. Walters v. S. 17 App. 226. Where the property stolen is money its value must be proved. Simpson v. S. 10 App. 681; Cook v. S. 2 App. 290; Lavarre v. S. 1 App. 685; Martinez v. S. 41 Tex. 164; Boyle v. S. 37 Tex. 360. It was formerly held otherwise. Warren v. S. 29 Tex. 369. When the value is alleged at so many dollars, the proof may be value in currency dollars. Hubotter v. S. 32 Tex. 479. If the property be hogs, their value must be proved. Hall v. S. 15 App. 40; Lunn v. S. 44 Tex. 85; Pittman v. S. 14 App. 576. Where the defendant was charged with theft of certain jewelry, one piece, a necklace being of the value of over twenty dollars, and the other pieces being of less than twenty dollars in value, and there was evidence tending to show, that defendant *found* the necklace, it was held that the court should have charged the jury, that if they believed from the evidence that she was guilty of the theft of the other articles, but had a reasonable doubt of her guilt of the theft of the necklace, they should not convict her of felony. Lee v. S. 14 App. 266. Where the theft is from the person, it is a felony *per se*, and the value of the property taken need not be alleged or proved. Shaw v. S. 23 App. 493. If the property stolen be a horse, ass, mule or cattle, value need not be proved. Post, §§ 1314-1316. But if it be any other animal than one of those above named, value must be both alleged and proved. Post, § 1318. It is the province of the jury to determine the value of the property, and where the evidence upon that issue is conflicting, the verdict, on appeal, will not be disturbed if there be evidence to support it. Jack v. S. 20 App. 656.

§1286 — ART. 738. — **Voluntary return of stolen property.** — If property, taken under such circumstances as to constitute theft, be voluntarily returned within a reasonable time, and before any prosecution is commenced therefor, the punishment shall be by fine not exceeding one thousand dollars. [O. C. 759, amended by Act Feb. 12, 1858, p. 181.]

§1287 — **Decisions under preceding article.** — A return of stolen animals on the evening of the day on which they were stolen, is a return of the property "within a reasonable time." *Angie v. S. 1 App. 307.* Where the stolen animal had been conveyed thirty miles, and was returned back ten miles of that distance, it was held to be not a return of the property within the meaning of the preceding article. Turning an animal loose upon the range is not a return of it. *Moore v. S. 8 App. 496.* Unless possession thereof had been obtained with the owner's consent. *McCracken v. S. 5 App. 507; Brill v. S. 1 App. 572.* A thief caught in the possession of the stolen property cannot claim the benefit of the preceding article by offering to give up the stolen property or pay for it. *Grant v. S. 2 App. 164.* A voluntary return of stolen property, within the meaning of the preceding article, must be made under the following circumstances: 1. The return must be voluntary, that is, willingly made; not made under the influence of compulsion, fear of punishment, or threats. If, however, it be made under the influence of repentance for the crime, and with the desire to make reparation to the injured owner, it will be voluntary, although it may also be influenced by fear of punishment. 2. It must be made within a reasonable time after the theft, and before prosecution for the theft has been commenced. 3. It must be an actual, not merely a constructive return of the property into possession of the owner. 4. The property returned must be the identical property taken, and all of it unchanged. *Bird v. S. 16 App. 528; Owen v. S. 44 Tex. 248; Stephenson v. S. 4 App. 591; Trafton v. S. 5 App. 480; Shultz v. S. Id. 390; Horseman v. S. 43 Tex. 353; Moore v. S. 8 App. 496; Allen v. S. 12 App. 190; Wheeler v. S. 15 App. 607; Bennett v. S. 17 App. 143; Dupree v. S. Id. 591; Shultz v. S. 20 App. 315.* Payment for the property is not a voluntary return. *Shultz v. S. 5 App. 390; Trafton v. S. Id. 480.*

§1288 — ART. 739. — **"Steal," or "stolen," include what.** — The words "steal," or "stolen," when used in this Code in reference to the acquisition of property, include property acquired by theft. [O. C. 760.]

"Steal," and "stolen," are synonymous with "theft." *Carr v. S. 9 App. 463.*

§1289 — ART. 740. — **Stealing of agricultural products.** — The stealing or feloniously taking any growing, standing or ungathered Indian corn, wheat, cotton, potatoes, rice or other agricultural product, shall hereafter be deemed

theft; and any person who shall hereafter steal or feloniously take, pluck, sever, or carry away any Indian corn, or wheat, cotton, potatoes, rice, or other agricultural product, growing, standing or remaining ungathered in any plantation, field or other ground, shall, on conviction thereof, be deemed guilty of theft and suffer punishment as in other cases of theft. [O. C. 761.]

Indictment, Willson's Cr. Forms, 469.

§1290 — ART. 741. — **Stealing record book, or filed paper.** — If any person shall take and carry away any record book or filed paper from any clerk's office, public office, or other place where the same may be lawfully deposited, or from the lawful possession of any person whatsoever, with intent to destroy, suppress, alter or conceal, or in any wise dispose of the same, so as to prevent the lawful use of such record book or filed paper, he shall be deemed guilty of theft and punished by imprisonment in the penitentiary not less than three nor more than seven years. [O. C. 753a, added by Act Feb. 12, 1878, p. 181.]

Indictment, Willson's Cr. Forms, 470; Witte v. S. 21 App. 88.

§1291 — ART. 742. — **Stealing from a wreck.** — If any person, with intent to deprive the true owner of the value thereof, shall appropriate to his own use, or dispose of to his own benefit, any property taken or driven on shore from any vessel wrecked, stranded or burnt on the sea shore, or on any river, bay or harbor of the State, he shall be punished by confinement in the penitentiary not less than two nor more than five years. [O. C. 770.]

Indictment, Willson's Cr. Forms, 417.

§1292 — ART. 742a. — **Conversion by a bailee is theft.** — Any person having possession of personal property of another by virtue of a contract of hiring or borrowing, or other bailment, who shall, without the consent of the owner, fraudulently convert such property to his own use with intent to deprive the owner of the value of the same, shall be guilty of theft, and shall be punished as prescribed in the Penal Code for theft of like property. [Act March 8, 1887, p. 14.] Indictment, Willson's Add. Cr. Forms, No. 157a.

§1293 — **Evidence—In general.** — The burden is on the State throughout the trial to establish the guilt of the accused beyond a reasonable doubt. Evidence establishing a mere probability, or a strong suspicion of his guilt is not sufficient. Chapman v. S. 1 App. 728; Ring v. S. 42 Tex. 282; Tollett v. S. 44 Tex. 95; Grant v. S. 3 App. 1; Casas v. S. 12 App. 59. See further upon this subject, C. C. P. chapter on EVIDENCE.

§1294 — **Same—Taking and asportation.** — It must be proved that there was a *taking* of the property, but it is not necessary to prove that there was any asportation of it. To constitute a *taking*, it is not necessary that the property should have passed into the actual, manual possession of the thief. Thus, where the defendant pointed out to a person a certain cow and calf on the range, falsely claiming that he owned them, and sold them to the person to whom he had pointed them out, and such person thereupon took possession of the cow and calf, it was held the acts of defendant constituted a taking effected through the innocent agency of the purchaser. Doss v. S. 21 App. 505; overruling Lott v. S. 20 App. 230. So where the defendant called up a bunch of hogs, and sold them to a person who took and carried them away, this was held to be a taking by the defendant. When the theft is of an animal, it is a taking, whenever the animal is brought under the control of the thief. Madison v. S. 16 App. 436. Killing the cow of another on the range, though the animal never passed into the manual possession of the slayer was held to be a taking. Coombes v. S. 17 App. 259. And killing a hog is taking it. Hall v. S. 41 Tex. 287; Walker v. S. 3 App. 70. But where the defendant sold a steer, claiming it as his property, and executed a bill of sale for it to the purchaser and received pay, the steer at the time being on the range, and not in the possession actual or constructive of the defendant or his vendee, it was held that there had been no taking. Hardeman v. S. 12 App. 207. A person may be guilty of a taking, although he be not present at the time and place of the taking, but the evidence must show his complicity as a principal in the original taking. See the following cases illustrating this doctrine: Wright v. S. 18 App. 356; Trimble v. S. Id. 632; Watson v. S. 21 App. 598; Doss v. S. Id. 505; Smith v. S. Id. 107; Welsh v. S. 3 App. 413; Wells v. S. 4 App. 20; Scales v. S. 7 App. 361; McCampbell v. S. 9 App. 124; Cohea v. S. Id. 173; O'Neal v. S. 14 App. 582; Ante, § 142. See further as to taking and asportation, Ante, §§ 1266-1267.

§1295 — **Same—Fraudulent intent.** — The evidence must show satisfactorily, beyond a reasonable doubt, that the accused took the property *fraudulently*, with the intent to deprive the owner of the value of the same, and to appropriate it to his, the accused's, use or benefit. The fraudulent intent with which the property was taken is the very gist of the offense, and with-

out such intent there can be no theft. Such fraudulent intent must have existed in the mind of the accused at the *very time* that he took the property. If at the *very time* he came into the possession of the property, such fraudulent intent did not exist in his mind, such intent, subsequently formed, would not make the taking of the property theft. *Hernandez v. S.* 20 App. 151; *Wilson v. S.* Id. 662; *Warren v. S.* 17 App. 207; *Winn v. S.* Id. 284; *Reed v. S.* 8 App. 40; *Robinson v. S.* 11 App. 403; *Alusworth v. S.* Id. 839; *Wilson v. S.* 14 App. 205; *Wolf v. S.* Id. 202; *Knutson v. S.* Id. 570; *Deering v. S.* Id. 599; *McAfee v. S.* Id. 668; *Dow v. S.* 12 App. 843; *Landin v. S.* 10 App. 63; *Mullins v. S.* 37 Tex. 337; *Isaacs v. S.* 30 Tex. 450; *Billard v. S.* Id. 367; *Quitow v. S.* 1 App. 65; *Johnson v. S.* Id. 118; *Clayton v. S.* 15 App. 348; *Ricks v. S.* 19 App. 308; *Martindale v. S.* Id. 833. And such fraudulent intent must be to appropriate or convert the property *permanently*. An intent merely to use the property *temporarily*, without an intent to permanently appropriate it, is not such an intent as will constitute theft. *Wilson v. S.* 18 App. 270; *Loza v. S.* 1 App. 488; *Johnson v. S.* 36 Tex. 375; *Blackburn v. S.* 44 Tex. 457. The *intent* with which the property was taken is to be arrived at by considering all the circumstances, immediately or remotely attending the taking that may be relevant thereto. *McNair v. S.* 14 App. 78; *Jinks v. S.* 5 App. 68. The first and most important element, or *indicia* of fraudulent intent is an attempt at concealment. *Herber v. S.* 7 Tex. 69. But there may be theft without any attempt at concealment, for the fraudulent intent may be shown to have existed, by proof of other facts. The manner of the taking is merely a circumstance more or less cogent, according to the other facts proved, to demonstrate intent. A taking may be with fraudulent intent, and theft, although it be open and public, and without any attempt at concealment. *Billard v. S.* 30 Tex. 367; *Isaacs v. S.* Id. 450; *Terrell v. S.* 41 Tex. 463; *Loza v. S.* 1 App. 488; *Quitow v. S.* Id. 63; *Dignowitty v. S.* 17 Tex. 521. It is not theft to take a neighbor's horse openly in the streets of a city, and ride him a few miles in the country, with the intention fairly manifested, to return him to the owner. *McDaniel v. S.* 35 Tex. 419. Nor is it theft to take property openly, in the presence of others, or of another claimant, under color of title, without fraudulent intent. *Kay v. S.* 40 Tex. 29; *Boyd v. S.* 18 App. 339. Nor to take it under an honest, though mistaken claim of right. *Bray v. S.* 41 Tex. 203; *Thurman v. S.* 33 Tex. 684; *Ante*, § 1275. Under such circumstances the evidence must show: 1. That the accused took the property. 2. That it belonged to the alleged owner. 3. That it was taken fraudulently by the accused, and without belief on his part that it was his own. *Johnson v. S.* 41 Tex. 608; *Ante*, § 1275. But it is not essential to constitute theft that the taker should know who is the owner of the property. It is sufficient if he knows that it is not his own, and takes it with a fraudulent intent. *Lawrence v. S.* 20 App. 536. When the property was obtained by false pretext, the evidence must show an appropriation of it by the accused. It will not be sufficient to show merely its temporary use by him. *Berg v. S.* 2 App. 148; *Ante*, § 1269. The mere fact that the accused rode an estray horse several days in the neighborhood, is not sufficient to show a fraudulent taking and permanent appropriation of the horse. *Blackburn v. S.* 44 Tex. 457. See, also, *Johnson v. S.* 36 Tex. 375; *Pitts v. S.* 3 App. 210. But an "estrays" is the subject of theft, and it is no defense that the animal was delivered to the accused by another person, who had taken it up and had not legally estrayed it. *S. v. Apel*, 14 Tex. 428; *Owens v. S.* 7 App. 470. In *Debbs v. S.* 43 Tex., it was held that if the accused honestly believed that the owner of an animal had forfeited his title to it, by a failure to brand it, the appropriation of such animal under such belief, would not be theft. But in the subsequent case of *Lawrence v. S.* 20 App. 536, it is held that the fraudulent taking of an unmarked sheep, goat or hog, is as much theft as though the same had been marked, and the doctrine laid down in the *Debbs* case, *supra*, is overruled. It is competent for the State to prove the theft of other property at the same time and place as the property in question, if such proof conduces to establish identity in developing the *res gestæ*, or to prove the guilt of the accused by circumstances connected with the theft, or to show the *intent* with which the accused acted with respect to the property for the theft of which he is on trial. *Carter v. S.* 23 App. 508; *Mayfield v. S.* Id. 645; *Holmes v. S.* 20 App. 509; *Kelly v. S.* 18 App. 262; *House v. S.* 16 App. 81; *Jones v. S.* 14 App. 85; *McCall v. S.* 2 Id. 853; *Long v. S.* 11 App. 381; *Davidson v. S.* 12 App. 215; *Tyler v. S.* 13 App. 205; *Galbraith v. S.* 41 Tex. 567; *Ivey v. S.* 43 Tex. 425; *Wright v. S.* 10 App. 476; *Webb v. S.* 8 App. 115; *Hardin v. S.* Id. 653; *Smith v. S.* 21 App. 96; *Smith v. S.* Id. 133; *Conley v. S.* Id. 495. The State is not entitled to prove that accused had been "extradited" from Mexico on another charge. *Fore v. S.* 5 App. 251. Nor that he was a "county convict." *Persons v. S.* 3 App. 240. Nor that he had "conscripted" cattle found in his possession. *Debbs v. S.* 43 Tex. 650. The defendant may rebut the State's evidence tending to show fraudulent intent by any facts and circumstances which may tend to show that he took the property without such fraudulent intent. He is not restricted to proof that he owned the property or had a legal right to take it. *Wills v. S.* 40 Tex. 69; *Smith v. S.* 41 Tex. 168; *Bawcom v. S.* Id. 189. Where the proof showed that the defendant was the hired hand of another person, hired to drive cattle, merely to prove that the stolen cattle were found in the herd which the defendant had in charge, is not sufficient to warrant his conviction of the theft. *Allen v. S.* 43 Tex. 517; *Perry v. S.* 41 Tex. 483. Contradictory statements are not sufficient evidence of crime where the evidence shows that they were prompted by another motive than concealment of the guilt of the accused. *Porter v. S.* 43 Tex. 368. An indictment for the theft of cattle is sustained by proof that the cattle were killed with the fraudulent intent of appropriating their hides. *Musquez v. S.* 41 Tex. 287; *McPhail v. S.* 9 App. 164. It is permissible for a defendant charged with theft of animals to prove his directions given to his employees in relation to the animals for the purpose of rebutting fraudulent intent. *Bawcom v. S.* 41 Tex. 189. An unrecorded brand or an unauthorized bill of sale, though inadmissible to prove title, may be competent to rebut a fraudulent intent. *Long v. S.* 1 App. 466.

§1296 — **Same — Identity of the property alleged to have been stolen.** — The property must be identified as the alleged stolen property by the best evidence attainable. *Garcia v. S.* 26 Tex. 209. But positive identification of paper money may, under some circumstances, be dispensed with. *Bagley v. S.* 3 App. 163. The property described in the indictment must be proved as described. If the property be described with unnecessary particularity in the indictment, such description must nevertheless be proved, or the indictment will not be sustained. *Hill v. S.* 41 Tex. 253; *Warrington v. S.* 1 App. 168; *Rose v. S.* Id. 401; *Watson v. S.* 5 App. 11; *Allen v. S.* 8 App. 360; *Simpson v. S.* 10 App. 681; *Davis v. S.* 13 App. 215; *Courtney v. S.* 3 App. 258; *McGee v. S.* 4 App. 625; *Cameron v. S.* 9 App. 332; *Gray v. S.* 11 App. 411. But where the variance is as to surplusage, or as to immaterial matter, it will not be fatal. The rule requiring the descriptive averments in the indictment to be proved is complied with when such averments are substantially proved, as that one identifies the other. *Smith v. S.* 7 App. 382; *Sweat v. S.* 4 App. 617; *Wolf v. S.* Id. 332; *Menly v. S.* 3 App. 382; *Stoneham v. S.* Id. 594; *Roth v. S.* 10 App. 27; *Hart v. S.* 14 App. 657. When the indictment charges the theft of two or more animals or of several articles of property, a conviction may be had when the proof shows the theft of but one of the animals, or of but one of the articles described. *Alderson v. S.* 2 App. 10. As to identity of animals see §§ 1314-1318. The jury cannot leave the court room and inspect the alleged stolen property, even with the consent of the defendant. *Smith v. S.* 42 Tex. 444.

§1297 — **Same — Ownership and possession.** — The allegations in the indictment of the ownership and possession of the alleged stolen property must be proved as laid. A material variance between these allegations and the evidence will be fatal. Proof of either a general or special property in the alleged owner will be sufficient. *Jinks v. S.* 5 App. 68; *Skipwith v. S.* 8 App. 135; *Walker v. S.* 9 App. 38; *Frazier v. S.* 13 App. 434. See upon this subject, Ante, §§ 1258-1273. The ownership of animals may be proved otherwise than by a bill of sale. Exclusive control, care and management of the property is sufficient proof of ownership. *Phillips v. S.* 17 App. 169; *Dodd v. S.* 10 App. 370; *Pippin v. S.* 9 App. 269; *Crockett v. S.* 5 App. 526. Where the indictment charges the ownership in two persons jointly, it will not be sustained by proof that the ownership was in but one of the persons. *Brown v. S.* 35 Tex. 689. Where the indictment charges ownership in one person, and the proof shows that the property was owned jointly or in common by two or more persons, but was in the control, care and management of the alleged owner, the allegation of ownership is sustained. *Terry v. S.* 15 App. 66; *Henry v. S.* 45 Tex. 84; *Crockett v. S.* 5 App. 526. Where the indictment alleges that the ownership of the property is unknown, the evidence must show that the grand jury used reasonable diligence to discover the ownership, and failed to ascertain who the owner of the property was. The allegation that the owner of the property was unknown to the grand jury must be sustained by proof. *Williamson v. S.* 13 App. 514; *Jorasco v. S.* 6 App. 238. Ownership cannot be proved by a bill of lading and indorsements. *Radford v. S.* 35 Tex. 15. Brands upon animals are not evidence of ownership unless recorded. But ear marks are evidence of ownership though not recorded. *Love v. S.* 15 App. 563; *Johnson v. S.* 1 App. 333. And an unrecorded brand is competent evidence of the identity of the animal, though not of ownership. *Coombes v. S.* 17 App. 258. The proof of record of a brand to show ownership must be made by the record itself, or by a certified or sworn copy thereof. It cannot be made by parol evidence. *Elsner v. S.* 22 App. 687. Ownership of animals, however, may be proved in other ways than by marks and brands. *Corn v. S.* 41 Tex. 302; *Poag v. S.* 40 Tex. 151; *Allen v. S.* 42 Tex. 518; *Johnson v. S.* 1 App. 333; *Jones v. S.* 3 App. 498; *Lockhart v. S.* Id. 567; *Fisher v. S.* 4 App. 181; *Wolf v. S.* Id. 332; *Hutto v. S.* 7 App. 44; *Love v. S.* 15 App. 563; *Wyers v. S.* 21 App. 448; *Dreyer v. S.* 11 App. 631. Where a brand was recorded after the theft was committed, it was held that it was admissible in connection with other evidence, but of itself was not sufficient evidence of ownership. *Priesmuth v. S.* 1 App. 480; *Harvey v. S.* 21 App. 178. A certified copy of the record of a recorded mark and brand is competent evidence. The original record need not be produced. *Wilson v. S.* 3 App. 206. When a mark and brand has been recorded in a county comprising the intended range of the owner's stock, it is admissible in evidence in any county in which a prosecution for the theft of such stock may be instituted. *Atterberry v. S.* 19 App. 401. A bill of sale, executed by the general to the special owner, after the alleged theft from the special owner, is not admissible to prove ownership. *Groom v. S.* 23 App. 82. A bill of sale cannot be introduced in evidence without proof of its execution unless it has been filed among the papers in the cause at least three days before the commencement of the trial, and notice of such filing given to the opposite party or his attorney. And if there be a subscribing witness to the bill of sale, its execution cannot be proved by another witness who testifies that he saw it executed, unless the absence of the subscribing witness be accounted for. An unacknowledged, unrecorded bill of sale is admissible to prove ownership in theft. But the property mentioned in the bill of sale must be identified as the alleged stolen property. *Morrow v. S.* 22 App. 239. It is not a valid objection to a bill of sale that it was recorded in the wrong record book. *Britt v. S.* 21 App. 215. See further as to bills of sale, Post, § 1324. Animals running in their accustomed range are in the possession of their owner. If they are under the control, care and management of a special owner, they are in the possession of such special owner. *Moore v. S.* 8 App. 496; *Mackey v. S.* 20 App. 603; *Littleton v. S.* 20 App. 168; Ante, § 1273.

See also as to mark and brand, *Harwell v. S.* 22 App. 251. The particular portion of the animal upon which the brand is placed is as important as the characters used. Where the brand was to be placed on the hip evidence showing that it was on the ribs was held insufficient. *Priesmuth v. S.* 1 App. 480. But such a variance may be explained by other evidence. *Harwell v. S.* 22 App. 25.

**§1298 — Same — Want of owner's consent.** — As to allegation of want of owner's consent, see *Ante*, § 1259. The allegation of want of the owner's consent to the taking of the property must be proved. It cannot be presumed merely from the possession of property recently stolen. *Garcia v. S. 26 Tex. 209*. It cannot be proved by the owner's declarations to third persons. *West v. S. 32 Tex. 651*. Nor by the mere fact that, in a dispute with the clerk as to whether defendant had bought the article, the former said he had not. *Davis v. S. 37 Tex. 227*. Nor by mere proof that the alleged owner claimed the property and took it. *Jorasco v. S. 8 App. 540*. But the fact of the want of the owner's consent may be proved by circumstantial evidence. *Willson v. S. 45 Tex. 76*; *McMahon v. S. 1 App. 102*; *Welsh v. S. 3 App. 422*; *Foster v. S. 4 App. 246*; *Trafton v. S. 5 App. 480*; *Rains v. S. 7 App. 588*; *Kemp v. S. 38 Tex. 110*; *Stewart v. S. 9 App. 321*; *Spruill v. S. 10 App. 695*; *Wilson v. S. 12 App. 481*; *Mackey v. S. 20 App. 603*. But circumstantial evidence should not be resorted to when direct evidence of the fact is attainable. *Wilson v. S. 12 App. 481*; *Bowling v. S. 14 App. 338*; *Williamson v. S. Id. 514*; *Anderson v. S. 14 App. 49*; *Love v. S. 15 App. 563*; *Miller v. S. 18 App. 34*; *Shultz v. S. 20 App. 308*; *Williams v. S. 19 App. 277*. Where ownership is alleged in two or more persons, the want of consent of each of the alleged owners must be proved. *Williams v. S. 19 App. 276*; *McIntosh v. S. 18 App. 285*. If the alleged owner proves to be an agent of the general owner, he may testify as to his authority as agent without producing a power of attorney. *Turner v. S. 7 App. 596*. The defendant cannot prove declarations of the owner, made after the alleged theft, that the property was taken with his consent, although the owner be dead at the time of the trial. *Sneed v. S. 4 App. 514*. As to bill of sale of property, when offered as evidence by defendant, see *Long v. S. 1 App. 466*; *Shoefercator v. S. 5 App. 207*; *Dreyer v. S. 11 App. 631*. Where the theft is committed by means of false pretexts, the want of the owner's consent to the taking is shown by proof that the property was obtained from him by such means. *Ante*, § 1269.

**§1299 — Same — Possession of stolen property.** — Possession of stolen property is presumptive evidence of the guilt of the possessor of the theft. It may be strong or weak, according to the circumstances of the case. It is merely a circumstance to be considered by the jury in connection with all the evidence adduced. And to warrant an inference or presumption of guilt from the circumstance of possession alone, such possession must be *recent*, must be *personal* and *exclusive*, must be *unexplained*, and must involve a distinct and conscious assertion of property by the defendant. *Robinson v. S. 22 App. 690*; *Ayres v. S. 21 App. 399*; *Lehman v. S. 18 App. 174*; *Sullivan v. S. Id. 623*; *York v. S. 17 App. 441*; *Roberts v. S. Id. 82*; *Bragg v. S. Id. 219*; *Perkins v. S. 32 Tex. 109*; *McNair v. S. 14 App. 83*; *Schindler v. S. 15 App. 394*; *Faulkner v. S. Id. 115*; *Thomas v. S. 43 Tex. 658*; *Yates v. S. 37 Tex. 202*; *Beck v. S. 44 Tex. 430*; *Jenkins v. S. 30 Tex. 444*; *Mondragon v. S. 33 Tex. 480*. It was formerly held that the circumstance of possession of recently stolen property, unexplained, would not, standing alone, be sufficient to warrant a conviction of the theft. *Hannah v. S. 1 App. 578*; *Truax v. S. 12 App. 230*. But these decisions have been overruled and it is now the settled doctrine that if a party in whose possession property recently stolen is found, fails satisfactorily to account for his possession, the presumption of guilt arising from recent loss and possession will warrant his conviction of the theft. *Roberts v. S. 17 App. 82*; *McNair v. S. 14 App. 78*. Proof of possession of part of the stolen property if unexplained will support a conviction for the theft of all of it. *Hill v. S. 41 Tex. 253*. And that it was all taken at the same time. *Jack v. S. 20 App. 656*. But proof of possession will not be sufficient to warrant conviction, if the other facts in evidence are not consistent with guilt. *Wofford v. S. 44 Tex. 439*.

**§1300 — Same — Defendant's explanation of possession.** — When the possession of recently stolen property is relied on as inculpatory of the defendant, his explanation of such possession is admissible in his behalf, provided it was given on the first occasion for any explanation by him — that is, when he was first directly or circumstantially called upon to explain his possession. And his explanation is admissible in his behalf, although at the time it was made, he was not then in possession of the property. *Taylor v. S. 15 App. 356*; *Castellow v. S. Id. 551*; *Howell v. S. 16 App. 93*; *Ross v. S. Id. 554*; *Saltillo v. S. Id. 249*; *Lewis v. S. 17 App. 140*; *Heskey v. S. Id. 161*; *York v. S. Id. 441*; *Windham v. S. 19 App. 413*; *Schultz v. S. 20 App. 315*. And when his explanation of his possession of the property is natural, reasonable and probably true, it operates to rebut the presumption of guilt arising from his possession of the property, and in such case, if such explanation be not shown to be false, further evidence of the defendant's guilt will be required to warrant his conviction. *Roberts v. S. 17 App. 82*; *York v. S. Id. 441*; *Windham v. S. 19 App. 413*; *Schultz v. S. 20 App. 315*; *Howell v. S. 16 App. 93*; *Ross v. S. Id. 554*; *Irvine v. S. 13 App. 499*; *Sitterlee v. S. Id. 587*; *McCall v. S. 14 App. 353*; *Clement v. S. 22 App. 23*; *Clark v. S. Id. 599*; *Vaughn v. S. 21 App. 573*; *Miller v. S. 18 App. 34*; *Anderson v. S. 11 App. 576*. But the State is only required to prove the falsity of the defendant's explanation made at the time his possession was challenged. It cannot be required to disprove every conflicting explanation the defendant may have made. *Ashlock v. S. 16 App. 13*. Recent possession of stolen property may be accounted for by proof of the purchase of the same, whether the purchase be in good or bad faith. And if the defendant in fact purchased the property he cannot be convicted of the theft of it, although he knew at the time he purchased it that it had been stolen by the seller. *Prator v. S. 15 App. 363*; *McAfee v. S. 14 App. 668*; *Bond v. S. 23 App. 180*; *Shuler v. S. Id. 182*; *Curlin v. S. Id. 681*; *Anderson v. S. 11 App. 576*. Where several are jointly indicted for the theft, explanation of possession by any one of them is admissible in evidence in behalf of each of the defendants. *Shelton v. S. 11 App. 36*; *Wright v. S. 10 App. 476*. See facts held insufficient to convict, although defendant's explanation of his possession was shown to be false. *Norwood v. S. 20 App. 306*.



§1301 — **Same — Value — Venue — Time.** — As to proof of *value*, see Ante, § 1285. As to allegation of *value*, see Ante, § 1257. As to allegation of *venue*, § 1253. The allegation of *venue* must be proved, and on appeal, where there is a statement of facts in the record, unless such statement of facts shows proof of venue, the conviction will be set aside. Venue is an issue which must be affirmatively and not inferentially proved. *Ryan v. S.* 22 App. 699; *Briggs v. S.* 20 App. 106; *Latham v. S.* 19 App. 306; *Bragg v. S.* 17 App. 219; *Winn v. S.* 15 App. 169; *Williamson v. S.* 18 App. 514. Where the proof was that the stolen animal was seen in its accustomed range, in C county, one week before it was found in defendant's possession in another county, it was held that it was sufficiently proved that when taken, the animal was in C county. *Ashlock v. S.* 16 App. 13. Where the evidence shows that the property was stolen in another county than that of the prosecution, but was brought by the thief into the county of the prosecution, the allegation of venue is sustained. *Dixon v. S.* 15 App. 480; *Clark v. S.* 23 App. 612; *Schubert v. S.* 20 App. 320. It is not necessary to prove that the theft was committed on the day alleged, but it must be proved that it was committed at some time prior to the presentment of the indictment or information, and at a date within the period of limitation prescribed for a prosecution for the offense. *Jackson v. S.* 34 Tex. 136; *Fisher v. S.* 33 Tex. 792.

§1302 — **Same — Held sufficient to sustain conviction.** — *Smith v. S.* 35 Tex. 738; *Cox v. S.* 41 Tex. 1; *Cave v. S.* Id. 182; *Cameron v. S.* 44 Tex. 652; *Quitzon v. S.* 1 App. 65; *Brown v. S.* 2 App. 139; *Bagley v. S.* 3 App. 163; *Gonzalls v. S.* Id. 507; *Berry v. S.* 4 App. 492; *Bybu v. S.* Id. 505; *Blankenship v. S.* 5 App. 218; *West v. S.* 6 App. 485; *Slaughter v. S.* 7 App. 123; *Calhoun v. S.* Id. 340; *Hudson v. S.* 10 App. 215; *Dodd v. S.* Id. 370; *Lowe v. S.* 11 App. 253; *Rhodes v. S.* Id. 563; *Davidson v. S.* 12 App. 214; *Harris v. S.* 12 App. 309; *Jones v. S.* 14 App. 85; *Luttrell v. S.* Id. 147; *Magee v. S.* Id. 366; *Hart v. S.* Id. 657; *Terry v. S.* 15 App. 66; *Schultz v. S.* Id. 258; *Chandler v. S.* Id. 587; *Elam v. S.* 16 App. 34; *Cowill v. S.* Id. 57; *Sutton v. S.* Id. 490; *McAfee v. S.* 17 App. 135; *Reynolds v. S.* Id. 413; *Timbrook v. S.* 18 App. 1; *House v. S.* 19 App. 227; *White v. S.* Id. 343; *Atterberry v. S.* Id. 401; *Cunningham v. S.* 20 App. 162; *Lawrence v. S.* Id. 536; *Masterson v. S.* Id. 574; *Watson v. S.* 21 App. 598; *Rummel v. S.* 22 App. 558; *Hart v. S.* Id. 563; *Golden v. S.* Id. 1; *Porter v. S.* 23 App. 295.

§ 1303 — **Same — Held insufficient to sustain conviction.** — *Powers v. S.* 16 Tex. 546; *Brown v. S.* 32 Tex. 606; *Thurman v. S.* 33 Tex. 684; *Gardner v. S.* Id. 692; *Adams v. S.* 24 Tex. 526; *Radford v. S.* 35 Tex. 15; *Mullins v. S.* 37 Tex. 337; *Turner v. S.* 38 Tex. 166; *Ritcher v. S.* Id. 643; *McHenry v. S.* 40 Tex. 46; *Haynes v. S.* Id. 82; *Poag v. S.* Id. 151; *Galloway v. S.* 41 Tex. 289; *Crult v. S.* Id. 476; *Perry v. S.* Id. 483; *Johnson v. S.* Id. 608; *Cline v. S.* 43 Tex. 494; *McGee v. S.* Id. 662; *Martin v. S.* 44 Tex. 172; *Williams v. S.* Id. 84; *Beck v. S.* Id. 430; *Blockburn v. S.* Id. 458; *Wofford v. S.* Id. 439; *Loza v. S.* 1 App. 488; *Berg v. S.* 2 App. 148; *Merritt v. S.* Id. 177; *Moore v. S.* Id. 350; *Smith v. S.* Id. 477; *Butler v. S.* 3 App. 48; *Clark v. S.* 7 App. 57; *Curry v. S.* Id. 267; *Landin v. S.* 10 App. 63; *Ward v. S.* Id. 293; *Brite v. S.* Id. 368; *Weldon v. S.* Id. 400; *Hornbeck v. S.* Id. 408; *Ellis v. S.* Id. 540; *Simpson v. S.* Id. 681; *Spruill v. S.* Id. 695; *Winn v. S.* 11 App. 304; *Conn v. S.* Id. 390; *Green v. S.* 12 App. 51; *Casas v. S.* Id. 59; *Pettigrew v. S.* Id. 225; *Daw v. S.* Id. 343; *Hardeman v. S.* Id. 350; *Johnson v. S.* Id. 385; *Seymore v. S.* Id. 391; *Taylor v. S.* Id. 489; *Shelton v. S.* Id. 513; *Hunter v. S.* 13 App. 16; *Voight v. S.* Id. 21; *Myers v. S.* Id. 57; *Johnson v. S.* Id. 378; *McNair v. S.* 14 App. 78; *Mapes v. S.* Id. 129; *Dresch v. S.* Id. 175; *Wolf v. S.* Id. 210; *Crockett v. S.* Id. 226; *Hammel v. S.* Id. 326; *Knutson v. S.* Id. 570; *Deesing v. S.* Id. 599; *Evans v. S.* 15 App. 31; *Taylor v. S.* Id. 356; *Shindler v. S.* Id. 394; *Harris v. S.* Id. 411; *Dixon v. S.* Id. 480; *Buntain v. S.* Id. 490; *Castillow v. S.* Id. 551; *Womack v. S.* 16 App. 178; *Harrison v. S.* Id. 325; *Johnson v. S.* Id. 402; *Madison v. S.* Id. 435; *Tucker v. S.* Id. 471; *Flitcher v. S.* Id. 635; *Moore v. S.* 17 App. 176; *Harris v. S.* Id. 177; *York v. S.* Id. 441; *Williams v. S.* Id. 521; *Miller v. S.* 18 App. 34; *Lehman v. S.* Id. 174; *Heskey v. S.* Id. 275; *Fairy v. S.* Id. 314; *Small v. S.* Id. 336; *Boyd v. S.* Id. 339; *Trimble v. S.* Id. 632; *Foster v. S.* 19 App. 53; *Ricks v. S.* Id. 308; *Martindale v. S.* Id. 333; *Tarin v. S.* Id. 359; *McGuire v. S.* Id. 467; *Block v. S.* 20 App. 175; *Lott v. S.* Id. 230; *Norwood v. S.* Id. 306; *Holley v. S.* 21 App. 156; *Messeldine v. S.* Id. 335; *Roberts v. S.* Id. 460; *Wilkerson v. S.* Id. 501; *McLaren v. S.* Id. 513; *Benton v. S.* Id. 554; *Vaughn v. S.* Id. 573; *Owens v. S.* Id. 579; *Cain v. S.* Id. 662; *Page v. S.* 22 App. 551; *Clark v. S.* Id. 599; *Philpps v. S.* Id. 621; *Robinson v. S.* Id. 690; *Ryan v. S.* Id. 699; *Donohoe v. S.* 23 App. 457; *White v. S.* Id. 643.

§1304 — **Same — Other decisions relating to.** — For decisions relating to accomplice testimony, circumstantial evidence, confessions, *Res gestæ*, and other decisions upon evidence not stated in this chapter, see title 8, chap. 7, of Code of Criminal Procedure. EVIDENCE.

§1305 — **Former acquittal or conviction.** — The theft of different articles of property at the same time and place, by the same act, constitutes but one offense, although said property may be owned by different persons, and may be taken from the possession of different persons. In such case a judgment of acquittal or conviction of the theft of a portion of the property, will be a bar to a prosecution for the theft of other portions of it. *Wilson v. S.* 45 Tex. 76; *Quitzon v. S.* 1 App. 48; *Hozier v. S.* 6 App. 542; *Hudson v. S.* 9 App. 151; *Adams v. S.* 16 App. 162; *Alexander v. S.* 21 App. 406. Where the evidence showed that the theft of cattle belonging to two different owners was the same act, it was held, that a conviction of the theft of the cattle of one of said owners would bar a prosecution for the theft of the cattle of the other owner. But, the indictment only charging the theft of the cattle belonging to one of said owners, an acquittal upon said charge would not bar a prosecution for the theft of the cattle belonging to the other owner, notwithstanding the transaction be the same, and the evidence identical. *Bright v. S.*



17 App. 152; *Alexander v. S.* 21 App. 406; *Simco v. S.* 9 App. 338. Where the first indictment charged a theft from H. Franks, and the second one charged it from H. Frank, it was held, that the former could not be pleaded in bar of the latter. *Parchman v. S.* 2 App. 228; *Branch v. S.* 20 App. 599. Where, under an indictment, charging the theft of cattle, the defendant was convicted of the offense defined by article 749 Post, but was granted a new trial, it was held, that he might properly be convicted on the second trial of theft as denounced by article 747, Post. *Campbell v. S.* 23 App. 262, overruling *Sisk v. S.* 9 App. 90.

§1306 — **Charge of the court.** — The charge should instruct the jury on the law applicable to the particular case before them, as developed by the facts proved. It should apply the law to the evidence. It is not essential that it should give the statutory definition of theft; but failing to do this it should inform the jury of the nature and character of the elements and ingredients of the offense. It should instruct as to fraudulent intent; that such intent is the essential ingredient of theft, and must have existed in the mind of the defendant at the very time he took the property; that such intent formed subsequent to the taking will not constitute theft; that a fraudulent intent embraces the ideas; that the defendant knew when he took the property that it did not belong to him; that he took it intending at the time to deprive the owner of the value of it, and to appropriate the same permanently to his own use or benefit; that to constitute a fraudulent taking, it must be an intentional taking without the consent of the owner, an intentional fraud, and an intentional appropriation. *Johnson v. S.* 1 App. 118. As to the taking and asportation of the property, see Ante §§ 1266, 1269, 1294. As to the fraudulent intent, § 1295. The charge must confine the fraudulent intent to the *very time* of the taking. *Warren v. S.* 17 App. 207. Where the evidence requires it the jury should be instructed as to the distinction between trespass and theft. *Bray v. S.* 41 Tex. 208; *Harris v. S.* 2 App. 102; *McPhall v. S.* 10 App. 128. Where there is evidence tending to show that the defendant took the property under an honest claim of right, such issue should be submitted to the jury under proper instructions, and the jury should be directed to acquit the defendant if from the evidence they entertained a reasonable doubt that he took the property fraudulently. *Cameron v. S.* 9 App. 332; *Sigler v. S.* Id. 427; *Miles v. S.* 1 App. 510; *Loza v. S.* Id. 488; *Hamilton v. S.* 2 App. 494; *Bray v. S.* 41 Tex. 203; *Varas v. S.* Id. 527; *Thompson v. S.* 43 Tex. 268; *Williams v. S.* 22 App. 332; *Evans v. S.* 15 App. 81; *Heskew v. S.* 18 App. 275. Where the evidence requires it, the court should instruct the jury that if the defendant took the property, with the intent at the time of appropriating it *temporarily*, but not *permanently*, they should acquit him. *Wilson v. S.* 18 App. 270; *Loza v. S.* 1 App. 488; *Blackburn v. S.* 44 Tex. 457; *Johnson v. S.* 36 Tex. 375; *Banks v. S.* 7 App. 591; *Dunham v. S.* 3 App. 465. Where there is evidence tending to show that the defendant purchased the property after it had been stolen by another, the charge should instruct the jury upon this issue, and direct the acquittal of the defendant, if from the evidence the jury entertained a reasonable doubt of his complicity in the theft. In such case the charge should not make the defendant's innocence depend upon his *honest* purchase of the property. If he in fact purchased it, having had no complicity in taking it, he cannot be convicted of theft, although he knew at the time of purchasing it that his vendor had stolen it. *Clayton v. S.* 15 App. 348; *Prator v. S.* Id. 363; *Faulkner v. S.* Id. 115; *Anderson v. S.* 11 App. 576; *Barrett v. S.* 18 App. 64; *Murphy v. S.* 17 App. 645; *Morrow v. S.* 22 App. 239; *McAfee v. S.* 14 App. 668; *Bond v. S.* 23 App. 180; *Shuler v. S.* Id. 182. Evidence of a purchase necessitates a charge in relation thereto, no matter what the court may think of its credibility. *Heath v. S.* 7 App. 464; *Smith v. S.* Id. 382; *Beekham v. S.* 8 App. 52; *Vincent v. S.* 9 App. 303; *Henry v. S.* Id. 358; *Ray v. S.* 13 App. 51. Where there is a doubt raised by the evidence that the defendant had any connection with or complicity in the original taking of the property, the court should instruct the jury that he cannot be convicted of the theft of the property unless the evidence shows beyond a reasonable doubt that he participated in the original taking, no matter what connection he may have had with the property thereafter. *Tucker v. S.* 21 App. 699; *Curlin v. S.* 23 App. 681; *McAfee v. S.* 17 App. 135. If the evidence tends to show an acting together with others, conspiracy or complicity in the taking (or with a view to the covering up of a fraudulent taking), between the vendor in a bill of sale, and the defendant, it would not only be right but proper for the court to submit the *bona fides* of the bill of sale, that the jury might ascertain and find whether or not it was a sham or device conceived to cover up and avoid the theft. *Roberts v. S.* 17 App. 82; *Prator v. S.* 15 App. 363; *Shoefercater v. S.* 5 App. 207. If an animal was purchased by the defendant with the knowledge that it had been stolen by his vendor, and the animal escapes and returns to the possession of the owner, and the defendant then takes it, he is guilty of theft. *McAfee v. S.* 17 App. 135; *Ashlock v. S.* 16 App. 13. The charge must not authorize a conviction without guilty knowledge or intent. *Logan v. S.* 2 App. 408; *Riojas v. S.* 8 App. 49; *Spinks v. S.* Id. 125; *Vincent v. S.* 9 App. 303; *Henry v. S.* Id. 358; *Ray v. S.* 13 App. 51; *Chapman v. S.* 1 App. 723. Where two persons are jointly indicted, the court may charge on the theory that one took and the other was present, knowing the unlawful intent, etc. *Cruitt v. S.* 41 Tex. 476; *Bybee v. S.* 4 App. 505; *Berry v. S.* Id. 492. And even when the defendant is indicted alone, on proper evidence, the court may charge the law of principals. *Corn v. S.* 41 Tex. 301. The charge should instruct that the allegations of ownership and possession should be proved, and that unless proved the defendant should be acquitted. *Williams v. S.* 4 App. 5; *Kay v. S.* 40 Tex. 29; *Bray v. S.* 41 Tex. 560; *Robinson v. S.* 5 App. 519; Ante, §§ 1258-1298. It should also instruct that the allegation of want of consent must be proved. *Lindley v. S.* 8 App. 445; *Burt v. S.* 7 App. 578; Ante, §§ 1259-1299. Also that the property alleged to have been stolen must be identified, where any question arises as to its being the same property found in possession of the defendant, and the evidence as to the description of the property must not be materially variant from the property described in the indictment. Ante, §§ 1256-1297. Where the punishment is dependent upon the value of the property, the charge

must explain the law upon the subject applicable to the facts in evidence and the standard of value. *Jackson v. S.* 20 App. 190; *Saddler v. S.* Id. 195; *Ante*, §§ 1257-1285. It should, also, instruct as to the venue of the offense. *Ante*, §§ 1253-1302. Where the property alleged to have been stolen was *lost* property, the rules with reference to theft in such case should be explained in the charge. *Ante*, § 1270. Where the theft was committed by means of false pretext, the rules in relation to such theft should be explained in the charge. *Ante*, § 1270. With regard to the presumption of guilt arising from possession of the property, the jury should not be told that the possession of recently stolen property is presumptive evidence of guilt. *Williams v. S.* 4 App. 178; *Alderson v. S.* 2 App. 10; *Foster v. S.* 1 App. 363; *Chapman v. S.* Id. 728; *Perry v. S.* 41 Tex. 484; *Thompson v. S.* 43 Tex. 268; *Thomas v. S.* Id. 658; *McCoy v. S.* 44 Tex. 618; *Parish v. S.* 45 Tex. 51. It is a mere circumstance to be considered by the jury in connection with other evidence, and the jury should not be told otherwise. *Watkins v. S.* 2 App. 73; *Allen v. S.* 4 App. 581; *Williams v. S.* Id. 178; *Gose v. S.* 6 App. 121; *Conner v. S.* Id. 455. But the jury should, if the evidence requires it, be instructed that possession of the alleged stolen property cannot be considered as evidence of the defendant's guilt, unless such possession was *recent*, was *personal* and *exclusive*, and was *unexplained* by the defendant. *Ante*, § 1300. When there is proof tending to show that defendant explained or accounted for his possession of the property, the charge should not fail to properly instruct the jury as to the effect of such evidence. *Ante*, § 1301. Where there is evidence tending to show a voluntary return of the property to the owner, the charge should not fail to submit that issue, explaining the law in relation thereto. *Ante*, §§ 1286-1287. Where there is evidence adduced by the State proving or tending to prove the theft of other property than that alleged in the indictment at the same time and place, the charge should not fail to instruct the jury that such testimony can only be considered by them for the purpose for which it was admitted, that is, to establish identity in developing the *res gestæ*, or to prove the guilt of the accused by circumstances connected with the theft, or to show the intent with which the defendant acted with respect to the property for the theft of which he is on trial; and that they could not convict the defendant for the theft of any other property than that named in the indictment. *Carter v. S.* 23 App. 508; *Davis v. S.* Id. 210; *Clark v. S.* Id. 612; *Mayfield v. S.* Id. 645; *Alexander v. S.* 21 App. 406; *House v. S.* 16 App. 25. A charge which assumed that the property named in the indictment was stolen, and that the defendant was the thief, was held erroneous. *White v. S.* 21 App. 339. It is error to charge that the possession of a stolen animal by the defendant, without a written transfer or bill of sale thereto, is *prima facie* evidence that such possession was illegal. *White v. S.* 21 App. 339; *Gomez v. S.* 15 App. 64; *Schindler v. S.* Id. 394; *Florez v. S.* 13 App. 665; *Garcia v. S.* 12 App. 335; *Post*, § 1324. It is a charge upon the weight of evidence and error to instruct the jury that if a part of the alleged stolen property was found and identified as such, the theft of the remainder might be inferred from that fact, if all of the property is shown to have been stolen at the same time and place. *White v. S.* 17 App. 188. For other decisions relating to the charge and pertinent to this offense, as well as to others, see notes to articles 677 to 686 inclusive, Code of Criminal Procedure.

§1307 — ART. 743. — **Receiving stolen property.** — If any person shall receive or conceal property, which has been acquired by another, in such manner as that the acquisition comes within the meaning of the term theft, knowing the same to have been so acquired, he shall be punished in the same manner as by law the person stealing the same would be liable to be punished. [O. C. 745a, added by Act Feb. 12, 1858, pp. 180-181.]

Indictment. *Willson's Cr. Forms*, 512; approved in *Brothers v. S.* 22 App. 447.

§1308 — **Indictment under preceding article.** — It is unnecessary to allege the name of the thief by whom the property was stolen, or the time or place of the theft; but the name of the owner of the property if known should be alleged, and the name of the person from whom the property was received by the defendant, or that the names of such persons were unknown to the grand jury. *S. v. Perkins*, 45 Tex. 10. It need not be alleged that the stolen property was received or concealed by the defendant, without the consent of the owner, or with the intent to deprive the owner of the value of it, and to appropriate it to the defendant's use or benefit. It is not necessary to charge that the defendant received or concealed the property with intent to defraud any person. *Nourse v. S.* 2 App. 304. Nor is it necessary to allege the facts which constituted the theft of the property. *Brothers v. S.* 22 App. 447; *Hodges v. S.* Id. 415. The indictment may charge both *receiving* and *concealing*, and a conviction may be had upon proof of either. *Nourse v. S.* 2 App. 304.

§ 1309 — **Other decisions under preceding article.** — A conviction for this offense cannot be had under an indictment charging theft. *Brown v. S.* 15 App. 581; *Chandler v. S.* Id. 587; *Gaither v. S.* 21 App. 527; *Ante*, § 1264. That the defendant, subsequent to the theft of the property, and with knowledge that it was stolen, aided the thief to dispose of it, or purchased it from the thief, are facts sufficient to support a conviction for receiving stolen property, knowing it to be stolen, but not to support a conviction for theft. *Prator v. S.* 15 App. 363. To sustain a conviction for receiving, etc., stolen property, it must satisfactorily appear beyond a reasonable doubt. 1. That the property was acquired by theft, and 2, that the defendant, knowing it to have been so acquired, received or concealed the same. *Wilson v. S.* 12 App. 481. It being necessary to authorize a conviction for receiving stolen property, knowing it to be stolen, that the theft of the property should be established, the acts and declarations of the thief are admissible to prove the theft, but the court in its charge to the jury should explain

he purpose for which such testimony is admitted, and direct the jury to not consider it for any other purpose. *Tucker v. S.* 23 App. 512. See *Estes v. S.* 23 App. 600, for evidence held to be hearsay, and improperly admitted against the defendant. Where the defendant was charged with receiving a yearling, knowing that the same was stolen, it was held competent for the State to prove that at the same time he received said yearling, he also received in connection with another person, and from the same thief, two other cattle, and that in connection with said other person, he sold the three cattle at the same time to a third person. Said testimony was admissible as tending to show defendant's knowledge and intent with respect to the animal named in the indictment. *Harwell v. S.* 22 App. 251. In the same case it was held error to reject evidence offered by the defendant to prove that before he received the cattle from the thief, the said thief had claimed the same as his property, and had bargained them to another party. The State having proved an act of the defendant, it was held that defendant should have been permitted to prove his statements accompanying and explanatory of said act. *Gaither v. S.* 21 App. 527. The thief is an accomplice in this offense, and a conviction cannot be sustained upon his testimony unless it is corroborated. *Miller v. S.* 4 App. 251. This offense is punishable the same as the theft of the property. *Nourse v. S.* 2 App. 805; *Vincent v. S.* 10 App. 330. For evidence held sufficient to sustain a conviction, see *Shaw v. S.* 27 Tex. 750; *Boon v. S.* 42 Tex. 237; *Nourse v. S.* 2 App. 804; *Tucker v. S.* 23 App. 512. For evidence held insufficient to sustain a conviction, see *Estes v. S.* 23 App. 600; *Brothers v. S.* 22 App. 447.

## CH. 10.—OF THEFT FROM THE PERSON.

ART.	SEC.	ART.	SEC.
744. Punishment for.	1310	Decisions relating to theft from the	
745. Ingredients of the offense.	1311	person.	1312

§1310 — ART. 744. — **Punishment for.** — If any person shall commit theft by privately stealing from the person of another, he shall be punished by confinement in the penitentiary not less than two nor more than seven years. [O. C. 762.]

Indictment, Willson's Cr. Forms, 472.

§1311 — ART. 745. — **Ingredients of the offense.** — To constitute the offense it is necessary that the following circumstances concur: —

1. The theft must be from the person; it is not sufficient that the property be merely in the presence of the person from whom it is taken.

2. The theft must be committed without the knowledge of the person from whom the property is taken, or so suddenly as not to allow time to make resistance before the property is carried away.

3. It is only necessary that the property stolen should have gone into the possession of the thief; it need not be carried away in order to complete the offense. [O. C. 763.]

§1312 — **Decisions relating to theft from the person.** — To constitute this offense the theft must be from the person, and not merely in the presence of the dispossessed party, and be committed without his knowledge, or so suddenly as to preclude resistance before asportation. If an indictment contains these allegations, in addition to those necessary to charge theft in general, it is substantially sufficient. *Woodard v. S.* 9 App. 412. But it will be insufficient without said allegations that the property was taken without the knowledge of the person dispossessed, or so suddenly as not to allow time to make resistance before it was carried away. *Kerry v. S.* 17 App. 178; *Gage v. S.* 22 App. 123. The indictment must allege, and the proof must show the ownership of the property and that the property was taken without the owner's consent. *Anderson v. S.* 14 App. 49. In this offense the punishment is not graded by the value of the property taken, as in ordinary theft, but the offense is *per se* a felony, if the article taken be of any value. It is not necessary therefore to allege or prove the value of the property taken. *Bennett v. S.* 16 App. 236; *Shaw v. S.* 23 App. 493; *Harris v. S.* 17 App. 132; *Flynn v. S.* 42 Tex. 301. An indictment which describes the property as "eight dollars, the same being the corporeal personal property of John Schell," was held bad, because it did not sufficiently describe the property. *Dukes v. S.* 22 App. 192. This offense being essentially different from ordinary theft, a conviction thereof cannot be had under an indictment for ordinary theft. *Harris v. S.* 17 App. 132. As to indictment for theft in general see Ante, § 1253, et seq. In this offense, as in ordinary theft, the taking of the property includes the carrying away of the same, and if the property was taken too suddenly to allow time for resistance, it was also carried away too suddenly to allow time for resistance. In other words asportation is no more necessary to constitute theft from the person, than it is to constitute ordinary theft: *Dukes v. S.* 22 App. 192; *Flynn v. S.* 42 Tex. 301; Ante, § 1266-1267-1294. This offense can be prosecuted only in the county where the act was committed. It cannot, like ordinary theft, be prosecuted in any county through or into which the thief may carry the property. *Gage v. S.* 22 App. 123; *Roth v. S.* 10 App. 27. For evidence held sufficient to sustain a conviction, see *Shaw v. S.* 23 App. 493; *Woodard v. S.* 9 App. 412; *Flynn v. S.* 42 Tex. 301. For other rules and decisions pertinent to this offense see preceding chapter.

## CH. 11.—THEFT OF ANIMALS.

ART.	SEC.	ART.	SEC.
746. Theft of horse, etc. Decisions relating specially to preceding article.	1313 1314	Decisions relating to preceding article.	1318
747. Theft of cattle. Decisions relating to this offense.	1315 1316	749. Willfully driving stock from range,—theft.	1319
748. Theft of sheep, hogs, etc., how punished.	1317	750. Party may drive stock in range.	1320
		751. What proof sufficient for the State. Decisions relating to this offense.	1321 1322

§1313 — ART. 746. — **Theft of horse, etc.** — If any person shall steal any horse, ass or mule, he shall be punished by confinement in the penitentiary not less than five nor more than fifteen years. [O. C. 765, amended by Act of Feb. 12, 1858, p. 181.]

Amended in revising by omitting the words "gelding, mare, colt," which were contained in the original article. Indictment, Willson's Cr. Forms, 473.

§1314 — **Decisions relating specially to preceding article.** — Prior to the amendment of the preceding article in revising it, by omitting therefrom the words "gelding, mare, colt," it was held that where the indictment alleged the animal stolen to be a "horse," and the proof showed that it was a "gelding," or a "mare," or a "colt," there was a fatal variance, and the conviction could not be sustained. It was required that the allegation that the animal was a "horse," or a "gelding," or a "mare," or a "colt," must be strictly proved, and that one of these could not be alleged, and another proved. *Banks v. S.* 28 Tex. 644; *Swindell v. S.* 32 Tex. 102; *Jordt v. S.* 31 Tex. 571; *Gibbs v. S.* 34 Tex. 134; *Keesee v. S.* 1 App. 298; *Lunsford v. S.* Id. 448; *Persons v. S.* 3 App. 241; *Brisco v. S.* 4 App. 219. But it is now only necessary to allege that the animal was a "horse," or an "ass," or a "mule," and a conviction will be sustained upon proof that it was an animal included within the generic word used. *Valesco v. S.* 9 App. 76; *Johnson v. S.* 16 App. 402; *Davis v. S.* 23 App. 210. An indictment which alleged that the animal stolen was "an animal of the horse species," was held to be sufficient, but reprehensible pleading. *Smythe v. S.* 17 App. 472. It is unnecessary to further describe the animal in the indictment, than to allege that it was a "horse," an "ass," or a "mule." If it be more particularly described as by its color, or brand, or sex, the descriptive allegation must be proved, or a conviction cannot be sustained. *Ante*, §§1256-1296; *Allen v. S.* 8 App. 360. The value of the animal need not be alleged or proved. *Lopez v. S.* 20 Tex. 781; *Johnson v. S.* 29 Tex. 492; *Davis v. S.* 40 Tex. 134. *Ante*, §§1257-1301. Animals in their accustomed range are in the possession of their owner, and if there be a special owner, they are in his possession. *Ante*, §§1273, 1297. For other statutory provisions and decisions pertinent to this offense, see chapter 9 of this title. Under an indictment for this offense, the defendant may be convicted of the offense denounced by article 749, Post. *Campbell v. S.* 22 App. 262; *Foster v. S.* 21 App. 80; *Smith v. S.* Id. 134. *Ante*, §1263. And where such conviction was had, and a new trial granted the defendant, it was held that on another trial he might be convicted of the theft as charged in the indictment. *Campbell v. S.* 22 App. 262, overruling *Sisk v. S.* 9 App. 90.

§1315 — ART. 747. — **Theft of cattle.** — If any person shall steal any cattle, he shall be punished by confinement in the penitentiary not less than two nor more than five years. [O. C. 766, amended by Act May 17, 1873, p. 80.]

Amended by omitting the word "neat" before the word "cattle," and also by omitting the words, "sheep, goat or hog."

Indictment, Willson's Cr. Forms, 474.

§1316 — **Decisions relating to this offense.** — The following descriptions of animals have been held sufficient: "Two beeves, the same being cattle." *Hubotter v. S.* 32 Tex. 479. "Certain neat cattle, to wit, one beef." *S. v. Garrett*, 34 Tex. 674. "One beef steer." *Short v. S.* 36 Tex. 644; *Robertson v. S.* 1 App. 311. "One beef, then and there being cattle." *Davis v. S.* 40 Tex. 134. "Six head of work oxen." *Musquez v. S.* 41 Tex. 236. "One ox." *Parchman v. S.* 44 Tex. 192. "A bull yearling." *Berryman v. S.* 45 Tex. 1. "Two certain oxen." *Henry v. S.* 45 Tex. 84. "Two work oxen." *Campblin v. S.* 1 App. 108. "One cow." *Johnson v. S.* 1 App. 118. "One beef steer, neat cattle." *Moore v. S.* 2 App. 350. "One certain calf, of the neat cattle kind." *Grant v. S.* 3 App. 1. "One beef cattle." *Duval v. S.* 8 App. 370. "One pledged beef steer." *Robertson v. S.* 1 App. 311. "Four animals of the cattle species." *McIntosh v. S.* 18 App. 284. There is no necessity whatever for the pleader to do more than allege the theft of one or more "cattle," and it is imprudent to allege more, because the descriptive allegation must be proved as alleged. *Ante*, §§1256-1296. The value of the animal need not be alleged or proved. *Ante*, §§1257-1301. Cattle in their accustomed range are in the possession of the owner, and if there be a special owner they are in his possession. *Ante*, §§1273-1297. Under an indictment for theft of cattle, a conviction may be had

for the offense denounced by article 749, Post. Ante §1263. And where such a conviction was had, and a new trial was granted the defendant, it was held that on another trial he might be convicted of the theft as charged in the indictment. *Campbell v. S.* 22 App. 262, overruling *Sisk v. S.* 9 App. 40. For other decisions pertinent to this offense see chapter 9 of this title.

§1317 — ART. 748. — **Theft of sheep, hogs, etc., how punished.** — If any person shall steal any sheep, hog or goat, he shall, if the value of the property stolen is twenty dollars or over, be punished by confinement in the penitentiary not less than two nor more than five years. If the value of the property is under twenty dollars, he shall be punished by imprisonment in the county jail not exceeding one year, during which time the prisoner may be put to hard work, and by fine not exceeding five hundred dollars, or by such imprisonment without fine. [O. C. 766a.]

Amended in revision so as to make the offense a felony or misdemeanor dependent upon the value of the property, it being a felony under the original article without regard to the value of the property taken.

Indictment, Willson's Cr. Forms, 475.

§1318 — **Decisions relating to preceding article.** — As the punishment under this article depends upon the value of the animals taken, such value must be both alleged and proved. *Blunt v. S.* 9 App. 234; *Hall v. S.* 15 App. 40. Ante §§1257-1301. And the defendant is entitled to prove the market value of the hogs, in rebuttal of evidence adduced by the State as to value. *Cannon v. S.* 18 App. 172. Where the indictment alleged that the defendant "did *kill*, steal, take and carry away a hog," it was held that the indictment charged the theft of a *dead* and not a *live* hog. *Thompson v. S.* 30 Tex. 356. Where the value of the animals alleged to be stolen is alleged to be less than twenty dollars, the charge is a misdemeanor, and within the jurisdiction of the county court. *Whitsell v. S.* 9 App. 198. An information charged the theft of a *male* hog, held, that the trial court did not err in refusing to instruct the jury that a male hog, is one which has not been changed from a boar to a barrow by castration. A *barrow* is a hog especially a male hog, castrated. *Williams v. S.* 17 App. 521. It is sufficient description of the animals to designate them by their generic name, as a "hog," a "sheep," a "goat." A more particular description is not required and should not be given. *Lunn v. S.* 44 Tex. 85; *Grant v. S.* 2 App. 164. Ante, §§1256-1296-1316. For other decisions pertinent to this offense, see Ante §§1314-1316, and chapter 9 of this title.

§1319 — ART. 749. — **Willfully driving stock from range — Theft.** — If any person shall willfully take into possession and drive, use, or remove from its accustomed range, any live stock not his own, without the consent of the owner and with intent to defraud the owner thereof, he shall be deemed guilty of theft, and on conviction shall be confined in the penitentiary not less than two nor more than five years, or be fined in a sum not to exceed one thousand dollars, or by both such imprisonment and fine, at the discretion of the jury trying the case. [O. C. 766b, Act Nov. 12, 1866, p. 188.]

Indictment, Willson's Cr. Forms, 476. In the Form cited the word "deprive" is used inadvertently instead of the statutory word "defraud," but it has been held that this does not vitiate the indictment. *Shubert v. S.* 20 App. 320.

§1320 — ART. 750. — **Party may drive stock in range.** — Nothing in the preceding article contained shall be construed to prevent any person from driving his own, and other stock that may be mixed therewith, to the nearest convenient point within the usual range of such stock, for separation. [O. C. 766c, Act Nov. 12, 1866, p. 187.]

§1321 — ART. 751. — **What proof sufficient for the State.** — In any prosecution under article 749, it shall only be necessary for the State to prove the act of driving, using or removing from its accustomed range any live stock not belonging to or under the control of the accused, and it shall devolve upon the accused to show any fact under which he can justify or mitigate the offense. [O. C. 766d, Act Nov. 12, 1866, p. 188.]

§1322 — **Decisions relating to this offense.** — The indictment for this offense need not aver an intention to appropriate the animals to the use of the defendant. *Smith v. S.* 34 Tex. 612. It is proper, and perhaps necessary, to allege the ownership of the animals. *Smith v. S.* 43 Tex. 433; *S. v. Faucett*, 15 Tex. 585. It may allege that the animal was driven out of the instead of its accustomed range. *Fowler v. S.* 38 Tex. 559. It need not describe the "range." *Foster v. S.* 21 App. 80; *S. v. Thompson*, 40 Tex. 515. Nor state the distance the animal was driven. *Darnell v. S.* 43 Tex. 147. The defendant may be prosecuted in one general indictment for driving cattle of different persons. *Long v. S.* 43 Tex. 467. An indictment which used the

word "deprive" instead of the statutory word "defraud" in alleging the intent, was held sufficient. *Shubert v. S.* 20 App. 320. Under an indictment for the theft of an animal, the defendant may be convicted of this offense. *Counts v. S.* 37 Tex. 593; *Campoell v. S.* 42 Tex. 591; *Bawcom v. S.* 41 Tex. 189; *Marshall v. S.* 4 App. 549; *Powell v. S.* 7 App. 467; *Turner v. S.* Id. 596; *Foster v. S.* 21 App. 80; *Smith v. S.* Id. 133; *McElmurray v. S.* Id. 691; *Campbell v. S.* 22 App. 262; *Ante*, § 1263. If the indictment be for the theft, but the charge submits only the offense defined by article 749, a general verdict of guilty is good for the latter offense. *Marshall v. S.* 4 App. 549. And where the indictment charged theft of a horse, and the verdict was a general one of "guilty of theft as charged in the indictment," assessing the punishment at two years' confinement in the penitentiary, it was held that the conviction was for the offense defined in art. 749, and that the verdict was sufficient. *Foster v. S.* 21 App. 80. It is error to charge that a party acting under another's authority must know that the latter had a right to give it, and that A cannot give B authority over more than one brand. *Willis v. S.* 40 Tex. 69. Having admitted proof that other property of like character was driven at the same time and from the same place as the property described in the indictment, the trial court erred in omitting in its charge to limit the jury as to the legitimate purposes for which such proof could be considered. In instructing the jury upon the law relating to this offense, the charge need not explain the legal signification of the word "willfully," though it would not be improper to do so. *Wheeler v. S.* 23 App. 598. But to constitute this offense it is essential that the act be willfully committed, that is with evil intent, or without reasonable ground to believe that it was lawful. *Yoakum v. S.* 21 App. 260. A party may be prosecuted for this offense in any county into or through which he may drive the stock, or in the county of the original taking. *McElmurray v. S.* 21 App. 691; *Shubert v. S.* 20 App. 320. It only devolves upon the State to prove the act of driving, using or removing from its accustomed range any live stock not belonging to or under the control of the accused. It devolves upon the accused to show any fact in justification or mitigation of the act. *Owens v. S.* 19 App. 242. It is no objection to a plea of former jeopardy interposed in a prosecution for this offense, that the indictment under which the former trial was had charged the theft of the stock, as under said indictment the defendant might have been convicted of this offense. *McElmurray v. S.* 21 App. 691.

## CH. 12. — MISCELLANEOUS PROVISIONS RELATING TO THE RECOVERY OF STOLEN ANIMALS AND THE DETECTION AND PUNISHMENT OF THIEVES.

ART.		SEC.	ART.		SEC.
752.	Want of bill of sale <i>prima facie</i> illegal evidence of possession.	1323	755.	Not applicable to animals raised by butcher.	1328
	Decisions under preceding article.	1324	756.	Butcher failing to make report of animals slaughtered.	1329
753.	Driving stock to market without bill of sale.	1325		Decisions under preceding article.	1330
	Venue of this offense.	1326	757.	Auctioneer selling animal without written statement, etc.	1331
754.	Butchering unmarked or unbranded animals.	1327	758.	Auctioneer failing to report sales of animals.	1332

§1323 — ART. 752 — Want of bill of sale *prima facie* evidence of illegal possession. — Upon the trial of any person charged with the theft of any animal of the horse, ass or cattle species, the possession of such stolen animal by the accused, without a written transfer or bill of sale containing a specific description of such animal, shall be *prima facie* evidence against the accused that such possession was illegal. [Act Nov. 13, 1886, p. 223; inserted here in revising.]

§1324 — Decisions under preceding article. — The preceding article, together with the succeeding articles of this chapter, are constitutional. *S. v. Deitz*, 30 Tex. 511; *Faith v. S.* 32 Tex. 373. Prior to the enactment of the preceding article, the absence of a written conveyance was not *prima facie* evidence of illegal possession. *Espy v. S.* 32 Tex. 375. The presumption of illegal possession arising from the absence of a written conveyance may be rebutted by parol proof of any fact tending to show legality of possession. *Wills v. S.* 40 Tex. 69; *Garcia v. S.* 12 App. 385; *Flores v. S.* 13 App. 665; *Gomez v. S.* 15 App. 64; *Schindler v. S.* Id. 394; *White v. S.* 21 App. 339. A bill of sale to be admissible in evidence must be filed among the papers of the cause at least three days before the commencement of the trial, and notice of such filing given to the opposite party or his attorney, or its execution must be proved. If the bill of sale be subscribed by a witness, its execution cannot be proved by another witness, unless the absence of the subscribing witness is accounted for. It is no objection to a bill of sale that it was not recorded until after the date of the alleged theft, and an unrecorded, unacknowledged bill of sale is admissible evidence to prove ownership in a prosecution for theft. The property mentioned in the bill of sale must be identified as the alleged stolen property. *Morrow v. S.* 22 App. 239; *Ante*, § 1297. It is not a valid objection to a bill of sale that it was recorded in the wrong book. *Britt v. S.* 21 App. 215. As to charging the preceding article in a prosecution for theft, see *Ante* § 1306.

§1325 — ART. 753. — Driving stock to market without bill of sale. — Any person who may be found in any county of this State driving to market any animals such as are specified in the preceding article, and who has not in his possession a bill of sale or transfer for each and all of said animals, containing their marks and brands, or a list of such marks and brands of any such animals as were raised by himself, both said bill of sale and list being duly certified as recorded by the clerk of the county court of the county from which such animals have been driven, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not exceeding two thousand dollars. [Act Nov. 13, 1866, p. 224.]

Indictment, Willson's Cr. Forms, 477.

§1326 — Venue of this offense. — It seems that this offense must be prosecuted in the county *into* which the stock is driven, and cannot be prosecuted in the county *from* which the same was driven. *Senterfit v. S.* 41 Tex. 186.

§1327 — ART. 754. — Butchering unmarked or unbranded animals. — If any butcher or other person engaged in the slaughter of animals shall kill, or cause to be killed, any unmarked or unbranded animal for market, or shall purchase and kill, or cause to be killed, any animal without having taken a bill of sale or a written transfer from the person selling the same, he shall be



fined not less than fifty nor more than three hundred dollars. [Act Nov. 13, 1866, p. 224; see Acts 1889, 21 Leg., Chap. 75, p. 84.]

Indictment, Willson's Cr. Forms, 478-479. Additional Forms, 157*a*, 495*b*, 199*a*, 542*a*.

§1328 — ART. 755. — **Not applicable to animals raised by butcher.** — The preceding article shall not apply to the slaughter of an animal raised by the person slaughtering the same. [Act Nov. 13, 1866, p. 224.]

§1329 — ART. 756. — **Butcher failing to make report of animals slaughtered.** — If any person engaged in the slaughter and sale of animals for market in any county, city, town or village in this State, shall fail to report to the commissioners' court of the county in which he transacts such business, at each regular term thereof, the number, color, age, sex, marks and brands of every animal slaughtered by him, since the last term of said court, accompanied with a bill of sale or written conveyance to him for every animal slaughtered, save such as were raised by himself, which shall be specified, he shall be punished by fine not less than fifty nor more than three hundred dollars. [Act Nov. 13, 1866, p. 224.]

Indictment, Willson's Cr. Forms, 480.

§1330 — **Decisions under preceding article.** — The preceding article defines a substantive offense, not limited by or dependent upon any other enactment, and is a general law in force throughout the State. There is no repugnancy between it and article 4565 of the Revised Civil Statutes, which prescribes requisites of such report. *Dreyer v. S.* 10 App. 97. The butcher is required to make report of *all* animals slaughtered, those raised by him to be specified in the report, and as to those not raised by him, the report must be accompanied by a written conveyance of the same. See an indictment for this offense held insufficient, *Kinney v. S.* 21 App. 348. For decisions under a former statute, see *Schultze v. S.* 30 Tex. 508; *Bergstrom v. S.* 36 Tex. 336.

§1331 — ART. 757. — **Auctioneer selling animal without written statement, etc.** — If any auctioneer or other person shall sell at auction any horse, mule or ox, without first requiring from the party for whom such sale is made, a written statement signed by him of the manner in which, and the name and residence of the person from whom he acquired such animal, he shall be fined not less than fifty nor more than one hundred dollars. [Act April 14, 1874, p. 98.]

Indictment, Willson's Cr. Forms, 481.

§1332 — ART. 758. — **Auctioneer failing to report sales of animals.** — If any auctioneer or other person shall sell at auction any horse, mule or ox, and shall fail, within ten days after such sale, to file with the clerk of the county court the written statement specified in the preceding article, duly attested with his certificate as to its genuineness, and accompanied with a further certificate containing an accurate description of the animal sold, together with the names and residence of the seller and purchaser, he shall be punished as prescribed in the preceding article. [Act April 14, 1874, p. 98.]

Indictment, Willson's Cr. Forms, 482.

## CH. 13.—ILLEGAL MARKING AND BRANDING AND OTHER OFFENSES RELATING TO STOCK.

ART.	SEC.	ART.	SEC.
759. Illegal marking and branding.	1333	764. Procedure in prosecutions for.	1340
Decisions under preceding article.	1334	765. Skinning cattle.	1341
760. Altering or defacing mark or brand.	1335	765a. Having possession of hide without owner's consent.	1342
Decisions under preceding article.	1336	765b. Having possession of hide with brand cut out, etc.	1343
761. Using mark or brand not on record.	1337	766. Milking another's cow.	1344
762. Same subject.	1338	767. Driving cattle from range.	1345
763. Killing unmarked or unbranded cattle, etc.	1339	768. Preceding article qualified.	1346
		769. Procedure in such cases.	1347

§1333—ART. 759.—**Illegal marking and branding.**—Every person who shall mark or brand any horse, mule, ass or cattle, or who shall mark any sheep, goat or hog, not being his own, and without the consent of the owner, and with intent to defraud, shall be punished in the same manner as if he had committed a theft of such animal. [O. C. 767.]

Indictment, Willson's Cr. Forms, 483. The form cited is bad as to a sheep, goat or hog, because it contains no allegation of value. Melton v. S. 20 App. 202.

§1334—**Decisions under preceding article.**—The indictment must allege that the act was done "without the consent of the owner" and "with intent to defraud." S. v. Hall, 27 Tex. 333. And these allegations must be proved. Fossett v. S. 11 App. 40. And "want of consent" cannot be proved by the declarations of the owner to a third person. West v. S. 32 Tex. 651. The indictment should allege the name of the owner of the animal, or that the owner is unknown. S. v. Haws, 41 Tex. 161; S. v. Faucett, 15 Tex. 584. An indictment which described the animal as a "colt," was held sufficient. *Horse* is the generic name of the equine species, *cow* of the bovine; to name one of the species is sufficient. Pullen v. S. 11 App. 89. Where several animals are marked or branded at the same time and place, the transaction is the same, although the animals may belong to different owners, and in such case a conviction for illegally marking or branding one of the animals will bar a prosecution for the same offense with reference to the others. Adams v. S. 16 App. 162; Morse v. S. 15 App. 522. Where the indictment charges the illegal marking or branding of a horse, mule, ass, or cattle, it need not allege value; but if the animal be a sheep, goat or hog, value must be alleged. If the value alleged be less than twenty dollars, value need not be proved, as in such case the offense alleged is a misdemeanor, and its punishment is not graded by the value of the animal. Melton v. S. 20 App. 202. Where an indictment alleged that the animal was the property of Joseph R, and the evidence proved it to be the property of Napoleon R, the variance was held fatal. Mayes v. S. 33 Tex. 340. See a case for evidence which negatived any criminal intent. Taylor v. S. 35 Tex. 496.

§1335—ART. 760.—**Altering or defacing mark or brand.**—Every person who shall alter or deface the mark or brand of any horse, mule, ass or cattle, or shall alter or deface the mark of any sheep, goat or hog, not being his own property, and without the consent of the owner, and with intent to defraud, shall be punished in the same manner as if he had committed a theft of such animal. [O. C. 768, amended by Act Feb. 12, 1858, pp. 181-182.]

Indictment, Willson's Cr. Forms, 484. The form cited is bad as to a sheep, goat or hog, in failing to allege the value of the same. Melton v. S. 20 App. 202.

§1336—**Decisions under preceding article.**—Putting a new brand on an animal already branded, without the consent of the owner, is an "altering" of the brand within the meaning of the preceding article, although such new brand may not interfere with the figure of the old brand, and may be on another part of the animal. Linney v. S. 6 Tex. 1. To constitute this offense, it is not necessary that the original seal of the old brand should be changed. The alteration may be effected by so clipping the hair on the original brand, as to change it into another brand. If the defendant, with fraudulent intent, altered the brand on an animal not his own, without the consent of the owner, he is guilty of this offense, no matter with what instrument or means he effected the alteration. Slaughter v. S. 7 App. 123. "Altering" and "defacing" are not synonymous. Defacing, means obliterating. Altering, means changing to another brand. Linney v. S. 6 Tex. 1. When the indictment described the brand which it was alleged was altered, and then described the brand as it appeared after the alleged alteration, it was held that the alteration must be proved as alleged, as it was descriptive of the offense. See this case for an indictment held good, and for a fatal variance between the alteration as alleged, and that proved. Davis v. S. 13 App. 215. Where the indictment charged the alteration of the brand on six head of cattle, describing the alteration, and the proof showed that the brand on some of the cattle had been altered as described, but on others the alteration was different from that alleged, it was held that the indictment was sustained—that proof

of the alteration as described in the indictment of the brand on any one of the animals was sufficient to sustain the indictment in this respect, and that it was competent for the State to prove the alteration of the brands upon the other cattle, although variant from the alteration described in the indictment, as such proof was *res gestæ*, the alterations all having been made at the same time and place, and constituted but one transaction. The charge of the court should confine the jury to the alteration alleged in the indictment. See this case for evidence held insufficient to corroborate the testimony of an accomplice, and insufficient to sustain a conviction. House v. S. 15 App. 522. The penalty for the offense must be correctly charged. Buford v. S. 44 Tex. 525. For other decisions pertinent to this offense, see, Ante, § 1334.

§1337 — ART. 761. — **Using mark or brand not on record.** — If any person shall mark or brand any unmarked or unbranded stock with a mark or brand not upon record, he shall be punished by fine not exceeding five hundred dollars. [Act Nov. 12, 1866, p. 188.]

Indictment, Willson's Cr. Forms, 485.

§1338 — ART. 762. — **Same subject.** — If any person shall alter or change any mark or brand upon any stock of his own, or that is under his control, without first having such changed mark or brand recorded, he shall be punished as prescribed in the preceding article. [Act Nov. 12, 1866, p. 188.]

Indictment, Willson's Cr. Forms, 486.

§1339 — ART. 763. — **Killing unmarked or unbranded cattle, etc.** — If any person shall knowingly kill any unmarked or unbranded animal of the cattle species, or any unmarked hog, sheep or goat, not his own, he shall be fined not less than twenty-five nor more than one hundred dollars. [Act Nov. 12, 1866, p. 188.]

Indictment, Willson's Cr. Forms, 487; Ante, arts. 747-748 and notes; Lawrence v. S. 20 App. 536.

§1340 — ART. 764. — **Procedure in prosecutions for.** — In prosecutions under the preceding article it shall only be necessary for the state to allege and prove that the animal killed was not the property of the accused, without stating or proving the true owner of such animal. [Added in revising.]

§1341 — ART. 765. — **Skinning cattle.** — If any person shall remove the hide, or any part thereof, from any cattle not his own, and without the consent of the owner, he shall be fined in a sum not less than twenty nor more one hundred dollars; and the removal of each separate hide from each animal shall constitute a separate offense. [Act Nov. 12, 1866, p. 188, amended by Act April 2, 1887, p. 105.] Indictment, Willson's Cr. Forms, 488.

§1342 — ART. 765a. — **Having possession of hide, without owner's consent.** — If any person shall be found in possession of any hide of any cattle not his own, and possession of said hide is obtained without the consent of the owner or his legal representative, he shall be fined in a sum not less than twenty nor more than one hundred dollars. [Act April 2, 1887, p. 105.]

Indictment, Willson's Add. Cr. Forms, No. 495a.

§1343 — ART. 765b. — **Having possession of hide with brand cut out, etc.** — If any person be found in possession of any hide of any cattle with brand cut out or disfigured, and shall offer the same for sale, he shall be fined in a sum not less than twenty nor more than one hundred dollars, and the possession and offer of sale of each hide with the brand cut out or disfigured shall constitute a separate offense; *provided*, that nothing in this act shall prevent any person who shall be guilty of the offense of theft of such hide from being prosecuted and convicted for such offense. [Apl. 2, '87, 105.]

Indictment, Willson's Add. Cr. Forms, No. 495b.

§1344 — ART. 766. — **Milking another's cow.** — If any person, without the consent of the owner, shall take up, use or milk any cow not his own, he shall, for every such offense, be punished by fine not exceeding ten dollars. [O. C. 769a; Act Nov. 12, 1866, p. 188.]

Indictment, Willson's Cr. Forms, 489. Compare preceding article with Art. 680a. Ante, §1172.

§1345 — ART. 767. — **Driving cattle from range.** — If any person shall willfully kill, or destroy, or drive, or remove from its accustomed range, any live stock not his own, without the consent of the owner, under such circumstances as not to constitute theft, he shall nevertheless, be guilty of misdemeanor, and shall be punished by fine not exceeding one thousand dollars. [O. C. 766b; Act Nov. 12, 1866, p. 187.]

Indictment, Willson's Cr. Forms, 490. See Ante, art. 749 and note thereto.

§1346 — ART. 768. — **Preceding article qualified.** — Nothing in the preceding article shall be construed to prevent any person from driving his own and other stock, which may be mixed therewith, until the same can be conveniently separated; *provided*, that nothing herein shall be construed to authorize any person, under any circumstances, to remove any live stock, not his own, from their usual range. [O. C. 766c, Act Nov. 12, 1866, p. 187.]

See Ante, art. 750.

§1347 — ART. 769. — **Procedure in such cases.** — In any prosecution under article 767, it shall only be necessary to prove the act of killing, or destruction, or driving, using or removing from the range, of any stock not belonging to or under the control of the accused, and it shall devolve upon the accused to show any fact under which he can justify or mitigate the offense. [O. C. 766d, Act Nov. 12, 1866, p. 187.]

See Ante, art. 751, and note thereto.

## CH. 14. — OFFENSES RELATING TO ESTRAYS.

ART.	SEC.	ART.	SEC.
770.	Unlawfully disposing of an estray. 1348	771.	Taking up and using without com-
	Decisions relating to this offense. 1349		plying with the law. 1350
			Decisions under preceding article. 1351

§1348 — ART. 770. — **Unlawfully disposing of an estray.** — If any person shall unlawfully remove, sell, or in any other manner dispose of any animal which has been taken up by him as an estray, he shall be punished by fine not exceeding two hundred and fifty dollars. [O. C. 775a; Act Feb. 12, 1858, p. 184.]

Indictment, Willson's Cr. Forms, 491. See Rev. Civil Statutes, chap. 3, title 63, ESTRAYS.

§1349 — **Decisions relating to this offense.** — An indictment contained two counts, the first charged the sale of an estray animal without having given legal notice of the sale, and the second charged the selling of the estray, when three adult bidders besides the family of the taker-up were not present. The State, on the trial, abandoned the first count, electing to proceed on the second. But the court submitted both counts to the jury in its charge. Held, error, because the matters charged in the first count were no longer in issue, and the charge should have limited the jury to a consideration of the second count only. It was further held that the term "family," as used in article 4583, Revised Statutes, means the collective body of persons who live in one house, under one head or manager, and that in this case the court should have so instructed the jury. *Goode v. S.* 16 App. 411. The gist of this offense is the unlawful disposition made of the animal. The venue should therefore be laid in the county where the unlawful act is done, and not in that where the animal is estrayed. To charge that the defendant unlawfully

killed the animal, charges an unlawful disposition of it, and the manner of the disposition. *Brogden v. S.* 44 Tex. 103. An "estrays" is the property of the owner, though such owner be unknown, and may be the subject of theft or of misdemeanor. If the owner be known at the time of the indictment his name and ownership should be alleged, and that the act of the defendant with respect to the animal was without such owner's consent. The word "estrays," as used in our statutes, does not mean an animal using its accustomed range, or which belongs to the neighborhood, the owner being known, or who might be known on reasonable inquiry. But our statutes do not restrict the meaning of the word to animals whose owners are unknown, but includes animals whose owners are known, but are remote, or animals whose owners would not follow and reclaim them with reasonable diligence. *S. v. Apel*, 14 Tex. 428; *S. v. Fletcher*, 35 Tex. 740. A "gelding" is included in the generic term "horse" used in the estrays law. *Owens v. S.* 38 Tex. 555. And "oxen," other than "work-oxen," are included in the term "cattle." *S. v. Moreland*, 27 Tex. 726. It is not necessary in the indictment to allege the age, sex, color, brand, etc., of the animal. *S. v. Crist*, 32 Tex. 99; *S. v. Anderson*, 34 Tex. 611. Seemingly it was held otherwise in *S. v. Meschac*, 30 Tex. 518. See Post, § 1351.

**§1350 — ART. 771. — Taking up and using without complying with the law.** — If any person shall, without complying with the laws regulating estrays, take up and use, or otherwise dispose of any animal coming within the meaning of an estrays, he shall be punished as prescribed in the preceding article. If the unlawful taking or disposition of an estrays animal be effected in such manner as to come within the meaning of theft, the person guilty of the same shall be punished for that offense. [O. C. 775b; Act Feb. 12, 1858, p. 184.]

Indictment, Willson's Cr. Forms, 492. See Rev. Civ Stat. chap. 3, title 63, ESTRAYS

**§1351 — Decisions under preceding article.** — "Without complying with the laws regulating estrays," is an essential ingredient of this offense and cannot be omitted in the indictment. *S. v. Hutchinson*, 26 Tex. 111. But to allege, "without estraying the same in the manner prescribed by law," was held sufficient. *S. v. Moreland*, 27 Tex. 726. It must be averred that the animal was an "estrays," not that it was an animal "coming within the meaning of an estrays." *S. v. Meschac*, 30 Tex. 518. To describe the animal as "one horse," is sufficient. *S. v. Ivey*, 33 Tex. 646; *S. v. Caraban*, Id. 697. Or as "one gelding." *S. v. Crist*, 32 Tex. 99. *Owens v. S.* 38 Tex. 555. Or, as "ox," oxen being included in the term "cattle," but not meaning "work-oxen." *S. v. Moreland*, 27 Tex. 727. It is not necessary to describe the animal by age, color, sex, brand, etc. *S. v. Crist*, 32 Tex. 99. *S. v. Anderson*, 34 Tex. 611. To constitute this offense the defendant must have "taken up and used" the animal. "Taking up" without "using" would not constitute the offense, and the indictment should charge, and the proof show both a taking up and a using of the animal. *Davis v. S.* 30 Tex. 352. But "did take up and trade off," charges both taking up and using. *S. v. Dunham*, 34 Tex. 675. Under former statutes it was necessary to allege and prove the value of the animal, because the punishment was regulated by such value. *McCormack v. S.* 23 Tex. 297; *Tharp v. S.* 28 Tex. 696; *Osborn v. S.* 33 Tex. 545. But as the punishment for this offense, and also for the offense defined in article 770 is not regulated or affected by the value of the animal, it is no longer necessary to allege or prove the value of the animal in a prosecution for either offense. It is essential that the evidence should show that the offense was committed in the county of the prosecution. *Tharp v. S.* 28 Tex. 696. When the State shows the taking up and using of an estrays, the burden is on the defendant to justify his action. *Ashcroft v. S.* 32 Tex. 108. This offense is in the nature of theft, and a prosecution for it is not barred until the lapse of two years after the cessation of the unlawful use of the animal. *Davis v. S.* 2 App. 162. The penalty is not confined to cases in which an estrays animal is taken up by a citizen on his own land or premises, but extends to all cases in which such an animal is taken up and used by any one contrary to the intent of the statute. *S. v. Apel*, 14 Tex. 428. Under a former statute, it was held that a person who took up and used an estrays horse without having legally advertised the same, and without having first made oath and estrayed the same according to law, was guilty of this offense. *S. v. Armantrout*, 21 Tex. 472. It is now made illegal by express statutory provision to use any horse, etc., taken up as estrays, for any purpose whatever, until the party taking up such animal shall have given the required bond. Rev. Civ. Stat. arts. 4576-4570-4571. But after giving such bond the taker up may use the animal in moderation. Rev. Civ. Stat. art. 4587.

## CH. 15.—OFFENSES RELATING TO THE PROTECTION OF STOCK-RAISERS IN CERTAIN LOCALITIES.

ART.	SEC.	ART.	SEC.
772. Inspector giving a fraudulent certificate.	1352	780. Decisions under preceding article.	1361
773. Counterbranding cattle without consent of owner.	1353	780. Agent selling without power of attorney.	1362
774. Clandestine driving cattle across Rio Grande.	1354	781. Using more than one brand or mark.	1363
775. Shipping hides imported from Mexico without inspection.	1355	782. Branding or marking outside of a pen.	1364
776. Selling hides without inspection.	1356	783. Clerk improperly recording brand.	1365
777. Driving cattle out of county to market without road-brand.	1357	784. Agent of railroad, etc., receiving for shipment uninspected animals.	1366
778. Driving stock out of county without owner's consent.	1358	785. Counties exempted from the operations of this chapter.	1367
778. Decisions under preceding article.	1359	Constitutionality of preceding articles.	1368
779. Failing to take bill of sale in purchasing animals.	1360		

§1352—ART. 772.—Inspector giving a fraudulent certificate.—Any inspector of hides and animals who shall give a certificate of inspection without having first made such inspection in accordance with law, or who shall fraudulently issue any certificate of inspection of any hides or animals, shall be fined not less than fifty nor more than five hundred dollars. [Act Aug. 23, 1876, p. 302, § 31.] See Acts 1889, 21 Leg. Ch. 41, p. 36, for added Arts.

Indictment, Willson's Cr. Forms, 493-494.

§1353—ART. 773.—Counterbranding cattle without consent of owner.—Any person who shall counterbrand any cattle without the consent of the owner, or his agent, shall be fined not less than ten nor more than fifty dollars for each animal so counterbranded. [Act Aug. 23, 1876, p. 302, § 32.]

Indictment, Willson's Cr. Forms, 495. See Ante, chap. 13, of this title.

§1354—ART. 774.—Clandestine driving cattle across Rio Grande.—Any person who shall drive any cattle across the Rio Grande river into Mexico, at any other point than where a United States custom-house is established, or where there is a place of inspection by United States custom-house officers, or without first having the same inspected in accordance with law, shall be confined in the penitentiary not less than two nor more than five years. [Act Aug. 23, 1876, p. 302, § 35.]

Indictment, Willson's Cr. Forms, 496.

§1355—ART. 775.—Shipping hides imported from Mexico without inspection.—Any person who shall ship from any port in this State any hides of cattle imported from Mexico without having first procured a certificate of importation and inspection in accordance with law, shall be fined not less than one nor more than five dollars for each hide so shipped. [Act Aug. 23, 1876, p. 302, § 35.]

Indictment, Willson's Cr. Forms, 497.

§1356—ART. 776.—Selling hides without inspection.—Any person who shall sell any hides of cattle without the same having been inspected shall be punished as prescribed in the preceding article. [Act Aug. 23, 1876, p. 302, § 36.]

Indictment, Willson's Cr. Forms, 498.

§1357—ART. 777.—Driving cattle out of county to market without road-brand.—Any person who shall drive any cattle out of any county, with the intention of driving the same beyond the limits of the State, to a market, without first having road-branded the same in accordance with law, shall be

fin'd not less than twenty nor more than one hundred dollars for each animal so driven. [Act Aug. 23, 1876, p. 303, § 37.]

Indictment, Willson's Cr. Forms, 499. See as to road-brand, Rev. Civ. Stat. art. 4632.

§1358 — ART. 778. — **Driving stock out of county, without owner's consent.** — Any person who shall drive any cattle or horses out of any county, without the written authority of the owner thereof, duly authenticated as the law requires, and without first having the same duly inspected, shall be punished as prescribed in the preceding article. [Act Aug. 23, 1876, p. 303, § 38.]

Indictment, Willson's Cr. Forms, 500.

§1359 — **Decision under preceding article.** — A prosecution for this offense may be maintained in the county from which the animal was driven. *Rogers v. S.* 9 App. 43. The indictment must negative that the cattle driven were the defendant's, and that they were driven without the owner's written authority. *Covington v. S.* 6 App. 512; *Lang v. S.* Id. 642; *Heard v. S.* 8 App. 466.

§1360 — ART. 779. — **Failing to take bill of sale in purchasing animals.** — Any person who shall purchase any animals or hides of cattle without obtaining a bill of sale from the owner or his agent, shall be fined not less than twenty nor more than one hundred dollars for each animal or hide so purchased. [Act Aug. 23, 1876, p. 303, § 39.]

Indictment, Willson's Cr. Forms, 501.

§1361 — **Decisions under preceding article.** — Where the charge was that the defendant purchased cattle on a certain day without taking a bill of sale, and the proof showed such a purchasing on three several days, and the conviction was for more than one day's purchase, the judgment was set aside, it being held that the conviction could only be for the purchase made on one of the days. See this case for an information for this offense held sufficient. *Long v. S.* 6 App. 642. An indictment for this offense must allege the ownership of the cattle to be in some one. *Houston v. S.* 13 App. 595. The venue of this offense is the county in which the cattle were purchased. *Brockman v. S.* 16 App. 54. The preceding article is construed to require that the bill of sale shall be obtained at the time of the delivery of the cattle. It being in evidence that the cattle were purchased and received by an agent of the defendant for the defendant, it was incumbent upon the State to not only show that the cattle were purchased and received by the agent under the directions of the defendant, but that said agent purchased and received the cattle without taking a bill of sale thereto, by direction of the defendant. *Houston v. S.* 13 App. 595. In a prosecution for this offense the defendant offered to prove that another person purchased the cattle for him, received them for him, and gave him a bill of sale which he said at the time was the bill of sale for the cattle, and he offered said bill of sale in evidence. This proposed testimony was rejected. Held, error. If defendant did in fact purchase the cattle through an agent, and the cattle were delivered to the agent in the absence of the defendant these facts would constitute a good defense, unless it further appeared that defendant consented to the receiving of the cattle by his agent, without a bill of sale therefor. *Brockman v. S.* 16 App. 54.

§1362 — ART. 780. — **Agent selling without power of attorney.** — Any person who shall, as the agent of another sell any cattle without first having obtained a power of attorney from the owner, duly authenticated, shall be fined not less than fifty nor more than five hundred dollars. [Act Aug. 23, 1876, p. 303, § 40.]

Indictment, Willson's Cr. Forms, 502.

§1363 — ART. 781. — **More than one brand or mark.** — Any person who shall, in originally branding or marking cattle, use more than one mark or brand, shall be fined not less than twenty-five nor more than one hundred dollars for each animal so branded or marked. [Act Aug. 23, 1876, p. 304, § 41.]

Indictment, Willson's Cr. Forms, 503.

§1364 — ART. 782. — **Branding or marking outside of a pen.** — Any person who shall brand or mark any animal, except in a pen, shall be fined not less than ten nor more than fifty dollars for each animal so branded or marked. [Act Aug. 23, 1876, p. 304, § 41.]

Indictment, Willson's Cr. Forms, 504.

§1365 — ART. 783. — **Clerk improperly recording brand.** — Any clerk of the county court who shall record any brand when the person having the

same recorded fails to designate the part of the animal upon which the same is to be placed, shall be fined not less than ten nor more than fifty dollars. [Act Aug. 23, 1876, p. 304, § 43.]

Indictment, Willson's Cr. Forms, 505. See *Harwell v. S.* 22 App. 251; *Priesmoth v. S.* 1 App. 481.

§1366 — ART. 784. — **Agent of railroad, etc., receiving for shipment uninspected animals.** — If any agent of any railroad, steamship, sailing vessel, or shipping company of any kind, shall receive for shipment any horses or cattle, unless such horses or cattle have been duly inspected according to law, he shall be fined not less than twenty-five nor more than one thousand dollars for each animal so unlawfully shipped. [Act Aug. 23, 1876, p. 304, § 45, amended by Act April 10, 1883, p. 71, by inserting the words "horses or," before the word "cattle."]

Indictment, Willson's Cr. Forms, 506.

§1367 — ART. 785. — **Counties exempted from the operations of this chapter.** — That the counties of Anderson, Austin, Angelina, Bell, Bowie, Brazos, Bastrop, Burleson, Brazoria, Camp, Cass, Chambers, Cherokee, Colorado, Dallas, Delta, Denton, Ellis, Fannin, Franklin, Falls, Freestone, Gonzales, Eastland, Stephens, Fayette, Galveston, Goliad, Grayson, Gregg, Grimes, Hardin, Harrison, Henderson, Hill, Hunt, Hopkins, Houston, Jackson, Jasper, Jefferson, Johnson, Kaufman, Lamar, Lee, Leon, Lampasas, McLennan, Madison, Marion, Montgomery, Morris, Nacogdoches, Newton, Orange, Panola, Parker, Polk, Palo Pinto, Rains, Red River, Robertson, Rockwall, Rusk, Sabine, San Augustine, San Jacinto, Shelby, Smith, Tarrant, Titus, Trinity, Tyler, Upshur, Van Zandt, Walker, Washington, Wharton, De Witt, Wise, Wood, Jack, Calhoun, Harris, Young, Wheeler, Lavaca, Oldham, Nueces, Bee, Refugio, Limestone, San Patricio, Donley, Matagorda, Victoria, and the unorganized counties attached to Wheeler, Oldham, and Donley counties, are hereby exempted from the operations of this act, and that the provisions of the same shall in no wise relate or apply to the aforesaid counties; *provided*, that in those counties bordering on the lines of the State, except those bordering on Red river, whether organized, or unorganized, the governor shall appoint an inspector, whose duty it shall be to inspect, under the provisions of this act, all stock about to be driven or shipped out of the State, where there is a depot or place for the shipment of cattle; *provided*, that such cattle shall not be subject to inspection on board of any railroad unless the same have been placed on board of such train for the purpose of evading the provisions of this act; *and provided further*, that the counties of Limestone, Fayette, Lavaca, Gonzales, Bell, Calhoun, Navarro, Hood, Houston, Somervell, Erath, Bosque, Austin, Jackson, Victoria, Freestone, Coryell, Hamilton, Williamson, and Harris, shall be excepted from all laws regulating inspection of hides. [Act Aug. 23, 1876, p. 304, § 46, last amended by Act March 21, 1887, p. 34.]

§1368 — **Constitutionality of preceding articles.** — The articles of this chapter have been held to be constitutional, not coming within the meaning of a "local law" as those words are used in sec. 23, art. 16 of the constitution. *Lastoo v. S.* 3 App. 363.



## CH. 16. — EMBEZZLEMENT

ART.	SEC.	ART.	SEC.
786. Defined and punished.	1369	789. "Money" and "property" defined.	1377
Indictment.	1370	Decisions relating to preceding article.	1378
Offense — Evidence.	1371	789a. Fraudulently receiving, etc., embezzled property.	1379
Venue of the offense.	1372	Decisions relating to preceding article.	1380
Charge of the court.	1373		
787. By factor or commission merchant.	1374		
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788. By carrier.	1376		

§1369 — ART. 786. — **Defined and punished.** — If any officer, agent, clerk, or attorney at law or in fact, of any incorporated company or institution, or any clerk, agent, attorney at law or in fact, servant or employee of any private person, copartnership, or joint stock association, or any consignee or bailee of money or property, shall embezzle, fraudulently misapply, or convert to his own use without the consent of his principal or employer, any money or property of such principal or employer which may have come into his possession, or be under his care by virtue of such office, agency or employment, he shall be punished in the same manner as if he had committed a theft of such money or property. [O. C. 771, amended by Act Feb. 12, 1858; amended by Act May 25, 1876, p. 9.]

Indictment, Willson's Cr. Forms, 507-508-509. See also Ante, art. 742a.

§1370 — **Indictment.** — The indictment must aver a fraudulent intent. *Peacock v. S. 36 Tex. 647.* But an allegation that the defendant "did embezzle, fraudulently misapply and convert to his own use" was held to sufficiently allege a fraudulent intent. Such allegation follows the language of the statute, and *ex vi termini* imports a fraudulent intent. *Bridgers v. S. 8 App. 145.* Where the indictment is against an agent, clerk, etc., it must be distinctly averred that the defendant had the care or possession of the money or property by virtue of his agency, clerkship, etc. *S. v. Johnson, 21 Tex. 775; Gaddy v. S. 8 App. 127.* For an indictment against an agent held good, see *Gibbs v. S. 41 Tex. 491; Brown v. S. 23 App. 214.* Against a clerk, see *Wise v. S. 41 Tex. 139.* Against a bailee. *Leonard v. S. 7 App. 417.* See *Golden v. S. 22 App. 1, and Brown v. S. 23 App. 214,* approving Willson's Cr. Forms, 507-508-509. The indictment need not allege an intent to deprive the owner of the property of its value and to appropriate it to the taker's use, as in theft. *Leonard v. S. 7 App. 417.* The indictment must allege the value of the embezzled property. *Reside v. S. 10 App. 675.* The ownership of the property embezzled must be alleged, and may be alleged in a special owner as in theft, and in case a corporation is the owner, it is sufficient to allege ownership in the corporation by name. *Leonard v. S. 7 App. 417; Riley v. S. 32 Tex. 763.* Where the indictment, in the same count, charged the embezzlement of a horse, and also a gun and pistol, the two latter of the aggregate value of twenty dollars, the indictment was held bad for duplicity. *Heineman v. S. 22 App. 44.* A conviction for this offense cannot be had under an indictment for theft. *Huntsman v. S. 12 App. 619,* overruling *Whitworth v. S. 11 App. 414.* See also *Simco v. S. 8 App. 406; Ante §1264.*

§1371 — **Offense — Evidence.** — Embezzlement is the fraudulent appropriation of the property of another by the person to whom it has been entrusted. It is akin to theft, but is a distinct offense. *Simco v. S. 8 App. 406; Golden v. S. 22 App. 1; Leonard v. S. 7 App. 417; Griffin v. S. 4 App. 390,* overruling upon this point, *Riley v. S. 32 Tex. 763.* The breach of trust constitutes the gist of the offense, and unless there be a duty or trust imposed this offense cannot exist. Four things must be established. 1. Defendant's agency and charged with the duty of receiving the property. 2. The receipt of the property. 3. Its receipt by virtue of his agency. 4. Its embezzlement. The offense may be effected by an authorized sale, if done with a fraudulent intent. But, if by transmutation the property becomes the agent's it ceases to be the subject of embezzlement by him. *Webb v. S. 8 App. 810; Epperson v. S. 21 App. 659; Leonard v. S. 7 App. 417; Griffin v. S. 4 App. 390; Johnson v. S. 21 Tex. 775; Brady v. S. 22 App. 694.* There is no settled mode in which embezzlement must take place. It may occur in any of the numberless ways which may suggest themselves to the particular individual. The mode of embezzlement is simply matter of evidence and not of pleading. *Cole v. S. 16 App. 461; Golden v. S. 22 App. 1.* (In the case of a bailment, it is only where the property is held by the bailee for the benefit of the bailor, that embezzlement can be committed.) Where the possession is for the benefit of the bailee, as in the case of a hiring, the offense cannot be committed. *Reed v. S. 16 App. 587.* But see Ante, art. 742a which makes a conversion under such circumstances theft. Partners cannot embezzle the partnership property, but a mere inchoate agreement of partnership cannot furnish immunity to one of the contracting parties, who obtains the money of the other upon such agreement, and then abandons the venture and appropriates the money. *Napoleon v. S. 3 App. 522.* It is not necessary to constitute the offense that a demand for the property should have been made upon the defendant. The fraudulent appropriation is to be inferred from facts. Flight, insolvency, concealment, or evasion, are circumstances to prove

guilt. The guilt of the defendant may be proved by any of the modes sanctioned by the general rules of evidence. Proof by positive testimony is not required. *Leonard v. S.* 7 App. 417; *Riley v. S.* 32 Tex. 763. Where the evidence shows that the property alleged to have been embezzled was an advance payment made to the defendant, a conviction for embezzlement will not be sustained. *Keeler v. S.* 4 App. 527. An indictment charging the embezzlement of particular property, will not be sustained by proof of the embezzlement of the proceeds of such property. *Baker v. S.* 6 App. 344. It is no objection to a conviction for this offense, that the evidence also proves that in committing the embezzlement the defendant also committed theft of the property. *Golden v. S.* 22 App. 1. The value of the property embezzled must be proved. *Reside v. S.* 10 App. 675; *Gerard v. S.* Id. 690. When a witness testified that the value of the property was as alleged in the indictment, it was held sufficient proof of value, although the indictment was not read in evidence, but only read as pleading. *Harris v. S.* 21 App. 478. The ownership of the property must be proved as alleged, and the non-consent of the owner or owners, to the appropriation thereof by the defendant. *Cohen v. S.* 20 App. 224; *Leonard v. S.* 7 App. 417; *Livingston v. S.* 16 App. 652. Where the indictment charged the defendant with the embezzlement of money intrusted to him for payment to the State treasurer, it was held competent for the State to prove by a clerk in the treasurer's office that the books of that office did not show payment of the money by the defendant to the treasurer. But it was further held, that this negative evidence did not suffice to countervail the presumption of innocence, and it was incumbent on the State to produce the best evidence, viz: the testimony of the treasurer, in proof of the non-payment of the money to him by defendant. *Strong v. S.* 18 App. 19. Where the evidence for the State establishes a *prima facie* case of guilt, and the defendant relies upon a *bona fide* disposition of the property, the burden is upon him to prove such defense. *Bridgers v. S.* 8 App. 145. Prior to the last amendment of art. 786 it was held that an attorney at law could not be convicted of this offense for converting to his own use moneys received for his client. *S. v. McLane*, 43 Tex. 404. But the amended article includes an attorney at law or in fact. *Griffin v. S.* 4 App. 390. For evidence held sufficient to support a conviction see *Riley v. S.* 32 Tex. 763; *Leonard v. S.* 7 App. 417; *Cole v. S.* 16 App. 461; *Harris v. S.* 21 App. 478; *Golden v. S.* 22 App. 1; *Epperson v. S.* Id. 694; *Brown v. S.* 23 App. 214. For evidence held insufficient, see *Henderson v. S.* 1 App. 432; *Victor v. S.* 15 App. 90; *Livingston v. S.* 16 App. 652; *Strong v. S.* 18 App. 19; *Cohen v. S.* 20 App. 225; *Perry v. S.* 22 App. 19; *Brady v. S.* 21 App. 659.

§1372—**Venue of the offense.**—This offense may be prosecuted in the county in which the defendant received the property, or in any county through, or into which he undertook, at the time of receiving it, to transport it. And the venue, like any other fact, may be proved circumstantially. *Brown v. S.* 23 App. 214; *Cohen v. S.* 20 App. 224; *Reed v. S.* 16 App. 586; *Cole v. S.* Id. 461. See C. C. P. art. 219. See facts held to constitute a delivery of goods to bailee. *Cohen v. S.* 20 App. 224. "Money" is property within the meaning of article 219 of the Code of Criminal Procedure. *Brown v. S.* 23 App. 214.

§1373—**Charge of the court.**—The statutory terms, "embezzle, fraudulently misapply, or convert to his own use" are employed in their ordinary signification and need not be explained in the charge. *Bridgers v. S.* 8 App. 145. If the evidence tends to show consent or the owner to the conversion of the property by the defendant the charge should submit that issue, and direct the jury to acquit in case they entertained a reasonable doubt of the want of the owner's consent. *Henderson v. S.* 1 App. 432. For a correct charge as to the ownership of money, where defendant claimed that the money, alleged to have been embezzled by him belonged to his wife, see, *Golden v. S.* 22 App. 1. For a correct charge as to embezzlement by a bailee who sold the property, having authority to sell, see *Epperson v. S.* 22 App. 694. This offense may be presented within three years after its commission, but not after the lapse of that time. Where, by the evidence, no issue is raised as to limitation the charge need not instruct in regard thereto. *Cohen v. S.* 20 App. 224.

§1374.—**ART. 787.—By factor or commission merchant.**—If any factor or commission merchant shall embezzle or fraudulently misapply or convert to his own use, any money, goods, produce, commodity or other property, which shall have come into his possession, or shall be under his care by virtue of his office, agency or employment, he shall be punished in the same manner as if he had committed a theft of such money, goods, produce, commodity or other property. [O. C. 771a, Act Feb. 12, 1858, p. 182.]

Indictment, Willson's Cr. Forms, 510. The form cited should allege the name of the consignor of the property, as well as of the owner of it, and the non-consent of each, to the conversion.

§1375—**Decisions under preceding article.**—The indictment should aver the character of the consignment and the act of conversion. If the indictment follows the language of the statute it sufficiently alleges fraudulent intent. It may describe the defendant as "the commission merchant" instead of "a commission merchant." *Bridgers v. S.* 8 App. 145. See an indictment held good on motion in arrest of judgment. *Gibbs v. S.* 41 Tex. 491. See, for other decisions applicable, Ante, §§ 1370-1371-1372-1373.

§1376—**ART. 788.—By carrier.**—If any carrier to whom any money, goods or other property shall have been delivered to be carried by him, or if

any other person who shall be intrusted with such property, shall embezzle or fraudulently convert to his own use any such money, goods or property, either in the mass as the same were delivered or otherwise, he shall be deemed guilty of theft, and shall be punished as prescribed for that offense according to the value of the money, goods or other property so embezzled or converted. [O. C. 772, Act Feb. 12, 1858, p. 182.]

Indictment, Willson's Cr. Forms, 511. See Ante, §§ 1370-1371-1372-1373 for decisions applicable to this offense, and also *Gaultie v. S.* 31 Tex. 32; *Keeler v. S.* 4 App. 527.

**§1377 — ART. 789. — "Money" and "property" defined.** — The term "money," as used in this chapter, includes besides gold, silver, copper or other coin, bank bills, government notes or other circulating medium current as money; and the term "property" includes any and every article commonly known and designated as personal property, and all writings of every description that may possess any ascertainable value. [Added in revising.]

**§1378 — Decisions relating to preceding article.** — "Money" is property within the meaning of article 219 of the Code of Criminal Procedure prescribing the venue of prosecutions for this offense. *Brown v. S.* 23 App. 214. It was at one time held that an indictment which charged the embezzlement of money, was not sustained by proof of the embezzlement of United States greenbacks, or national bank notes, or both. *Block v. S.* 44 Tex. 620. But such is not now the law. *Griffin v. S.* 4 App. 390.

**§1379 — ART. 789a. — Fraudulently receiving, etc., embezzled property.** — If any person shall fraudulently receive or conceal any property which has been acquired by another in such manner as that the acquisition comes within the meaning of embezzlement, knowing the same to have been so acquired, he shall be punished in the same manner as the person embezzling the same, would be liable to be punished. [Act March 16, 1883, p. 24.]

Indictment, Willson's Cr. Forms, 513. The form cited is approved in *Hodges v. S.* 22 App. 415.

**§1380 — Decisions relating to preceding article.** — Embezzlement is an offense *eo nomine*, and the preceding article is not so indefinitely framed, or of such doubtful construction as that it cannot be understood, and is not, therefore, inoperative. It uses the words "acquired" and "acquisition" where the words "converted" and "conversion" should have been used, but still the legislative intent is plain, which is to create and punish as an offense the fraudulent receiving or concealing of *embezzled* property, the same as the fraudulent receiving or concealing of *stolen* property. *Hodges v. S.* 22 App. 415. Prior to the enactment of the preceding article it was not an offense to fraudulently receive or conceal embezzled property. *Leal v. S.* 12 App. 279.

## CH. 17. — OF SWINDLING AND THE FRAUDULENT DISPOSITION OF MORTGAGED PROPERTY.

I. SWINDLING.			ART.	SEC.
ART.		SEC.	794.	
790.	"Swindling" defined.	1381	If the act constitutes any other of-	1392
791.	Certain wrongful acts included.	1382	fense.	
	Indictment.	1383	795. Executor, etc., converting estate	1393
	"False pretense," etc., defined.	1384	guilty of swindling.	
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	Evidence.	1387	PROPERTY.	
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792.	"Money" includes bank bills.	1390	Decisions relating to preceding ar-	
793.	No benefit need accrue to defend-		ticle.	1396
	ant.	1391		

## I. SWINDLING.

§1381 — ART. 790. — "Swindling" defined. — "Swindling" is the acquisition of any personal or movable property, money or instrument of writing conveying or securing a valuable right by means of some false or deceitful pretense or device, or fraudulent representation with intent to appropriate the same to the use of the party so acquiring, or of destroying or impairing the rights of the party justly entitled to the same. [O. C. 773a Act Feb. 12, 1858, p. 183.]

§1382 — ART. 791. — Certain wrongful acts included. — Within the meaning of the term "swindling" are included the following wrongful acts:

1. The exchange of property upon the false pretense that the party is the owner or has the right to dispose of the property given in exchange.

2. The purchase of property upon the faith and credit of some other person upon the false pretense that such other person has given the accused the right to use his name or credit in making the acquisition.

3. The obtaining by false pretense the possession of any instrument of writing, certificate, field-notes or other paper relating to lands, the property of another, with the intent that thereby the proper owner shall be defeated of a valuable right in such lands.

4. The special enumeration of cases of swindling, above set forth, shall not be understood to exclude any case which, by fair construction of the language, comes within the meaning of the preceding article. [O. C. 773b, Act Feb. 12, 1858, p. 12.] Indictment, Willson's Cr. Forms, 514-517.

§1383 — Indictment. — The indictment must distinctly aver the ownership of the property acquired by the defendant, and the person from whom the same was acquired by the defendant. *Burd v. S.* 39 Tex. 509. The false or deceitful pretense or device, or fraudulent representation used to accomplish the swindle, must be set forth fully and accurately. The facts of the case should be stated clearly and distinctly, accompanied by such explanations, when necessary, as will place in bold relief the important fact, so that its meaning, relation and pertinency may be fully comprehended, without a resort to inference. *S. v. Baggerly*, 21 Tex. 757; *Washington v. S.* 41 Tex. 583; *Mathena v. S.* 15 App. 473. *Buntain v. S.* 1d. 515; *Sutton v. S.* 14 App. 473. And it must appear that the false pretenses, etc., related to existing facts, or past events; mere false promises, or false professions of intention, though acted upon, are not sufficient. *Allen v. S.* 16 App. 150. It must be distinctly alleged that the pretenses, etc., were false, and an omission of such allegation is not cured by an averment that the defendant knew they were false. *S. v. Levi*, 41 Tex. 563; *Warrington v. S.* 1 App. 168. It must be alleged that the defendant knew the pretenses, etc., were false when he made them. *S. v. Levi*, 41 Tex. 563; *Marander v. S.* 44 Tex. 442; *Hirsh v. S.* 1 App. 393. It must be alleged that the injured party was induced to part with the ownership of the property, acquired by the defendant, by means of the false pretenses, etc., alleged in the indictment. *Hightower v. S.* 23 App. 451; *Mathena v. S.* 15 App. 473; *Buckalew v. S.* 11 App. 352; *Epperson v. S.* 42 Tex. 79; *White v. S.* 3 App. 605; *Erven v. S.* 11 App. 536. But it need not be expressly alleged that the injured party relied upon the false pretenses, etc. *Baker v. S.* 14 App. 332. A general description of the property acquired, as in theft, will be sufficient, but if the property be particularly described, it must be proved as described, or the indictment will not be sustained. *Childers v. S.* 16 App. 524. The indictment should fully

set out the matter alleged to be false, and the matter thus, alleged, being material and descriptive, must be proved as alleged. The alleged false matter, however, may be set out by its substance, or by its tenor. If set out by its tenor, the proof must conform strictly to the allegations; but if by its substance, then it is only necessary to prove the allegations substantially. Thus, when the alleged false representation was, that the defendant had "a large amount of money on deposit in the Dallas National Bank," proof that the representation was that he "had \$5,000 on deposit" in said bank, was held sufficient. It was further held that the allegation that the defendant fraudulently obtained the sum of \$106 was supported by proof that he obtained \$109—the variance being immaterial, it only being necessary to prove that he so obtained money of the value of \$20 or more. This case is distinguished from *Marwinski v. S.* 9 App. 877, and *Litman v. S.* Id. 461. *Moore v. S.* 20 App. 233. The fact that the indictment alleges facts which constitute theft, will not vitiate it. By the same act the defendant may have committed both theft and swindling, and the State had its election to prosecute him for either offense, but a conviction of one would bar a prosecution for the other. *Sims v. S.* 21 App. 649. But, it has been held, contrary to the doctrine of the last cited case, that where the indictment alleged facts which showed that the defendant had committed the offense of uttering a forged instrument, it was a bad indictment. *Hirshfield v. S.* 11 App. 207. An essential ingredient of swindling is the *intent* with which the property is acquired. It must be acquired with the intent to appropriate the same to the use of the person acquiring it, and this intent must be alleged in the indictment. *Stringer v. S.* 13 App. 520, overruling upon this point *Tomkins v. S.* 33 Tex. 228. Where the swindling alleged consists in obtaining a person's signature to an instrument in writing, it must be alleged that the instrument, after being signed, was delivered. *Baker v. S.* 14 App. 332. So, when it was alleged that the swindle was accomplished by means of a false draft, it was held that the indictment was bad, because it did not allege that said draft was delivered to or accepted by the injured party. *Lutton v. S.* 14 App. 518. Where the alleged swindle was perpetrated by means of a written instrument, the written instrument should be set out, as in the case of forgery, or good reason should be alleged for not so setting it out. *S. v. Baggerly*, 21 Tex. 757; *Ante*, § 740; *Baker v. S.* 14 App. 332; *White v. S.* 3 App. 605; *May v. S.* 15 App. 430. Where it was charged that the swindling was by means of a "writing obligatory," which the defendant knew to be valueless, it was held that the indictment must show wherein the said writing was valueless. *S. v. Dyer*, 41 Tex. 520. The ownership of the property acquired by the defendant by the swindle must be alleged, and the same rules apply in respect to ownership as are applicable in a prosecution for theft. *May v. S.* 15 App. 430; *Ante*, § 1258. The value of the property acquired must be alleged, as in theft, *Ante*, § 1257-1285. See an indictment which was held bad for uncertainty, because it did not clearly appear therefrom whether the pleader intended to charge that the defendant swindled the injured party out of an organ, or out of a chance in a raffle for said organ. If the latter, swindling could not be based upon it, a "chance in a raffle" not being property. *Rosales v. S.* 22 App. 673. It has been held that a conviction may be had for this offense under an ordinary indictment for theft. *Ante*, § 1263.

§1384 — "False pretense" etc., defined.—The false pretense, etc., to constitute this offense, must be as to some existing fact, or past event. Mere false promises, or false professions of intention, although acted upon, are not sufficient. *Matthews v. S.* 10 App. 279; *Allen v. S.* 16 App. 150; *Blum v. S.* 20 App. 578; *Johnson v. S.* 41 Tex. 65. It is not necessary that the pretense, etc., should be in words; there may be a sufficient false pretense, etc., in the acts and conduct of the party, without any verbal representation of a fraudulent nature. *Blum v. S.* 20 App. 578. It need not be such an artificial device as would impose upon a man of ordinary prudence and caution, nor need it be such that cannot be guarded against by ordinary caution. But if the pretense was absurd or irrational, or if the injured party knew its falsity, or had the means of instantly detecting it, it will not be such a pretense as will constitute this offense. *Buckalew v. S.* 11 App. 352; *Colbert v. S.* 1 App. 314; *May v. S.* 20 App. 213.

§1385 — Distinction between swindling and theft.—When the possession of property is acquired by false pretenses, the true distinction between theft and swindling is this: when by such pretenses the owner is induced to part with the property finally, the offense is *swindling*; but when possession is obtained in a manner not adequate to pass title to the property, but merely the *interim* custody, and the property is then appropriated in pursuance of the original fraudulent intent, it is theft. *White v. S.* 11 Tex. 769; *S. v. Vickery*, 19 Tex. 326; *Cline v. S.* 43 Tex. 494; *Pitts v. S.* 5 App. 122. Swindling may be committed without destroying or impairing the rights of the party justly entitled to the property, and may be perpetrated upon one who is not even justly entitled to the property. It may be committed with *either of two* intents: 1. With the intent to appropriate the property. 2. With the intent to destroy or impair the rights of the party justly entitled to the property, or, both these intents may enter into the offense. Theft is not constituted unless the *two* intents exist and accompany the taking of the property. *May v. S.* 15 App. 430.

§1386 — Elements of swindling.—Decisions defining the offense. *Mathews v. S.* 10 App. 279; *May v. S.* 15 App. 430. Swindling comprehends four elements, all of which must concur to constitute the offense. 1. There must be an intent to defraud. 2. There must be an actual act of fraud committed. 3. False pretenses must have been made by the accused. 4. The fraud must have been accomplished by means of the false pretenses made use of for the purpose. *Blum v. S.* 20 App. 578. To constitute this offense, some false pretense, etc., as to an existing fact, or a past event, must have been made. Mere false promises, or false professions of intentions, although acted upon are not sufficient. *Johnson v. S.* 41 Tex. 65. *Matthews v. S.* 10 App. 279; *Allen v. S.* 16 App. 150; *Blum v. S.* 20 App. 578. See further as to false pretense, *Ante*, § 1384. The title to money or property must be obtained by the accused, or must pass from the injured party. *Cline v. S.* 43 Tex. 494; *S. v. Vickery*, 19 Tex. 326; *May v. S.* 15 App. 430. An essential

element of the offense is, that the party injured, in parting with his property, actually relied upon and was deceived by the false pretenses, etc., of the accused. *Buckalew v. S.* 11 App. 352; *Ervin v. S.* Id. 536. Swindling may be predicated upon a promissory note when its execution has been procured by means of false or deceitful pretenses or fraudulent representations. *Baker v. S.* 14 App. 332. The purchase of property upon the faith and credit of some other person, upon the false pretense that such other person has given the accused the right to use his name or credit in making the acquisition, is swindling. *Sherwood v. S.* 42 Tex. 498. An essential element of this offense is the *intent* with which the defendant acquires the property. *Stringer v. S.* 13 App. 520; *May v. S.* 15 App. 430.

§1387—**Evidence.**—To sustain a conviction the facts charged must be proved; and if the charge be that the accused passed spurious money, representing it to be good, the spuriousness of the money must be satisfactorily proved. *Brown v. S.* 29 Tex. 503. So where the property was acquired by means of a representation that the defendant had money on deposit in a bank, it must be satisfactorily proved that he had no such deposit. *Moore v. S.* 17 App. 233. The notarial certificate of the protest of a draft made in another State is admissible in evidence to prove the matters stated in such certificate, but is not evidence to prove any fact not stated in said certificate. *May v. S.* 15 App. 430; *S. C.* 17 App. 233. Other swindles perpetrated by the defendant, about the same time and in the same manner as the one for which he is on trial, are admissible to establish the identity and the fraudulent intent of the defendant. *Davidson v. S.* 12 App. 214. The value of the property must be proved, as in theft. *Ante*, § 1285. Evidence that the property was of the value of fifteen dollars will not support a conviction for the felony grade of this offense. *Mathews v. S.* 10 App. 279. Where two persons are jointly indicted for this offense, evidence that one of them, with the knowledge, approbation, concurrence and direction of the other, made the false pretenses charged, warrants the conviction of both. *Blum v. S.* 20 App. 578. But to make one defendant amenable for the acts and declarations of his co-defendant, proof of complicity between them, in the commission of the offense, must be adduced. *Marwinski v. S.* 9 App. 377. See a state of case wherein the defendant should have been permitted to show the course of dealing between himself and the alleged injured parties, both before and after the date of the alleged offense, as reflecting upon the intent of the defendant, or throwing light upon the question whether or not the creditor was using the criminal law to collect a debt. *Lutton v. S.* 14 App. 518. Evidence that the defendant delivered the property to the wife of the person whose name was used as a basis of credit, is competent for the defendant. *Bozier v. S.* 5 App. 220. But, that the defendant at the time he acquired the property intended to repay the same, cannot operate to relieve the act of its criminal character, and evidence of such intent, and the defendant's ability to make the repayment, is not competent. *Buntain v. S.* 15 App. 515.

§1388—**Variance.**—Where the indictment alleged that the property acquired was "good, lawful and current money of the United States of America, being currency bills," it was held that this description, though unnecessarily particular, should have been strictly proved. *Childers v. S.* 16 App. 524. Where the indictment charged that the property acquired was nine dollars, and the proof was that it was six dollars, the variance was held to be fatal. *Marwinski v. S.* 9 App. 377; *Litman v. S.* Id. 461. But see *Moore v. S.* 20 App. 233, explaining the cases last cited, and holding that where the indictment charged that the defendant obtained \$106, but the proof showed he obtained \$109, there was no variance. It was also held in the same case, that where the indictment alleged the false representation to be that the defendant had "a large amount of money on deposit in the Dallas National Bank," it was not a variance to prove the representation to be that he "had \$5,000 on deposit" in said bank. An indictment which alleged the ownership of the property to be in B. K. & Co., was held to be not supported by proof that B. & K. were the owners. *Mathews v. S.* 33 Tex. 102. The false pretense, etc., must be proved precisely as alleged. *Warrington v. S.* 1 App. 168.

§1389.—**Charge of the court.**—See a charge devolving the burden of proof upon the defendant held to be harmless and immaterial error in view of the facts in the case. *Sherwood v. S.* 42 Tex. 498. See a case where the trial court properly refused to charge the law relating to circumstantial evidence, and also properly refused to instruct the jury that if the defendant at the time he acquired the property intended to repay it, he would not be guilty. *Buntain v. S.* 15 App. 515.

§1390—**ART. 792.**—"Money" includes bank bills.—Within the meaning of "money," as used in this chapter, are included also bank bills, or other circulating medium current as money. [O. C. 773c, Act Feb. 12, 1858, p. 183.]

See *Childers v. S.* 16 App. 524.

§1391—**ART. 793.**—No benefit need accrue to defendant.—It is not necessary, in order to constitute the offense of swindling, that any benefit shall accrue to the person guilty of the fraud or deceit, nor that any injury shall result to the persons intended to be defrauded, if it is sufficiently apparent that there was a willful design to receive benefit or cause an injury. [O. C. 773d, Act Feb. 12, 1858, p. 183.]

§1392—**ART. 794.**—If the act constitutes any other offense.—Where property, money or other articles of value enumerated in the definition of

swindling, are obtained in such manner as to come within the meaning of theft, or some other offense known to the law, the rules herein prescribed with regard to swindling shall not be understood to take any such case out of the operation of the law which defines any such other offense. [O. C. 773e, Act Feb. 12, 1885, p. 183.]

See *Hirshfield v. S.* 11 App. 207; *Mathews v. S.* 33 Tex. 192. *Contra*, *Sims v. S.* 21 App. 649.

§1393 — ART. 795. — **Executor, etc., converting estate, guilty of swindling.** — If any executor, administrator or guardian having charge of any estate, real, personal or mixed, shall unlawfully, and with intent to defraud any creditor, heir, legatee, ward or distributee interested in such estate, convert the same or any part thereof to his own use, he shall be deemed guilty of the offense of swindling. [O. C. 773b, Act Feb. 12, 1858, p. 183, amended by Act April 10, 1883, p. 66.]

The amendment is by inserting the word "creditor." Indictment, Willson's Cr. Forms, 518.

§1394 — ART. 796. — **Punishment.** — Every person guilty of swindling shall be punished in the same manner as is provided for the punishment of theft, according to the amount of the money or the value of the property or instrument of writing so fraudulently acquired. [O. C. 773g, Act Feb. 12, 1858, p. 183.]

See Ante, §§ 1282, 1283.

## II. FRAUDULENT DISPOSITION OF MORTGAGED PROPERTY.

§1395 — ART. 797. — **Fraudulent disposition of mortgaged property.** — If any person has given, or shall hereafter give any mortgage, deed of trust or other lien, in writing, upon any personal or movable property or growing crop of farm produce, and shall remove the same or any part thereof out of the State, or shall sell or otherwise dispose of the same with intent to defraud the person having such lien, either originally or by transfer, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years. [O. C. 773, Act Feb. 12, 1858, p. 183, amended by Act March 31, 1885, p. 85.]

The amendment inserts "or growing crop of farm produce." Indictment, Willson's Cr. Forms, 519, approved in *Glass v. S.* 23 App. 425.

§1396 — **Decisions relating to preceding article.** — Prior to the amendment of the preceding article, it was held that a growing crop of cotton was not movable property, nor was it personal property until ready to be harvested, and hence could not be the basis of this offense. *Hardeman v. S.* 16 App. 1. But the article as amended expressly includes "growing crops." *Honeycut v. S.* 23 App. 71. The indictment must allege that the property was personal or movable property, or a growing crop of farm produce, at the time of the execution of the mortgage or lien upon it. The sale or other disposition of *real* property on which the owner had executed a written lien is not an offense. *Hardeman v. S.* 16 App. 1. It must be alleged that the mortgage, deed of trust, or other lien in writing, was valid, subsisting and unpaid at the time of the sale, removal or disposition of the property. *Satchell v. S.* 1 App. 438. If the instrument is conditional, it must be averred that the condition has happened. *S. v. Deveraux*, 44 Tex. 383. Neither the value of the property, nor its liability to forced sale need be alleged, and the title may be laid in the administrator of a deceased mortgagee. *S. v. Maxey*, 41 Tex. 524. The fraudulent intent must be averred and proved. *Satchell v. S.* 1 App. 438; *Robberson v. S.* 8 App. 502. It must be alleged that the mortgage or other lien was in writing, and that the injured party was the holder of the same. *Moye v. S.* 9 App. 88. The indictment should describe the property as it is described in the mortgage or other written lien, but it will be sufficient if the description is sufficient to identify the property as that described in the mortgage or other lien. *Glass v. S.* 23 App. 425. The preceding article makes it a penal offense: 1. To remove out of the State the property upon which a lien in writing has been given. 2. To sell such property. 3. To otherwise dispose of such property, with the intent in either case to defraud the holder of the lien. A removal of the property from one county to another in the State, does not constitute the offense. The term "otherwise dispose of" does not include a removal, or a sale, but does include any other mode of placing the property beyond the reach of the holder of the lien. *Robberson v. S.* 3 App. 502. Where the evidence raised the issue that in exchanging the mortgaged property, the defendant stipulated that the title to the same should not pass to and vest in the vendee, until he, the defendant, had satisfied the mortgage, the court should have submitted this issue in its charge, and should have directed the jury that such a disposition of the property would not have been with a fraudulent intent. *Glass v. S.* 23 App. 425.

## CH. 18.—OF OFFENSES COMMITTED IN ANOTHER COUNTRY OR STATE.

ART.	SEC.	ART.	SEC.
798. Bringing stolen property into this State.	1397	Decisions under preceding articles.	1399
799. Requisites of guilt under preceding article.	1398		

§1397—ART. 798.—Bringing stolen property into this State.—If any person who shall have committed an offense in any foreign country, State, or territory, which if committed in this State would have been robbery, theft, or receiving of stolen goods or property, knowing the same to have been stolen, shall bring said property into this State, he shall be deemed guilty of robbery, theft or receiving of stolen goods, knowing the same to have been stolen, as the case may be, and shall be punished as if the offense had been committed in this state. [O. C. 774.]

Indictment, Willson's Cr. Forms, 520.

§1398—ART. 799.—Requisites of guilt under preceding article.—To render a person guilty under the preceding article, it must appear that by the law of the State or territory from which the property was taken and brought to this State, the act committed would also have been robbery, theft or receiving of stolen goods. [O. C. 775.]

§1399—Decisions under preceding articles.—For a sufficient indictment, and evidence held sufficient to support a conviction, see *Cowell v. S.* 16 App. 57. See the same case for the manner of proving the laws of an Indian nation. The law of the foreign country or State is an element of the offense and an issuable fact to be alleged and proved. But it need not be averred that the defendant was amenable to, or punishable by, the laws of said foreign country or State. Article 2250 of the Revised Statutes provides how laws shall be proved, and is applicable in criminal cases. *Cummins v. S.* 12 App. 121. But it must be averred that the act was an offense under the laws of such foreign country or State. *S. v. Morales*, 21 Tex. 298; *Carmisales v. S.* 11 App. 474. It must be shown that the defendant committed the theft and brought the property into this State, or, at least, that he had possession or control over it after it came into this State. But if the defendant not only aided in the original theft, but furnished the means for bringing the property into this State, and then came to this State himself in pursuance of an agreement with the other thief, and here received his portion of the fruits of the theft, he brought the property into the State within the meaning of the law. In a case arising under the preceding articles, all the facts and circumstances bearing upon the transaction, whether transpiring in this State or out of it, are admissible in evidence, and may be considered by the jury. See charges held correct, and evidence held sufficient to support conviction. *Sutton v. S.* 16 App. 490. The evidence must show that the defendant brought the property into the county of the prosecution, or took possession and control of it after it reached said county. *Carter v. S.* 37 Tex. 362.



## TITLE 18.—OF MISCELLANEOUS OFFENSES.

## CH. 1. CONSPIRACY.

## 2. THREATS.

## 3. SEDUCTION.

## 4. EMPLOYMENT OF SAILORS AND CREW.

CH. 5. PROTECTION OF SETTLERS ON  
SCHOOL LANDS.

## 6. FENCES WITHOUT GATES.

## CH. 1.—OF CONSPIRACY.

ART.	SEC.	ART.	SEC.
800. Definition.	1400	806. To kill, same as murder.	1406
801. When offense complete.	1401	807. Conspiracy to commit an offense in another State.	1407
802. Agreement must be positive.	1402	808. Conspiracy in another State to commit offense in this.	1408
803. Mere threat not sufficient.	1403	Decisions as to conspiracy.	1409
804. What crimes the subject of.	1404		
805. Punishments.	1405		

§1400 — ART. 800. — **Definition.** — A “conspiracy” is an agreement entered into between two or more persons to commit any one of the offenses hereafter named in this chapter. [O. C. 776, Act Oct. 26, 1871, p. 15.]

Indictment, Willson's Cr. Forms, 521-522.

§1401 — ART. 801. — **When offense complete.** — The offense of conspiracy is complete, although the parties conspiring do not proceed to effect the object for which they have so unlawfully combined. [O. C. 777, Act Oct. 26, 1871, p. 15.]

§1402 — ART. 802. — **Agreement must be positive.** — Before any conviction can be had for the offense of conspiracy, it must appear that there was a positive agreement to commit one of the offenses hereafter named in this chapter. It will not be sufficient that such agreement was contemplated by the parties charged. [O. C. 778, Act Oct. 26, 1871, p. 15.]

§1403 — ART. 803. — **Mere threat not sufficient.** — A threat made by two or more persons acting in concert will not be sufficient to constitute conspiracy. [O. C. 779, Act Oct. 26, 1871, p. 15.]

§1404 — ART. 804. — **What crimes the subject of.** — The agreement to come within the definition of conspiracy must be to commit one or more of the following offenses, to wit: Murder, robbery, arson, burglary, rape, or any other offense of the grade of felony, [O. C. 780, Act Oct. 26, 1871, p. 15, amended by Act Feb. 5, 1884, p. 25.]

The amendment leaves out the words “theft and forgery” adding in their stead, “or any other offense of the grade of felony.”

§1405 — ART. 805. — **Punishments.** — Conspiracy to commit murder shall be punished by confinement in the penitentiary not less than two nor more than ten years. Conspiracy to commit any one of the other offenses named in the preceding article shall be punished by confinement in the penitentiary not less than two nor more than five years. [O. C. 781, Act Oct. 26, 1871, p. 15.]

§1406 — ART. 806. — **To kill, same as murder.** — A conspiracy to kill a human being shall be deemed a conspiracy to commit murder. [O. C. 782, Act Oct. 26, 1871, p. 16.]

§1407 — ART. 807. — **Conspiracy to commit an offense in another State.** — A conspiracy entered into in this State for the purpose of committing any one of the offenses named in article 804, in any other of the States or territories of the United States, or in any foreign territory, shall be punished in the same manner as if the conspiracy so entered into was to commit the offense in this State. [O. C. 783, Act Oct. 26, 1871, p. 16.]

Indictment, Willson's Cr. Forms, 523.

**§1408 — ART. 808. — Conspiracy in another State to commit offense in this.** — A conspiracy entered into in another State or territory of the United States, to commit any one of the offenses named in article 804 in this State, shall be punished in the same manner as if the conspiracy had been entered into in this State. [Added in revising.]

Indictment, Willson's Cr. Forms, 524.

**§1409 — Decisions as to conspiracy.** — The indictment need not set out the offense with the same particularity for an unexecuted as for an executed conspiracy. See an indictment for conspiracy to commit burglary held sufficient. *Brown v. S.* 2 App. 115; *Mason v. S.* Id. 192. And see same cases for evidence held sufficient to sustain convictions. An "agreement" is a coming together of parties in opinion or determination; the union of two or more minds in a thing done or to be done; a mutual assent to do a thing. A conspiracy cannot be committed by one person alone, and it cannot be committed by two, when there is no concurrence of purpose and mind, or when the concurrence or purpose on the part of one is unreal or feigned. *Woodworth v. S.* 20 App. 375. But it is not necessary, in order to establish a conspiracy to commit an offense, to prove that the persons charged came together and actually agreed in terms to have that design and pursue it by common means. If it be proved that they pursued the same objects, often by the same means, one performing one part and another a different part of the same, so as to complete it with a view to the attainment of the same object, the jury will be justified in concluding that they were engaged in a conspiracy to effect that object, and such acting together would make all principal offenders, whether bodily present at the place of the offense or not, and until the full purpose and object of the conspiracy has been consummated. *Smith v. S.* 21 App. 107. The offense is complete as soon as the criminal agreement is entered into, and although the conspirators do not proceed to consummate it. *Johnson v. S.* 3 App. 590. Conspiracy is a substantive offense. *Myers v. S.* 6 App. 1. Where several were jointly indicted for conspiracy, and one had severed and been tried and acquitted, it was held to be error to charge, on the trial of another of the defendants, with reference to a supposed conspiracy between him and the defendant who had been acquitted. The charge should have confined the jury to a conspiracy between the defendant on trial and the defendants not yet tried. *Paul v. S.* 12 App. 346. Where the indictment charged the defendants, one H and one W, with a conspiracy to commit burglary, and the evidence completely exonerated the defendant W, it was held not to be error for the court to instruct the jury, that if the evidence showed a conspiracy between the defendant and H, the offense would be complete, and that the State was not required to prove W was also a party to the conspiracy. The allegations as to W were held to be surplusage and not essential to be proved. *Woodworth v. S.* 20 App. 375. The acts and declarations of co-conspirators, made in furtherance of the common design, and while the conspiracy continues, are evidence against each other. *Phillips v. S.* 6 App. 364; *Cox v. S.* 8 App. 254; *Loggins v. S.* Id. 434; *Avery v. S.* 10 App. 199; *Post v. S.* Id. 598; *Loggins v. S.* 12 App. 65; *Pierson v. S.* 18 App. 524; *Kennedy v. S.* 19 App. 618; *Smith v. S.* 21 App. 96; *Smith v. S.* Id. 107. But conspiracy cannot be proved by the declarations of a co-conspirator made after the consummation of the offense, and in the absence of the defendant. And if a co-conspirator testifies as a witness in establishment of the conspiracy, his testimony is that of an accomplice, and is insufficient unless corroborated as such. *Cohes v. S.* 11 App. 153.

## CH. 2. — OF THREATS.

ART.	SEC.	ART.	SEC.
809. Threat to take life, etc.	1410	Decisions as to threats.	1414
810. Threat must be seriously made.	1411	813. Sending threatening letter.	1415
811. Which is a question of fact.	1412	Decisions under preceding article.	1416
812. Certain threats not included.	1413		

§1410 — ART. 809. — Threat to take life, etc. — If any person shall threaten to take the life of any human being, or to inflict upon any human being any serious bodily injury, he shall be punished by fine of not less than one hundred nor more than two thousand dollars, and, in addition thereto, he may be imprisoned in the county jail not exceeding one year. [O. C. 784, Act Feb. 22, 1875, p. 51.]

Indictment, Willson's Cr. Forms, 525-526.

§1411 — ART. 810. — Threat must be seriously made. — In order to render a person guilty of the offense provided for in the preceding article, it is necessary that the threat be seriously made. [O. C. 785, Act Feb. 22, 1875, p. 51.]

§1412 — ART. 811. — Which is a question of fact. — It is for the jury to determine, in every case of prosecution under article 809, whether the threat was seriously made or was merely idle and with no intention of executing the same. [O. C. 786, Act Feb. 22, 1875, pp. 51-52.]

§1413 — ART. 812. — Certain threats not included. — A threat that a person will do any act merely to protect himself, or to prevent the commission of some unlawful act by another, does not come within the meaning of this chapter. [O. C. 787, Act Feb. 22, 1875, p. 52.]

§1414 — Decisions as to threats. — It is sufficient, in the case of a threat to take life, for the indictment to allege that the defendant "did unlawfully and seriously threaten to take the life of" a person, naming the person, without alleging the particulars of the threat. *Tynes v. S.* 17 App. 123; *Bule v. S.* 1 App. 58; *Longley v. S.* 43 Tex. 490; *Fain v. S.* 41 Tex. 385. An indictment which charged that two defendants did "jointly and severally," seriously threaten, etc., was held good, the words "jointly and severally" being treated as surplusage. *Gay v. S.* 3 App. 168. That the threat was conditional is immaterial, provided it required something to be done or left undone, that the party threatening had no right to require. *McFain v. S.* 41 Tex. 385. But a mere rash and inconsiderate expression will not constitute this offense. *March v. S.* 3 App. 107. Whether the threat was seriously made is a question of fact, and must be submitted to the jury. *Longley v. S.* 43 Tex. 490. Two things must concur to constitute this offense. 1. A threat to take life or do serious bodily injury. 2. A serious intention existing at the time of making such threat, to execute it. *Bule v. S.* 1 App. 58. It is competent for the State, to prove intention, to give in evidence other threats made by the defendant on another occasion. *Longley v. S.* 43 Tex. 490; *Aycock v. S.* 2 App. 381; *Thrasher v. S.* 3 App. 281. And, also to prove that the defendant had a grudge against the party threatened, and in such case, it was held not to be error for the court to charge that the jury might consider such grudge, if any existed at the time the threats were made, if any threats were made, in determining whether such threats, if any, were seriously made. *Aycock v. S.* 2 App. 381. The fact the defendant did not execute the threat when he could have done so will not necessitate a charge that the jury might infer that the threat, if made, was not seriously made. *Vincent v. S.* 3 App. 678. If the object of the threat was merely to extort money, it is not sufficient to constitute this offense, unless the defendant intended to execute the threat, in case the money was not paid him. *Haynie v. S.* 2 App. 168.

§1415 — ART. 813. — Sending threatening letter. — If any person shall knowingly send or deliver to another, any letter or writing, whether signed or not, threatening to accuse such other person of a criminal offense with a view of extorting money, property, thing of value, or any advantage whatever from such other person, or threatening to kill or in any manner injure the person of such other, or to burn or otherwise destroy or injure any of his property, real or personal, or to do any other injury to such other person, he shall be punished by fine not less than one hundred nor more than one thousand dollars, and, in addition thereto, may be imprisoned in the county jail not exceeding one year. [Added in revising.]

Indictment, Willson's Cr. Forms, 527.

§1416 — **Decisions under preceding article.** — The indictment must charge that the act of sending or delivering the letter was “knowingly” done. To allege that it was “unlawfully” done will not be sufficient. *Tynes v. S.* 17 App. 123. Nor will it be sufficient to charge that the defendant “knowingly did threaten, etc., by sending, etc.” It is knowingly *sending* or *delivering*, a threatening letter that constitutes this offense. *Castles v. S.* 23 App. 286. The indictment should set out the letter or composition in *hæc verba*. *Tynes v. S.* 17 App. 123.

### CH. 3.—SEDUCTION.

ART.	SEC.	ART.	SEC.
814. Punishment.	1417	817. Married man not liable, if known.	1420
815. “Seduction” — How used.	1418	Decisions relating to seduction.	1421
816. Marriage obliterates offense.	1419		

§1417 — **ART. 814. — Punishment.** — If any person, by promise to marry, shall seduce an unmarried female, under the age of twenty-five years, and shall have carnal knowledge of such female, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years, or by fine not exceeding five thousand dollars. [O. C. 788, Act Feb. 12, 1858, p. 185.]

Indictment, Willson’s Cr. Forms, 528.

§1418 — **ART. 815. — “Seduction” — How used.** — The term “seduction” is used in the sense in which it is commonly understood. [O. C. 789.]

§1419 — **ART. 816. — Marriage obliterates offense.** — If the parties marry each other at any time before the conviction of the defendant, or if the defendant in good faith offer to marry the female so seduced, no prosecution shall take place, or, if begun, it shall be dismissed; but the benefits of this article shall not apply to the case of a defendant who was in fact married at the time of committing the offense. [O. C. 790.]

§1420 — **ART. 817. — Married man not liable, if known.** — No person who was, at the time of committing the offense, married, and the fact of marriage known to the woman, shall be held liable for the offense defined in this chapter. [O. C. 791.]

§1421 — **Decisions relating to seduction.** — The seduced female is incompetent to testify against the defendant. C. C. P. art. 730; *Cole v. S.* 40 Tex. 147. The indictment must allege that at the time of the commission of the act the female was unmarried. *Mesa v. S.* 17 App. 395. The promise of marriage is an essential element of this offense, and the concession must have been alone upon that consideration. The jury must not therefore be instructed that “seduce” is used in its ordinary sense. *Cole v. S.* 40 Tex. 147.

### CH. 4.—EMPLOYMENT OF SAILORS AND CREW.

§1421a — **ART. 817a. — Restriction on employment of crew of vessel.**

§1. That no sailor or portion of the crew of any foreign sea-going vessel shall engage in working on the wharves or levees of ports in the State of Texas beyond the end of the vessels’ tackle.

§2. That any officer, sailor or member of the crew of a foreign sea-going vessel, violating section 1 of this act shall be deemed guilty of a misdemeanor, and on conviction shall be fined in a sum not less than ten dollars nor more than one hundred dollars, or be imprisoned in the county jail for not less than ten nor more than thirty days, or both, in the discretion of the court or jury. [Act March 26, 1885, Ch. 54, p. 52.]

## CH. 5—PROTECTION OF SETTLERS ON SCHOOL LANDS.

## §1421b—ART. 817b.—Punishment for certain threats, etc.

§1. Any person who by force, threats or intimidations shall prevent, or attempt to prevent, or shall combine and confederate with others to prevent, or attempt to prevent, any person who has acquired a right thereto in accordance with the laws of the state from peaceably entering upon and establishing a settlement on any parcel or tract of land belonging to the common school, university, the lunatic, blind, deaf and dumb and orphan asylum lands, subject to purchase and settlement under and in accordance with the laws of this state, shall be deemed guilty of a misdemeanor, and upon conviction therefor, shall be fined in any sum not less than two hundred nor more than one thousand dollars, and in addition thereto shall be imprisoned in the county jail not less than one nor more than six months. [Act March 31, 1885, Ch. 89, p. 83.]

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## CH. 6—FENCES WITHOUT GATES.

§1421c—ART. 817c.—Gate shall be placed every three miles, etc.—That it shall be unlawful for any person or persons, by joining fences, or otherwise, to build or maintain more than three miles lineal measure of fence, running in the same general direction, without a gateway in same, which gateway must be at least eight feet wide, and shall not be locked; *provided*, that all persons who have fences already constructed in violation of this section, shall have six months within which to conform to the provisions hereof.

§1421d—ART. 817d.—Penalty for violation of preceding article.—If any person or persons shall build or maintain more than three miles lineal measure of fencing, running in the same general direction, without providing such gateway, he shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not less than one nor more than two hundred dollars, and each day that such fence remains without such gateway shall constitute and be punished as a separate offense.

§1421e—ART. 817e.—Applicable only to pasture lands.—The provisions of this bill shall only apply to pasture lands. [Act Feb. 6, 1884, Ch. 24, p. 37.]

## TITLE 19. — REPETITION OF OFFENSES.

ART.	SEC.	ART.	SEC.
818. Second and subsequent convictions for misdemeanor.	1422	821. Second conviction for capital offense — How punished.	1425
819. Subsequent conviction for felony.	1423	Decisions as to increased punishments.	1426
820. Third conviction for felony — How punished.	1424		

**§1422 — ART. 818. — Second and subsequent convictions for misdemeanor.** — If it be shown on the trial of a misdemeanor that the defendant has been once before convicted of the same offense, he shall, on a second conviction, receive double the punishment prescribed for such offense in ordinary cases, and upon a third, or any subsequent conviction for the same offense, the punishment shall be increased, so as not to exceed four times the penalty in ordinary cases. [O. C. 792.]

Indictment, Willson's Cr. Forms, 540.

**§1423 — ART. 819. — Subsequent conviction for felony** — If it be shown, on the trial of a felony less than capital, that the defendant has been before convicted of the same offense, or of one of the same nature, the punishment, on such second or other subsequent conviction shall be the highest which is affixed to the commission of such offense in ordinary cases. [O. C. 792.]

Indictment, Willson's Cr. Forms, 541.

**§1424 — ART. 820. — Third conviction for felony — How punished.** — Any person who shall have been three times convicted of a felony, less than capital, shall, on such third conviction, be imprisoned to hard labor for life in the penitentiary. [O. C. 793.]

**§1425 — ART. 821. — Second conviction for capital offense. — How punished.** — A person convicted a second time of any offense to which the penalty of death is affixed as an alternate punishment, shall not receive, on such second conviction, a less punishment than imprisonment for life in the penitentiary. [O. C. 794.]

Indictment, Willson's Cr. Forms, 542.

**§1426 — Decisions as to increased punishments.** — The increased punishments provided by the preceding articles cannot be inflicted unless the indictment alleges the previous conviction, and that the offense with which the defendant is then charged was committed since said previous conviction. "Murder" and "an assault with intent to murder" are not offenses of the same nature. Long v. S. 86 Tex. 6.

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# THE PENAL CODE.

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REVISED  
PENAL CODE  
AND  
CODE OF CRIMINAL PROCEDURE,  
AND  
PENAL LAWS  
Passed by the 16th, 17th, 18th, 19th and 20th Legislatures  
OF THE  
STATE OF TEXAS.

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ANNOTATED BY  
SAM. A. WILLSON:

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PART II—CODE OF CRIMINAL PROCEDURE.

[Third Edition.]

INCLUDING ACTS OF TWENTY-SECOND LEGISLATURE, 1891.

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## PREFACE.

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When Part 1 of this work—the Penal Code—was prepared and published, Vol. 24 of the Court of Appeals Reports had not been issued, and hence the annotations do not embrace that volume. Part 2—the Code of Criminal Procedure—however, includes the decisions of said volume in so far as they relate to Procedure. The decisions contained in Vol. 25, Court of Appeals Reports, recently published, are not noted in this work.

It has not been the purpose of the author, nor was it practicable, to make this work a digest of *all* the decisions, but to note those only which are germane to the provisions of the Codes, and to so arrange them as to enable the searcher to easily find such as he may desire to examine. It will doubtless be found that the work is imperfect in failing to note some decisions. It will appear, however, that such omissions are few, and, in most instances, unimportant. The careful searcher for the law will, of course, not content himself with these annotations, nor with any mere digest of the decisions. He will thoroughly explore the reports, and examine the decisions in full.

The Criminal Statutes, enacted since the revision of the Codes, including those of the 20th Legislature, have been incorporated in this work, in places deemed most appropriate.

Hoping that the work may prove convenient at least, it is respectfully submitted.

SAM. A. WILLSON.

RUSK, TEXAS, 1888.



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PART II OF THE REPORT  
OF THE  
COMMISSIONERS TO REVISE THE CODE,\*

MADE TO THE GOVERNOR, JANUARY 1, 1879.

---

The following memoranda will serve to show most of the suggestions or changes that have been made in this Code.

All the provisions concerning criminal procedure that have heretofore been found in different acts and parts of acts, and very often in statutes, not penal in their character, have been gathered together and arranged under appropriate chapters and articles.

TITLE 1.—*Introductory.*

CH. 1.—GENERAL PROVISIONS.—This chapter is the same substantially as the introductory title, chapter 1, of the original Code. The necessary changes have been made to conform its provisions to the present Constitution.

CH. 2.—The general duties of officers charged with the enforcement of the criminal laws.

*I.—The Attorney-General.*—Art. 29 of the original Code is omitted, because it is believed to be no longer the law. Art. 29 of this Code, which supplies the omitted article, also Art. 30 of this Code, are taken from the Penal Code and inserted in this place, where we conceive they more appropriately belong. [Adopted.]

*II.—District and County Attorneys.*—The duties of these two officers are more fully set forth than in the original Code, and made to correspond with the provisions of the law as now in force. [Adopted.]

*III.—Magistrates.*—Art. 52 of the original Code, defining “Magistrates,” is placed as Art. 42 of this Code, and Art. 33 of original Code is made Art. 43 of this Code; Art. 33 of the original Code is omitted, as it properly belongs in the Penal Code, and is included in Art. 252 of the Penal Code. [Adopted.]

*IV.—Peace Officers.*—In this chapter there are no material changes.

*V.—Sheriffs.*—Art. 49 is taken from the Civil Statutes (P. D. 5114). We are of the opinion it properly belongs in this place. [Adopted.]

*VI.—Clerks of the District and County Courts.*—Art. 58 is added. [Adopted.]

CH. 3.—CONTAINING DEFINITIONS.—Arts. 51 and 52 of original Code are made Arts. 42 and 44 of this Code, where, in our opinion, they more properly belong. No other changes are made in this chapter. [Adopted.]

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(\*) For Part I see the Penal Code, and for Part III see the Civil Code.

**TITLE 2.—Of the Jurisdiction of Courts in Criminal Actions.**

**CH. 1.**—This chapter has been made to conform to the existing Constitution and laws. The special criminal district court of the counties of Galveston and Harris is not included herein, but in Title xxx, in the Civil Statutes under the general head of "Courts." Its power and jurisdiction is fully treated of in four chapters.

**CH. 2.**—OF THE COURT OF APPEALS.—This is in conformity with the existing Constitution and laws, and supplies the place of "Title I, Part 1, of the Supreme Court," in the original Code.

**CH. 3.**—OF THE DISTRICT COURTS.—This supplies the place of Title II, Part 1, of the original Code, and is made to conform to the existing Constitution and laws.

**CH. 4.**—OF THE COUNTY COURTS.—This chapter is added to the original Code, and conforms to the existing Constitution and laws.

**CH. 5.**—OF JUSTICES' AND OTHER INFERIOR COURTS.—This chapter supplies the place of Title III, Part 1, of the original Code, and is so changed as to make it conform to the existing Constitution and laws.

**TITLE 3.—Of the Prevention and Suppression of Offenses; and the Writ of Habeas Corpus.**

This title is in place of Part 2, Titles I, II, III and IV, of the original Code, and no material changes are made.

**TITLE 4.—The Time and Place of Commencing and Prosecuting Criminal Actions.****CH. 1.—THE TIME WITHIN WHICH CRIMINAL ACTIONS MAY BE COMMENCED.**

**Art. 196.** It was thought proper to change the law so as to limit prosecutions for treason and murder.

**Art. 201** is added in accordance with the law as established by the supreme court of the state. No other changes are made in the law as it now exists.

**CH. 2.**—OF THE COUNTY IN WHICH OFFENSES MAY BE PROSECUTED.—This chapter is substantially the same as Chap. 2, Title I, Part 3, of the Code, and is the law as it now exists.

**TITLE 5.—Of Arrest, Commitment and Bail.**

**CH. 1.**—OF ARREST WITHOUT WARRANT.—The same as Title II, Part 3, Chap. 1, of the present Code.

**CH. 2.**—OF ARREST UNDER WARRANT.—The same substantially as Chap. 2, Title I, Part 3, of the Code, with the amendments and additions thereto by the Act of April 17, 1871, page 39 (P. D., 6592, *et seq.*). Also Arts. 250, 251 and 252 are added, as they are considered necessary to supply an omission in the present laws.

**CH. 3.**—OF THE COMMITMENT AND DISCHARGE OF THE ACCUSED.—No material changes are made in the Code. Art. 265 is added, and the arrangement of several articles changed.

**CH. 4.**—OF BAIL.—Contains substantially all the provisions of the Code upon the subject of bail. Arts. 295, 315, 316, 317 and 321 are added to supply what we conceive to be omissions in the Code. [Adopted.]

TITLE 6.—*Of Search Warrants.*

No material changes have been made in the present law in this title.

TITLE 7.—*Of the Proceedings Subsequent to Commitment or Bail, and Prior to the Trial.*

CH. 1.—THE ORGANIZATION OF THE GRAND JURY.—This chapter is made to conform to the Act of August 1, 1876, page 79, *et seq.* Arts. 369, 370, 388 and 391 are suggested as necessary additions to supply omissions in the present law. [Adopted.]

CH. 2.—OF THE DUTIES, PRIVILEGES AND POWERS OF THE GRAND JURY.—No material change is made in the existing law. Arts. 398, 403, 404, 405, 407, 410 and 415 are suggested as necessary additions. [Art. 410 stricken out and the others adopted.]

CH. 3.—OF INDICTMENTS AND INFORMATIONS.—No material changes are made. The Act of August 12, 1876, page 135, is added in Arts. 435, 6, 7 and 8. Arts. 425, 426, 427, 428, 433, 439, are suggested as necessary additions. [Adopted.]

CH. 4.—OF PROCEEDINGS PRELIMINARY TO TRIAL.—The following articles are suggested as necessary additions to the present provisions of the Code, viz: Arts. 443, 445, 446, 447, 448, 449, 451, 454, 459, 460, 461, 462, 464, 465, 476, 478, 479, 490, 491, 494, 495, 496, 497, 499, 500, 501, 505, 535, 553, 556, 564, 565, 566, 569 to 575 inclusive, 576, 577, 584, 588, 591. No other material changes or additions are made in this chapter. [Adopted.]

TITLE 8.—*Of Trial and its Incidents.*

CH. 1.—MODE OF TRIAL.—Arts. 595, 602 are added to conform to present laws. No other material changes. [Adopted.]

CH. 2.—OF THE SPECIAL VENIRE IN CAPITAL CASES.—Arts. 607, 608, 609, 610, 611, 612, 613 and 614 are suggested as necessary additions. [Adopted.]

CH. 3.—OF THE FORMATION OF THE JURY IN CAPITAL CASES.—Arts. 619, 620, 621, 622, 625, 628, 629, 630, 631, 632, 644 are suggested as necessary additions. No other material changes made. [Adopted.]

CH. 4.—OF THE FORMATION OF THE JURY IN CASES LESS THAN CAPITAL.—Arts. 645 to 651 added to conform to present laws (Act of August 1, 1876, page 82, *et seq.*); also Arts. 654 to 656 inclusive. Arts. 658 and 659 are suggested as necessary additions. No other material changes. [Adopted.]

CH. 5.—OF THE TRIAL BEFORE THE JURY.—Arts. 664, 665, 666, 669, 670 688, 691 and 700 are added as necessary and to conform to existing laws. [Adopted.]

CH. 6.—OF THE VERDICT.—Arts. 705, 706, 707 are added as necessary and to conform to existing laws. Art. 714 is an amplification of Art. 631 of the Code, and is, in our judgment, necessary. [Adopted.]

CH. 7.—OF EVIDENCE IN CRIMINAL ACTIONS.—Arts. 729, 736, 737 and 756 are suggested as necessary additions. No other material changes. [Adopted.]

CH. 8.—OF DEPOSITIONS, ETC.—No material changes are made, except in the addition of Art. 774. [Adopted.]

TITLE 9.—*Of Proceedings after Verdict.*

CH. 1.—OF NEW TRIALS.—Arts. 778, 780, 781 and 782 are suggested as necessary additions. No other material changes. [Adopted.]

CH. 2.—ARREST OF JUDGMENT.—No material change is made.

CH. 3.—JUDGMENT AND SENTENCE.—Arts. 791, 792, 800, 803, 805 and 806 are suggested as necessary additions. No other material changes. [Adopted.]

CH. 4.—EXECUTION OF JUDGMENTS.—Arts. 807, 810, 812, 814, 815, 816, 819, 825, 833 are suggested as necessary additions. No other material changes. Art. 825 should state when the sentence shall commence; we suggest that this be when the convict reaches the penitentiary. [Adopted, except as to time of commencement of the term of imprisonment. It commences from date of sentence, etc.]

TITLE 10.—*Appeal and Writ of Error.*

Arts. 836, 837, 838, 839, 843, 844, 845, 846, 852, 853, 854, 855, 856, 857, 858, 859, 879 are suggested as necessary additions. No other material changes. [Adopted.]

TITLE 11.—*Of Proceedings in Criminal Actions Before Justices of the Peace, etc.*

CH. 1.—GENERAL PROVISIONS.—Arts. 898 and 900 are suggested as necessary additions. No other material changes. [Adopted.]

CH. 2.—OF THE ARREST OF THE DEFENDANT.—Arts. 902, 903, 905, 906, 907, 909, 910 are added from act of August 17, 1876, p. 166. No other material changes. [Adopted.]

CH. 3.—OF THE TRIAL AND ITS INCIDENTS.—Arts. 912, 917, 918, 919, 934, 935, 936, 937, 938, 939, 940, 941 are suggested as necessary additions. No other material changes. [Adopted.]

CH. 4.—OF THE JUDGMENT AND EXECUTION.—Arts. 943 and 945 are suggested as necessary additions. No other material changes. [Adopted.]

TITLE 12.—*Miscellaneous Proceedings.*

CH. 1.—OF INQUIRIES AS TO THE INSANITY OF THE DEFENDANT AFTER CONVICTION.—Arts. 955, 956, 957, 958 and 959 are suggested as necessary additions. No other material changes. [Adopted.]

CH. 2.—DISPOSITION OF STOLEN PROPERTY.—Arts. 966, 972 and 973 are suggested as necessary additions. No other material changes. [Adopted.]

CH. 3.—REPORTS OF OFFICERS CHARGED BY LAW WITH THE COLLECTION OF MONEY.—Arts. 975, 976, 977, 978 and 979 are supplied from Act of May 1, 1874 (page 182). Art. 980 is suggested as a substitute for Art. 806 of the Code. Art. 807 of the Code is omitted and provided for in the Revised Statutes, under the title "County Finances." [Adopted.]

CH. 4.—REMITTING FINES AND FORFEITURES, ETC., ETC.—No material changes are made in the law as it now exists.



TITLE 13.—*Of Inquests.*

CH. 1.—INQUESTS UPON DEAD BODIES.—No material changes are made in the law as it now exists.

CH. 2.—FIRE INQUESTS.—Supplied from Act of June 2, 1873, page 171. [Adopted.]

TITLE 14.—*Of Fugitives from Justice.*

Arts. 1031, 1032, 1036, 1037, 1038 and 1039 are suggested as necessary additions. [Adopted.]

TITLE 15.—*Of Costs in Criminal Actions.*

CH. 1.—TAXATION OF COSTS.—Arts. 1040 to 1048, inclusive, are suggested as necessary additions. [Adopted.]

CH. 2.—OF COSTS PAID BY THE STATE.—Arts. 1049 to 1054, inclusive, are suggested as necessary additions. Also Arts. 1057 to 1059, inclusive. [Adopted.]

CH. 3.—OF COSTS PAID BY COUNTIES.—Arts. 1065 and 1066 are supplied from Act of August 23, 1876, page 290. Arts. 1071 to 1076, inclusive, and 1079 to 1085, inclusive, are suggested as necessary additions. No material change is made in the law as it now exists, in other respects. [Adopted.]

CH. 4.—OF COSTS PAID BY DEFENDANTS.—Arts. 1087 to 1095, inclusive, are supplied from the Act of August 23, 1876, page 284, *et seq.* Arts. 1096 to 1105, inclusive, are suggested as necessary additions. Also Arts. 1109 and 1110. The mileage fee for executing process is omitted from the costs in all cases, the commission being of the opinion that it is the source of much extortion on the part of officers, and also operates unequally. [Adopted, except that Art. 1103 was stricken out.]

TITLE 16.—*Commissions on Money Collected.*

No material change in the law as it now exists.

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*The report on the Civil Statutes is included in Sayles' Statutes.*

*Section 2.—Be it further enacted, That the following articles shall hereafter constitute the CODE OF CRIMINAL PROCEDURE of the State of Texas, to-wit:*

XVI

# THE CODE OF CRIMINAL PROCEDURE.

## TITLE 1.—INTRODUCTORY.

CH. 1. CONTAINING GENERAL PROVISIONS.

CH. 2. THE GENERAL DUTIES OF OFFICERS CHARGED WITH THE ENFORCEMENT OF THE CRIMINAL LAWS.

CH. 3. CONTAINING DEFINITIONS.

### CH. 1.—CONTAINING GENERAL PROVISIONS.

ART.	SEC.	ART.	SEC.
1. Objects of this Code.	1427	11. Liberty of speech and of the press.	1456
2. The same.	1428	12. Person shall not be disqualified as a witness for religious opinion or want of religious belief.	1457
3. Trial by due course of law secured.	1429	13. Outlawry and transportation prohibited.	1458
"Due course of law"—Decisions as to.	1430	14. Conviction shall not work corruption of blood, etc.	1459
4. Rights of accused persons.	1431	15. No conviction of treason, except, etc.	1460
Right to a speedy trial.	1432	16. Privilege of senators and representatives.	1461
Right to a public trial.	1433	17. Privilege of voters.	1462
Impartial jury.	1434	18. Change of venue.	1463
Shall not be compelled to give evidence against himself.	1435	19. Conservators of the peace—Style of process.	1464
Right to be heard.	1436	Commencement and conclusion of prosecutions.	1465
Shall be confronted with the witnesses against him.	1437	20. In what cases accused may be tried, etc., after conviction.	1466
Shall have compulsory process for witnesses.	1438	21. Same subject.	1467
Shall not be held to answer unless on indictment, etc.	1439	22. No conviction of felony, except by verdict of jury.	1468
5. Protection against searches and seizures.	1440	23. Defendant may waive any right, except, etc.	1469
Decisions under preceding article.	1441	Waiver of right—Decisions as to.	1470
6. Prisoners entitled to bail, except in certain cases.	1442	24. Trials shall be public.	1471
Former constitutional provisions as to bail.	1443	25. Defendant shall be confronted by witnesses, except, etc.	1472
What are capital offenses.	1444	26. Construction of this Code.	1473
Right to bail—Decisions as to.	1445	Decisions under preceding article.	1474
7. Writ of <i>habeas corpus</i> shall never be suspended.	1446	27. When rules and common law shall govern.	1475
8. Excessive bail, fines, etc., forbidden.	1447	Decisions under preceding article.	1476
Excessive bail—Decisions as to.	1448	Constitutional provisions — Rules for interpreting.	1477
Excessive fines, etc.—Decisions as to.	1449	Declaring statutes unconstitutional.	1478
Courts shall be open, etc.	1450	Constitutional law—Miscellaneous decisions.	1479
9. No person shall be twice put in jeopardy for same offense.	1451		
Jeopardy—Decisions as to.	1452		
Plea of jeopardy.	1453		
10. Trial by jury shall remain inviolate.	1454		
Decisions under preceding article.	1455		

§1427—ART. 1.—Objects of this Code.—It is hereby declared that this Code is intended to embrace rules applicable to the prevention and prosecution of offenses against the laws of this state, and to make the rules of proceeding

in respect to the prevention and punishment of offenses intelligible to the officers who are to act under them, and to all persons whose rights are to be affected by them. It seeks—

1. To adopt measures for preventing the commission of crime.
2. To exclude the offender from all hope of escape.
3. To insure a trial with as little delay as shall be consistent with the ends of justice.
4. To bring to the investigation of each offense, on the trial, all the evidence tending to produce conviction or acquittal.
5. To insure a fair and impartial trial; and,
6. The certain execution of the sentence of the law when declared. [O. C. 1, amended by Act Feb. 15, 1858.]

§1428—ART. 2.—**The same.**—In order to collect together, for the convenience of officers and all others charged with the enforcement of the laws, the material provisions of the constitution of this state respecting the prosecution of offenses, the following provisions of said instrument are here inserted. [O. C. 2.]

§1429—ART. 3.—**Trial by due course of law secured.**—No citizen of this state shall be deprived of life, liberty, property or privileges, outlawed, exiled, or in any manner disfranchised, except by due course of the law of the land. [Bill of Rights, sec. 19; O. C. 3.]

See, also, Const. U. S. Amendment XIV.

§1430—“**Due course of law**”—**Decisions as to.**—A citizen can only be convicted and punished for a felony by due course of the law of the land, and by authority of an indictment of a grand jury. A grand jury is composed of *twelve* men, no more and no less. An indictment presented by a body of men purporting to be a grand jury, but which body is composed of more, or less, than twelve members, is a nullity, and a conviction had thereunder is not “by due course of the law of the land.” *Lott v. S. 18 App. 627; McNeese v. S. 19 App. 48; Williams v. S. Id. 264; Ex parte Swain, Id. 323; Smith v. S. Id. 95; Rainey v. S. Id. 479.* And so a conviction by a petit jury, composed of more or less than *twelve* men, is not a conviction “by due course of law” in a felony case. *Lott v. S. 18 App. 627.* And in a misdemeanor case, tried in the county court or in a justices’ court, the jury must be composed of six men, where the right of trial by such a jury has not been waived by the defendant. “Due course of the law of the land” demands a legal conviction by a legal jury. *Stoll v. S. 14 App. 59; Marks v. S. 10 App. 334.* By “the law of the land” is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. It means that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Everything which passes under the form of an enactment is not, therefore, to be considered the law of the land. See the meaning of the term “law of the land” fully discussed. *Huntsman v. S. 12 App. 619.* The legislature cannot condemn a particular act as an indictable offense, and then empower the courts in the prosecution of such an offense, to substitute in the indictment and proof, an altogether different act, not prohibited. Nor can it dispense with the essential allegations and proofs, even in offenses *mala prohibita*. *Hewitt v. S. 25 Tex. 722; S. v. Williams. Id. 738; S. v. Duke, 42 Tex. 455; Williams v. S. 12 App. 395; Huntsman v. S. Id. 619.* This provision has no application whatever to proceedings had in criminal cases after trial and conviction. *Loyd v. S. 19 App. 137.*

§1431—ART. 4.—**Rights of accused persons.**—In all criminal prosecutions, the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof. He shall not be compelled to give evidence against himself. He shall have the right of being heard by himself or counsel, or both; shall be confronted with the witnesses against him and shall have compulsory process for obtaining witnesses in his favor. And no person shall be held to answer for a criminal offense, unless on indictment of a grand jury, except in cases in which the punishment is by fine, or imprisonment otherwise than in the penitentiary; in cases of impeachment and in cases arising in the army and navy, or in the militia, when in actual service in time of war or public danger. [Bill of Rights, sec. 10; O. C. 4.]

See also Const. U. S. Amendments V and VI.

**§1432—Right to a speedy trial.**—This constitutional guarantee must receive a reasonable interpretation. It cannot be held to mean that in all the possible vicissitudes of human affairs, a person accused of crime shall have a speedy trial. It is intended to prevent the government from oppressing the citizen by holding criminal prosecutions suspended over him for an indefinite time, and to prevent delays in the customary administration of justice, by imposing upon the judicial tribunals an obligation to proceed with reasonable dispatch in the trial of criminal accusations. It applies to all criminal accusations, without respect to the grade of the crime of which the accused may stand charged. It does not place the citizen upon such vantage ground that the state cannot demand from him such services as, under the circumstances of the country, he ought, for the public good, or the public safety, to render. *Ex parte Turman*, 26 Tex. 708. An accused, who has never demanded, or been refused a trial, cannot invoke by *habeas corpus*, a discharge from imprisonment under this provision. *Hernandez v. S.* 4 App. 425. But if an accused is denied a trial by due course of law, or such a trial is denied him for an unreasonable length of time, he may resort to *habeas corpus* for relief. *Rutherford v. S.* 16 App. 649. This provision of the constitution has no application to proceedings had after trial and conviction. *Lloyd v. S.* 19 App. 137.

**§1433—Right to a public trial.**—By a public trial is not meant that every person who sees fit, shall in all cases be permitted to be present; because there are many cases where, from the character of the charge, and the nature of the evidence by which it is to be supported, the motives to attend the trial on the part of portions of the community would be of the worst character, and where a regard to public morals and public decency would require that at least the young be excluded from hearing and witnessing the evidences of human depravity which the trial must necessarily bring to light. The requirement of a public trial is for the benefit of the accused; that the public may see that he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions; and the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether. Publicity does not absolutely forbid all temporary shutting of doors, or render incompetent a witness who cannot be heard by the largest audience, or require a court room of dimension adequate to the accommodation of all desirous of attending a notorious trial, or vocal organs in counsel or judge capable of reaching all. See this case, for an instance, in which it was held proper, and not in violation of the right of public trial, for the trial court to exclude from the court room a portion of the audience. *Grimmett v. S.* 22 App. 36. The trial must be at the court house at the county site of the county. *Adams v. S.* 19 App. 1. See, *post*, Art. 24, §1466.

**§1434—Impartial jury.**—A jury for the trial of a felony case must be composed of twelve members, no more and no less. Const. Art. V, sec. 13. A jury in the county or justice's court must be composed of six members, no more and no less, unless the accused should waive such a jury. *Lott v. S.* 18 App. 627; *post*, §§1451, 1452. For the rules regulating the formation of impartial juries to try criminal cases, see, *post*, chapters 2, 3 and 4 of Title 8.

**§1435—Shall not be compelled to give evidence against himself.**—Article 367, of the Penal Code, *ante*, §599, is not in violation of this provision of the constitution. *Wright v. S.* 23 App. 313.

**§1436—Right to be heard.**—The preceding section of the Bill of Rights has reference exclusively to the trial in the *nisi prius* court, and cannot be construed to confer upon a person convicted of crime, and confined in jail, pending his appeal to the court of appeals, the right to be brought personally before said last named court to be heard in person upon said appeal. But in a *nisi prius* trial, the right of the accused to be heard by himself, or by counsel, or both, is guaranteed, and cannot be denied, however simple, clear, unimpeached and conclusive the evidence against him may be. *Tooke v. S.* 23 App. 10.

**§1437—Shall be confronted with the witnesses against him.**—The statute making dying declarations admissible in evidence against the accused in case of homicide, does not infringe this constitutional right. *Burrell v. S.* 18 Tex. 713. It was held error to admit in evidence against the defendant telegraphic dispatches purporting to be replies to dispatches sent by defendant. He was entitled to be confronted by the witnesses whom it was claimed sent such dispatches. *Chester v. S.* 23 App. 577. The rule that the accused shall be confronted with the witnesses against him, does not preclude such documentary evidence to establish collateral facts as would be admissible under the rules of common or statutory law. *May v. S.* 15 App. 430; *Rogers v. S.* 11 App. 608. See, *post*, Art. 25, §1467.

**§1438—Shall have compulsory process for witnesses.**—This right of the accused is controlled and restricted by Articles 488 and 489, *post*. The Act of April 23, 1883, *post*, Art. 1061b, does not repeal or modify Article 489. The purpose of said Article 489 is simply to regulate the compensation of attached witnesses in felony cases. Applications for attachments for absent witnesses are not subject to judicial discretion, but when Article 1061b has been complied with the process must issue, and to deny the process in such case, is to deny the accused a constitutional right of vital importance. *Roddy v. S.* 16 App. 502. The accused has the constitutional right to have his witnesses present at the trial, and it is no answer to an application for a continuance based upon the ground that his witnesses are absent, for the prosecution to admit that the witnesses would swear to the facts as stated in the application. *Warren v. S.* 29 Tex. 464. It is not within the power of the legislature to deny a defendant the constitutional right of having compulsory process for his witnesses, and in so far as Art.

489a, *post*, deprives a defendant of such right, said article is unconstitutional. *Homan v. S.* 23 App. 212. A *subpoena* is compulsory process, and the mode of its issuance, service and return, and the penalties for its disobedience, are provided for in this Code, *post*, Arts. 477 to 486. *Neyland v. S.* 13 App. 536. The issuance of a *subpoena* is a matter of right, and is not a matter resting in the discretion of the court or clerk. *Edmons v. S.* 43 Tex. 230.

§1439—**Shall not be held to answer unless on indictment, etc.**—Article 434, *post*, which provides for the substitution of an indictment which has been lost, etc., is not in conflict with this provision. *Withers v. S.* 21 App. 210; *Shultz v. S.* 15 App. 258. For statutes and decisions pertinent to this provision see, *post*, Ch. 3, Title 7, **INDICTMENTS**.

§1440—**ART. 5.—Protection against searches and seizures.**—The people shall be secure in their persons, houses, papers and possessions from all unreasonable seizures or searches; and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause supported by oath or affirmation. [Bill of Rights, sec. 9; O. C. 5.]

See, also, Const. U. S. Amendment IV.

§1441—**Decisions under preceding article.**—For a discussion of the preceding article with reference to a seizure of the person, see *Alford v. S.* 8 App. 545. See also, *post*, Arts. 233-236 and notes thereto. As to arrest without warrant, see *Staples v. S.* 14 App. 136, and, *post*, §§1722, 1723, 1724. "Probable cause" means a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged. *Landa v. Obert*, 45 Tex. 539. As to search warrants, see, *post*, Title 6.

§1442—**ART. 6.—Prisoners entitled to bail, except in certain cases.**—All prisoners shall be bailable by sufficient sureties, unless for capital offenses, where the proof is evident; but this provision shall not be so construed as to prevent bail after indictment found, upon examination of the evidence in such manner as may be prescribed by law. [Bill of Rights, sec. 11; O. C. 6.]

See, also, Const. U. S. Amendment VIII. and State Const., Bill of Rights, sec. 13; *post*, §§1445, 1446, Ch. 4, Title 5, Arts. 309-567.

§1443—**Former constitutional provisions as to bail.**—The constitution of the Republic of Texas provided: "All persons shall be bailable by sufficient security, unless for capital crimes, when the proof is evident or presumption strong." Declaration of Rights, sec. 10, the Constitution of 1845, Bill of Rights, sec. 9, provided: "All prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident or the presumption great." The same provision was incorporated in the constitutions of 1861, Bill of Rights, sec. 9. The amended Constitution of 1866, Bill of Rights, sec. 9, provided, as does the preceding article, that: "All prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident." The same language is used in the Constitution of 1869, Bill of Rights, sec. 9.

§1444—**What are capital offenses.**—An offense for which the highest penalty is death, is a capital offense. *Ante*, §119. The following named are capital offenses: Treason, *ante*, §172a; murder in the first degree, *ante*, §1072; perjury committed in a capital case, *ante*, §314; rape, *ante*, §917.

§1445—**Right to bail—Decisions as to.**—The terms "proof is evident or presumption great" used in the Constitution of 1845, indicate the same degree of certainty, whether the evidence be direct or circumstantial. The design of the provision is to secure the right of bail in all cases, except in those in which the facts show with reasonable certainty that the prisoner is guilty of a capital offense. If the evidence is clear and strong, leading a well guarded and dispassionate judgment to the conclusion that the offense has been committed; that the accused is the guilty agent, and that he would probably be punished capitally, if the law is administered, bail is not a matter of right. *Ex parte Smith*, 23 App. 100, criticising and declaring to be wrong the rule laid down in *Ex parte Foster*, 5 App. 525, and followed in *Ex parte Beacom*, 12 App. 318, to the effect that it is a safe rule to refuse bail, where the judge would sustain a capital conviction pronounced by a jury upon the evidence. See, also, *McCoy v. S.* 25 Tex. 33; *Drury v. S.* *Id.* 45; *Thompson v. S.* 25 Tex. Sup. 395; *Ex parte Cook*, 2 App. 388; *Ex parte Coldiron*, 15 App. 464. From the fact of a conflict of evidence, it does not necessarily follow that the inculpatory evidence fails to make the "proof evident," for it is not all exculpatory evidence that will destroy or impair that which is inculpatory or which will raise a reasonable doubt of the guilt of the accused of a capital offense. The evidence is to be considered in its entirety, and if, when so considered, a reasonable doubt of the guilt of the accused of a capital offense is not engendered, the "proof is evident," and bail should be refused. *Ex parte Smith*, 23 App. 100. Bail may be refused upon circumstantial evidence. *Ex parte Rothschild v. S.* 2 App. 560. Where the guilt of the accused depends upon the issue of his sanity or insanity at the time of the commission of the offense, if the testimony upon this issue is of a character to induce the belief that he was insane when he committed the act, he is entitled to bail. *Zembrod v. S.* 25 Tex. 519; and so where there is

a conflict of evidence upon this issue, it cannot be said that the "proof is evident." *Ex parte* Miller, 41 Tex. 213; but see *Ex parte* Smith, *supra*. On appeal from a judgment refusing bail, where the evidence is conflicting, the court of appeals will rarely grant bail, as the court below is in a far better situation to determine as to the credibility of witnesses. *Ex parte* Rothschild, 2 App. 560; *Ex parte* Beacom, 12 App. 318; *Drury v. S.* 25 Tex. 45. The word "evident" means manifest, plain, clear, obvious, apparent, notorious. Unless it plainly, clearly, obviously appear by the proof that the accused is guilty of a capital offense, he is entitled to bail. *Ex parte* Boyett, 19 App. 17. An accused is not entitled to bail on the ground that a disagreement of the jury, upon the trial of the cause, shows that the proof is not evident. *Ex parte* England, 23 App. 90; *Webb v. S.* 4 App. 167. This provision of the constitution applies only to prisoners before conviction, and a felon, after verdict of conviction, cannot go at large on bail pending an appeal. *Ex parte* Ezell, 40 Tex. 451; *Ex parte* Sewartz, 2 App. 74; *Warnock v. S.* 6 App. 450; *post*, Art. 841. Nor is bail allowable in extradition cases, pending an appeal. *Ex parte* Erwin, 7 App. 288. On a proceeding to admit to bail, it is proper to hear the witnesses who testified before the grand jury, and if that proof is not evident, bail should be allowed, in the absence of further inculcating evidence, notwithstanding a statement by the district attorney that he has other evidence, which he will not disclose for fear of weakening the state's case. *Ex parte* Bramer, 37 Tex. 1. Even after indictment found charging the accused with a capital offense, he is entitled to bail if the proof of his guilt of a capital offense is not evident. But in such case the indictment suffices to show *prima facie* that the offense is non-bailable, and the burden is upon the accused in applying for bail to show that he is entitled to it. *Ex parte* Randon, 12 App. 145; *Ex parte* Scroggin, 6 App. 546; *Ex parte* Smith, 23 App. 100. For evidence held sufficient to justify the refusal of bail, see the following cases: *Drury v. S.* 25 Tex. 45; *Moore v. S.* 31 Tex. 1; *Herrin v. S.* 33 Tex. 638; *Ex parte* Rothschild, 2 App. 560; *Ex parte* Rucker, 6 App. 81; *Ex parte* Beacom, 12 App. 318; *Smith v. S.* 23 App. 100; *Ex parte* Williams, 18 App. 653. In many other cases on appeal the evidence was held sufficient to justify the denial of bail, but usually in such cases written opinions are not delivered, and it is only the reported cases in which written opinions were delivered that are cited above. For cases in which it was held that the evidence was insufficient to justify the refusal of bail, see the following: *McCoy v. S.* 25 Tex. 33; *Zembrod v. S.* *Id.* 519; *Thompson v. S.* 25 Tex. Sup. 395; *Ex parte* Cooper, 31 Tex. 185; *Ex parte* Bramer, 37 Tex. 1; *Ex parte* Foster, 5 App. 625; *Ex parte* Rucker, 6 App. 81; *Ex parte* Bomar, 9 App. 610; *Ex parte* Randon, 12 App. 145; *Ex parte* Gilstrap, 14 App. 240; *Ruston v. S.* 15 App. 324; *Ex parte* Coldiron, *Id.* 460; *Ex parte* Pace, 16 App. 541; *Ex parte* Catney, 17 App. 332; *Ex parte* Matlock, 18 App. 227; *Ex parte* Williams, *Id.* 653; *Ex parte* Boyett, 19 App. 17; *Ex parte* Shamberger, *Id.* 572; *Ex parte* Cochran, 20 App. 242; *Ex parte* Dickson, *Id.* 332; *Ex parte* Terry, *Id.* 486; *Ex parte* Wilson, *Id.* 498; *Ex parte* Allen, 22 App. 201; *Ex parte* Kunde, *Id.* 418; *O'Connor v. S.* *Id.* 660; *Ex parte* England, 23 App. 90; *Ex parte* Hay, *Id.* 585; *Ex parte* McDowell, *Id.* 679. For statutes and other decisions concerning bail, see, *post*, Ch. 8, Title 2, HABEAS CORPUS; Ch. 4, Title 5, BAIL, and, *post*, §§1445-1446.

§1446—ART. 7.—Writ of habeas corpus shall never be suspended.—The writ of *habeas corpus* is a writ of right, and shall never be suspended. [Bill of Rights, sec. 12; O. C. 7.]

See, also, Const. U. S. Art. 1, Sec. 9, Sub. 2.—See *S. v. Sparks & Magruder*, 27 Tex. 705, as to Act of Confederate Congress suspending the writ in certain cases. See, *post*, Ch. 8, Title 3, for the provisions and decisions regulating HABEAS CORPUS.

§1447—ART. 8.—Excessive bail, fines, etc., forbidden.—Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law. [Bill of Rights, sec. 13; O. C. 8.]

See, also, Const. U. S. Amendment 8.

§1448—Excessive bail.—Decisions as to.—The amount of bail to be required in any case is to be regulated by the court, judge, magistrate or officer taking the bail. They are to be governed in the exercise of this discretion by the constitution of the state, and by the rules prescribed by article 296, *post*. When the record, on appeal, fails to disclose the pecuniary circumstances of the accused, the court of appeals will not consider that question. *McConnell v. S.* 13 App. 390. On appeal from a judgment refusing bail, or requiring bail claimed to be excessive, the record should show the pecuniary circumstances of the accused. *Ruston v. S.* 15 App. 324; *Ex parte* Coldiron, *Id.* 464. See a case in which it was held that the amount of bail required was excessive. *Ex parte* Wilson, 20 App. 498. *Prima facie*, the amount of five hundred dollars is not an excessive amount of bail upon a charge of felony. Whether excessive, in fact, depends largely upon the pecuniary condition of the accused. A sum which might be trivial to a wealthy man, might be to a poor man oppressive, and equivalent to a denial of bail. To authorize the court of appeals to reduce an ostensibly reasonable amount of bail, fixed by the court below, the pecuniary circumstances of the accused must be disclosed in the record. *Ex parte* Hutchings, 11 App. 28. See, *post*, Art. 296.

1449—Excessive fines, etc.—Decisions as to.—When the punishment assessed is within the limits prescribed by law, it is not "excessive," and courts cannot remedy the grievance, even though of opinion that the discretion of the jury was not judiciously exercised. *Brown*

v. S. 16 Tex. 122; March v. S. 35 Tex. 115; Chiles v. S. 2 App. 36; League v. S. 4 App. 147; Davis v. S. *Id.* 456; Johnson v. S. 5 App. 423; Drake v. S. *Id.* 649; Williams v. S. 6 App. 147; Smith v. S. 7 App. 414. Ten years' confinement in the penitentiary being within the limits of the penalty prescribed by law for horse theft, such penalty cannot be held to be excessive, even though the same jury, upon the same evidence, awarded only five years to a co-defendant who pleaded guilty. Jones v. S. 14 App. 85. Confinement in the penitentiary for the crime of horse theft is neither an excessive, cruel or unusual punishment, nor does it become so by reason of Article 800, *post*, providing for successive imprisonment upon different convictions. Lillard v. S. 17 App. 114. If a penal statute imposes an unconscionable penalty, it is a matter for redress and correction by the legislature and not the courts. Wallace v. S. 33 Tex. 445. And so it is if the law is unwise and bears with undue severity upon any particular class. Albright v. S. 8 App. 216.

§1450—Courts shall be open, etc.—Legislation in regard to the courts must be so construed as not to violate the provision that every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law. As to courts in newly organized counties, and as to courts for counties not organized. Runge & Co. v. Wyatt, 25 Tex. Sup. 291; O'Shea v. Twohig, 9 Tex. 336; Clark v. Goss, 12 Tex. 395; Nelson v. S. 1 App. 41; Chivarrio v. S. 15 App. 330; Barr v. S. 16 App. 333.

§1451—ART. 9.—No person shall be twice put in jeopardy for same offense.—No person for the same offense shall be twice put in jeopardy of life or liberty; nor shall a person be again put upon trial for the same offense after a verdict of not guilty in a court of competent jurisdiction. [Bill of Rights, sec. 14; O. C. 9.]

See, also, Const. U. S. Amendment V. *Post*, §§ 1452, 1453, 1712.

§1452—Jeopardy—Decisions as to.—When a person has been placed on trial upon a valid indictment for an offense, involving life or liberty, in a competent court, and a competent jury has been impaneled, sworn and charged with his case, he is "put in jeopardy" within the meaning of the preceding article, and from a repetition thereof upon the same indictment, or upon any other indictment for the same offense, this constitutional shield forever protects him. Wherefore, after jeopardy has once so attached, if without lawful authority, the trial court discharges the jury without the consent of the accused and before verdict, he cannot be legally again tried for the same offense. In so far as a contrary doctrine is held in *Mosely v. S. 33 Tex. 671*, and *Taylor v. S. 35 Tex. 97*; those decisions are overruled. This constitutional bulwark of liberty does not rest merely within the discretion of a trial judge, but the exercise of his discretion in discharging a jury impaneled in a criminal cause, before verdict, is revisable on appeal. *Powell v. S. 17 App. 345*. But such discretion will not be revised on appeal, unless it is made clearly to appear that it has been abused to the prejudice of the accused. *Schindler v. S. 17 App. 408*; *Varnes v. S. 20 App. 107*; see *Pizana v. S. 20 App. 139*, approving the definition of jeopardy, given in *Powell v. S. supra*. And see, also, as to the meaning of "jeopardy," *Ex parte Porter*, 16 App. 321; *Vestal v. S. 3 App. 648*. The term "same offense" means the same criminal act or omission, whether the offense be the same *eo nomine* or not. *Hirshfield v. S. 11 App. 207*. Pendency of other indictments for the same charge is not jeopardy, nor is it any way available to the accused until he has been put in jeopardy under one of them. He cannot require that the state shall elect upon which of the indictments it will proceed. *Bailey v. S. 11 App. 140*. The constitutional guaranty against second jeopardy extends to and obtains in prosecutions for misdemeanors. *Brink v. S. 18 App. 344*. A dismissal of a prosecution before jeopardy has attached, is not a bar to another prosecution for the same offense. *Ex parte Porter*, 16 App. 321; *Goode v. S. 2 App. 520*; *Quitow v. S. 1 App. 47*; *Brill v. S. Id. 152*; *Ex parte Rogers*, 10 App. 655; *Longley v. S. 43 Tex. 490*; *Swindell v. S. 32 Tex. 102*. The doctrine of jeopardy, or *res adjudicata*, has no application to proceedings before examining courts. *Ex parte Porter*, 16 App. 321; *post*, Art. 281. It is not contemplated by article 568, *post*, that in case of postponement of trial, after a jury has been impaneled, the court has the right to discharge the jury; nor would the court have such right even in case of a continuance for the term, except upon a clear showing of necessity. See this case for an instance in which the action of the court in postponing a case and discharging the jury at the instance of the state, was held to constitute jeopardy. *Pizana v. S. 20 App. 139*. Where the defendant was placed upon trial before a jury properly impaneled, upon an indictment charging him with the theft of a horse, the property of *Fabian Flores*, and the district attorney, upon discovering that the name of the owner of the horse was not *Fabian* but *Antonio Flores*, dismissed the indictment, and the defendant was thereafter indicted for the theft of the same horse alleged to be the property of *Antonio Flores*, it was held that the proceeding had under the first indictment did not constitute jeopardy. *Branch v. S. 20 App. 599*. Jeopardy is no defense unless the second indictment charges the same offense as was charged in the first indictment. A party may be legally tried on a second indictment based upon the same facts as the previous one, if the first indictment was so defective as that no valid judgment could have been rendered on it, or if it was tried by a court having no jurisdiction, or if the jury impaneled under it was lawfully discharged before verdict, or if such jury found a verdict against the defendant and he had it set aside by motion for a new trial, or in arrest of judgment. *Parchman v. S. 2 App. 228*; *Lewis v. S. 1 App. 323*; *Simco v. S. 9 App. 338*; *Dubose v. S. 13 App. 418*. But because the second indictment may differ from the first one in form, it cannot deprive the defendant of his defense of former jeopardy if both are based upon the same facts,



and if the first indictment was such that the accused might lawfully have been convicted under it on proof of the same facts as those by which the second is to be sustained. But if the two indictments are so diverse as to preclude the same evidence from sustaining both, the jeopardy is not the same. *Parchman v. S. 2 App. 228.* The effect of a reversal by the court of appeals, of a judgment of conviction, is to place the defendant in precisely the same condition as though the court below had granted a new trial, and there had been no appeal; and as in such case no final adjudication is reached, the doctrine of former jeopardy does not apply. *Thompson v. S. 9 App. 649.* Where a verdict is clearly insufficient and void it is the duty of the trial court to declare it a nullity and set it aside, and whether this be done by the court *ex mero motu*, or upon the defendant's motion, the defendant may again be placed upon trial, and a plea of former jeopardy will not avail him. *Dubose v. S. 13 App. 419; Robinson v. S. 23 App. 315.* A verdict of not guilty puts a final end to the prosecution. There can neither be a new trial nor an appeal in such a case. *S. v. Burris, 3 Tex. 118.* See, *post*, Article 21. Legislatures are not empowered to interpret and declare the meaning of a constitutional provision, nor to abrogate the settled judicial construction of such a provision. Hence it would seem that Article 20, *post*, which in effect makes jeopardy mean no more than "legal conviction," is without constitutional warrant or validity. The term "former jeopardy" having received a settled judicial construction prior to its use in the constitution of this state, the presumption obtains that the authors of the constitution had that construction in view in using that phrase, and no different meaning of the phrase can be established by legislative enactment. *Powell v. S. 17 App. 345.* See, further, as pertinent to the subject of jeopardy, *post*, Art. 553, and note thereto.

**§1453—Plea of jeopardy.**—Former jeopardy is a constitutional and not a statutory defense, and although the plea of former jeopardy is not one known to the statutory law of this state, and has no place assigned it in the regular order of pleadings, it is, nevertheless, a plea available to the accused, and may be interposed even after the jury has been impaneled and the plea of not guilty entered. Nor is it essential to the validity of such plea that a record of the proceedings of the former trial was perpetuated by a bill of exceptions. *Pizano v. S. 20 App. 139.* See, also, as to the right to plead former jeopardy, *Blanford v. S. 10 App. 627.* For pleas of former jeopardy held to be good, see *Powell v. S. 17 App. 345; Brink v. S. 18 App. 344; Pizano v. S. 20 App. 139; McElmurray v. S. 23 App. 691; Branch v. S. 20 App. 599; Alexander v. S. 21 App. 406.* For form of plea, see *Willson's Cr. Forms, 617.*

**§1454—ART. 10.—Trial by jury shall remain inviolate.**—The right of trial by jury shall remain inviolate. [Bill of Rights; O. C. 10.]

See, also, Const. U. S. Amendment VI. See, also, *post*, Arts. 594, 595.

**§1455—Decisions under preceding article.**—The preceding article applies to a trial in a forfeited bail case after judgment *nisi* has been rendered, and in such case the rules applicable in civil cases apply. In criminal cases, save such as are specially excepted, the only mode of trying an issue of fact is by a jury. *Short v. S. 16 App. 44.* In felony cases the trial *must* be by a jury composed of no more and no less than *twelve* men. *Post*, Arts. 22, 23; Const. Art. V, Sec. 13; *Lott v. S. 18 App. 627.* In a misdemeanor case, tried in the county court, or in a justice's, mayor's or recorder's court, the jury is composed of *six* men. Const. Art. V, Sec. 16; *post*, Art. 595. In a misdemeanor case the defendant may waive a trial by jury, or by a legal jury. *Post*, Art. 23; *Raspberry v. S. 1 App. 664.* But, on appeal in a misdemeanor case, if the record shows that there was a trial by a jury of less than the legal number of persons, the conviction will be set aside unless the record further shows that the defendant waived the right to be tried by a legal jury. *Stoll v. S. 14 App. 59.* Under the Constitution of 1845, it was held that it was not competent for the legislature to authorize summary trials before mayors, etc., without a jury, for offenses involving fine and imprisonment. *Burns v. Lagrange, 17 Tex. 415; ante*, §§1431-1434.

**§1456—ART. 11.—Liberty of speech and of the press.**—Every person shall be at liberty to speak, write or publish his opinion on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers investigating the conduct of officers or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases. [Bill of Rights, sec. 8; O. C. 11.]

See, *ante*, Ch. 1, Title 16, Penal Code, p. 223, for statutes and decisions as to the offense of LIBEL.

**§1457—ART. 12.—Person shall not be disqualified as a witness for religious opinion, or want of religious belief.**—No person shall be disqualified to give evidence in any of the courts of this state on account of his religious opinions, or for the want of any religious belief; but all oaths or

affirmations shall be administered in the mode most binding upon the conscience, and shall be taken subject to the pains and penalties of perjury. [Bill of Rights, sec. 5.]

First inserted in the Constitution of 1876, and here inserted in revising. See, *post*, Art. 736, § .

§1458—ART. 13.—**Outlawry and transportation prohibited.**—No citizen shall be outlawed; nor shall any person be transported out of the state for any offense committed within the same. [Bill of Rights, sec. 20.]

Inserted in revising.

§1459—ART. 14.—**Conviction shall not work corruption of blood, etc.**—No conviction shall work corruption of blood or forfeiture of estate. [Bill of Rights, sec. 21.]

Inserted in revising. See, *ante*, §§ 124, 125, 126, 127, Penal Code, p. 33.

§1460—ART. 15.—**No conviction of treason, except, etc.**—No person shall be convicted of treason, except on the testimony of two witnesses to the same overt act, or on confession in open court. [Bill of Rights, sec. 22.]

Inserted in revising. See, *post*, Articles 743, 744. For offense of TREASON, see, *ante*, Ch. 1, Title 4, Penal Code, p. 41.

§1461—ART. 16.—**Privilege of senators and representatives.**—Senators and representatives shall, except in cases of treason, felony or breach of the peace, be privileged from arrest during the session of the legislature, and in going to and returning from the same, allowing one day for every twenty miles such member may reside from the place at which the legislature is convened. [State Constitution, art. 3, sec. 14; O. C. 12.]

§1462—ART. 17.—**Privilege of voters.**—Voters shall, in all cases except treason, felony or breach of the peace, be privileged from arrest during their attendance at elections, and in going to and returning therefrom. [State Constitution, art. 6, sec. 5; O. C. 11.]

For the offense of illegally arresting a voter, see, *ante*, §264, Penal Code, p. 61.

§1463—ART. 18.—**Change of venue.**—The power to change the venue in civil and criminal cases shall be vested in the courts, to be exercised in such manner as shall be provided by law. [State Constitution, art. 3, sec. 45.]

Inserted in revising. In previous constitutions this provision read as follows: "The legislature shall provide for a change of venue in civil and criminal cases." For statutes and decisions relating to change of venue in criminal cases, see, *post*, Article 576, *et sequitur*.

§1464—ART. 19.—**Conservators of the peace—Style of process.**—All judges of the supreme court, court of appeals and district courts shall, by virtue of their offices, be conservators of the peace throughout the state. The style of all writs and process shall be "The State of Texas." All prosecutions shall be carried on in the name and by the authority of "The State of Texas," and conclude, "against the peace and dignity of the state." [State Constitution, art. 5, sec. 12; O. C. 15.]

§1465—**Commencement and conclusion of prosecutions.**—A prosecution in the name of the government, and conducted by the proper law officers, was held to be sufficient to show that it was carried on "in the name and by the authority of the State of Texas." *Drummond v. R.* 2 Tex. 156. Indictments and informations must commence "in the name and by the authority of the State of Texas." *Post*, Arts. 420-430; *Saine v. S.* 14 App. 144. They must conclude, "against the peace and dignity of the state." *Post*, Arts. 420-430; *S. v. Durst*, 7 Tex. 74; *S. v. Sims*, 43 Tex. 521; *Holden v. S.* 1 App. 225; *Cox v. S.* 8 App. 254; *Haun v. S.* 13 App. 383; *Thompson v. S.* 15 App. 39. But, if the pleader concludes the indictment with the words, "against the peace and dignity of the state," no words following that phrase, and not forming part of it, will vitiate the indictment. This case distinguished from *Haun v. S. supra*. *Rowlet v. S.* 23 App. 191. The marginal note, "a true bill," at the foot of an indictment, is no part of the indictment itself, and does not vitiate the indictment. *Thomas v. S.* 8 App. 344. A conclusion "against the peace and dignity of the State of Texas," will not vitiate the

**Indictment.** *S. v. Pratt*, 44 Tex. 93; *Haun v. S.* 13 App. 383. For commencement of an indictment, see *Willson's Cr. Forms*, 1; of an information, *Id.* 543. Conclusion of an indictment, *Id.* 7; of an information, *Id.* 544.

**§1466—ART. 20.—In what cases accused may be tried, etc., after conviction.**—By the provisions of the constitution, no person shall be exempt from a second trial for the same offense, who has been convicted upon an illegal indictment or information, and the judgment thereupon arrested; nor where a new trial has been granted to the defendant, nor where a jury has been discharged without rendering a verdict, nor for any cause other than that of a legal conviction. [O. C. 19.]

See, *ante*, §§ 1449, 1450. The preceding article has been held to be without constitutional warrant or validity, it being a legislative construction of a constitutional provision. *Powell v. S.* 17 App. 345.

**§1467—ART. 21.—Same subject.**—By the provisions of the constitution, an acquittal of the defendant exempts him from a second trial or a second prosecution for the same offense, however irregular the proceedings may have been; but if the defendant shall have been acquitted upon trial in a court having no jurisdiction of the offense, he may, nevertheless, be prosecuted again in a court having jurisdiction. [O. C. 20.]

*Ante*, §§1449, 1450; *post*, Arts. 525-553.

**§1468—ART. 22.—No conviction of felony, except by verdict of jury.**—No person can be convicted of a felony except upon the verdict of a jury duly rendered and recorded. [O. C. 22.]

*Ante*, §§1451, 1452. As to the mode of rendering and recording verdicts, see, *post*, Ch. 6, Title 7.

**§1469—ART. 23.—Defendant may waive any right, except, etc.**—The defendant to a criminal prosecution for any offense may waive any right secured to him by law, except the right of trial by jury in a felony case. [O. C. 26.]

**§1470—Waiver of a right—Decisions as to.**—The general rule is, that whatever a person can do himself, *sui juris*, he can do by an attorney. And this rule applies in cases of attorneys appointed by the court, as well as in those cases where the attorneys are employed. Ordinarily, the action of the attorney, as the representative of his client in the conduct of a cause, will be binding upon the client in all matters where by law the client is not specially requested to act for himself. But in no criminal case can the client be absolutely bound by the act of his attorney, when the act is both prejudicial to his rights and in contravention of known and well established principles of law. Thus an attorney cannot waive the right of his client in a felony case to a copy of the indictment. *McDuff v. S.* 4 App. 58. Nor can counsel jeopardize the life or liberty of his client by an agreement to accept a written statement in lieu of an adverse witness' personal testimony, or to waive the sanction of the witness' oath. *Bell v. S.* 2 App. 215. Nor consent to the amendment of the indictment in a material respect. *Calvin v. S.* 25 Tex. 789. Nor the right of the defendant to be personally present in court, when the jury asks for and receives additional instructions from the court. *Shipp v. S.* 11 App. 46; *Granger v. S.* *Id.* 454. After a juror has been sworn and impaneled in a felony case, the court has no authority to excuse or discharge him without the defendant's personal consent. The defendant might in person give such consent, and he might also waive the right to have the jury kept together until the termination of the trial, but any such waiver must be expressly made by himself, and cannot be made by his counsel, nor can his mere silence, or failure to object, be construed to be a waiver. *Sterling v. S.* 15 App. 249; *Hill v. S.* 10 App. 618; *Early v. S.* 1 App. 248; *Brown v. S.* 38 Tex. 482. The submission of an appeal upon an agreement in writing, signed by the counsel of each party, expressly waiving all but a certain question, or questions in the case, is binding upon the parties as to all the questions so waived. *Downes v. S.* 22 App. 393. A judgment *nunc pro tunc* was entered in a criminal case in the absence of the defendant. Counsel for defendant proposed to waive the error in the court of appeals. Held: 1. The error was jurisdictional, and could not be waived; and, 2. If it could be waived, the waiver could only be made by the defendant himself. *Mapes v. S.* 13 App. 85. A defendant may waive his right to be present when his motion for a new trial is acted on. If the record shows that his counsel waived such right, it will be presumed, in the absence of a showing to the contrary, that the defendant authorized such waiver. *Escareno v. S.* 16 App. 85. In a trial for theft, the state offered in evidence the affidavit of the owner of the alleged stolen property, to the effect that he never gave his consent to the taking of the property. To this affidavit was attached an agreement signed by the state's counsel, and by the defendant and his counsel, and an attesting witness, to the effect that the affidavit should be read in evidence as the testimony of said witness. The

defendant objected to the affidavit being read in evidence, because, 1. He had the right to be confronted with the witnesses against him; and 2. Because it was not proved that he signed the agreement. Held, the first objection was not tenable, as the defendant had the power personally to waive any right secured to him except the right of trial by jury. The second objection was tantamount to a denial that he executed the agreement, and it was incumbent on the state to prove that he executed said agreement, before it could legally be received in evidence. *Allen v. S. 16 App. 237.* Irregularities in the organization of a trial jury will, on appeal, be considered as having been waived by the defendant, unless properly excepted to in the trial court at the very time they occur. *McMahon v. S. 17 App. 321.* It was held competent for the defendant to consent that his counsel might testify on the trial to statements made to said counsel by him in the presence of another party, who was a competent witness, but who was not present to testify to such statements at the trial. *Walker v. S. 19 App. 176.* Acceptance of the jury by defendant, without exception made, is a waiver of all errors in its organization. *Castaneda v. S. 7 App. 582; Yanez v. S. 6 App. 429; Caldwell v. S. 12 App. 302; Bule v. S. 1 App. 452; Ray v. S. 4 App. 450.* And a waiver by counsel of defendant of the mode of impanneling a trial jury, has been held binding upon the defendant. *Grant v. S. 3 App. 1.* The copy of the jury list may be waived by the defendant, and the service of it will be presumed on appeal, if the record is silent as to service. *Houillon v. S. 3 App. 537; Swofford v. S. Id. 76.* It is too late after verdict to complain that the defendant has not been served with a copy of the indictment and of the special venire. *Roberts v. S. 5 App. 141.* In misdemeanor cases the defendant may waive the right of trial by jury. *Rasberry v. S. 1 App. 664.* Or he may waive a trial by a legal jury; but where, on appeal, the record shows a trial by an illegal jury, the conviction will be set aside, unless it be further shown that the defendant waived the right of trial by a legal jury. *Stoll v. S. 14 App. 59; ante, §§1451, 1452.*

**§1471—ART. 24.—Trials shall be public.**—The proceedings and trials in all courts shall be public. [O. C. 23.]

*Ante, §§1431-1433.*

**§1472—ART. 25.—Defendant shall be confronted by witnesses, except.**—The defendant upon a trial shall be confronted with the witnesses, except in certain cases provided for in this Code, where depositions have been taken. [O. C. 24.]

*Ante, §§1431-1437. As to depositions, see, post, Ch. 8, Title 8.*

**§1473—ART. 26.—Construction of this Code.**—The provisions of this Code shall be liberally construed, so as to attain the objects intended by the legislature, the prevention, suppression and punishment of crime. [O. C. 25.]

*See, ante, Penal Code, §§15 to 27, pp. 19-20; Ex parte Porter, 16 App. 321.*

**§1474—Decisions under preceding articles.**—This Code lays down its own rules of interpretation, and courts must be governed by those rules, so far as applicable. *Speer v. S. 2 App. 246.* Such construction should be given to the different articles of the Code as accords with its general objects and purpose, and which will give full effect to all its provisions, general as well as special, so that they may stand and operate in harmony, though a special provision may thereby be partially controlled, where otherwise a general one could have no effect. *Cockrum v. S. 24 Tex. 394.* For other decisions pertinent to this subject, see, *ante, §1432 et seq.* See, also, *Ex parte Porter, 16 App. 321.*

**§1475—ART. 27.—When rules of common law shall govern.**—Whenever it is found that this Code fails to provide a rule of procedure in any particular state of case which may arise, the rules of the common law shall be applied and govern. [O. C. 27.]

*Act Feb. 15, 1858. See, ante, Penal Code, §9.*

**§1476—Decisions under preceding article.**—The courts must be governed by the rules of interpretation prescribed by the Code, but when a state of case arises for which the Code prescribes no rule, it commands recourse to the rules of the common law. Thus, in computing the one day's service of the copy of indictment, recourse was had to the rules of the common law. *Speer v. S. 2 App. 246.* The common law, in its application to juries and evidence, is followed, except when it has been changed by the Code. *Mathews v. S. 32 Tex. 117.* As to evidence, see, *post, Arts. 725, 726.* As to common law rules, with relation to venue, see *Chivarrio v. S. 15 App. 330.*

**§1477—Constitutional provisions—Rules for interpreting.**—A constitution is not to receive a technical construction, like a common law instrument or a statute; it is to be interpreted so as to carry out the great principles of government, not to defeat them. *Hunt v. S. 7 App. 212.* No principle of construction can empower the courts to treat as mere matter of form any express provision of the constitution. *Cox v. S. 8 App. 254.* Constitutional provisions are absolutely *mandatory*, and can in no case be regarded as *directory* merely, to be obeyed or not, within the discretion of either or all of the departments of government. *Hunt v. S. 22 App. 396; Holly v. S. 14 App. 505; Cox v. S. 8 App. 254.* Legislative power, except where the constitution has imposed limits upon it, is practically absolute. And where limitations

upon it are imposed, they are to be strictly construed, and are not to be given effect as against the general power of the legislature, unless such limitations clearly inhibit the act in question. If the act itself is within the scope of legislative authority, it must stand. *Baldwin v. S.* 21 App. 591. Legislatures are not empowered to interpret the constitution, nor to abrogate the settled judicial construction of a constitutional provision. *Powell v. S.* 17 App. 345. The distinguishing characteristic between the Federal and a State Constitution is, that the former is but a grant of legislative power, and congress, in framing laws, can exercise only such authority as is granted; whereas, State Constitutions are but limitations upon the plenary power with which otherwise the legislative department of the state was originally invested. The congress of the United States can enact no laws but such as the Federal Constitution, either expressly or by implication, authorizes it to enact. On the other hand, the power of a state legislature to enact laws is absolute, except as restrained by constitutional limitations, and these limitations are created and imposed by express words, or by necessary implication. In construing the constitution the courts of the state must understand that the framers of the instrument, and the people who adopted it, employed and interpreted the words and language of the instrument in their ordinary sense. The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it. In the construction of written laws, it is the intent of the law maker that is to be enforced, which intent is to be found in the instrument itself; and it is to be presumed that language has been employed with sufficient precision to convey it, and, unless examination demonstrates that such presumption does not hold good in the particular case, nothing remains but to enforce it. Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature must be understood to mean what they have clearly expressed, and in such case no room is left for construction. The courts are not at liberty to search elsewhere for possible or even probable meanings, when one is plainly declared in the instrument itself. The constitution of the state is simply a chart containing limitations upon power, and when it declares how power may be exercised over any subject, then no power can be exercised over that subject in any manner not clearly within the plain import of the language of the constitution. Mere silence, or failure to provide for some particular feature of the subject, cannot be construed into a neglect, omission, or an ignoring of that feature. It is a general rule that when the constitution gives a general power, or enjoins a duty, it also gives by implication every particular power necessary for the exercise of the one or the enjoyment of the other. The implication under this rule, however, must not be conjectural or argumentative. And it is further modified by another rule, that, where the means for the exercise of a general power are given, no other or different means can be implied as being more effective or convenient. And another rule is, that when the constitution defines the circumstances under which a right may be exercised, or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition, or to extend the penalty to other cases. *Holly v. S.* 14 App. 505. In expounding a constitutional provision, such construction should be employed as will prevent any clause, sentence or word, from being superfluous, void or insignificant. The thing to be sought is the thought expressed. Contemporaneous legislative construction is always considered of force. *Cordova v. S.* 6 App. 207. Effect is to be given, if possible, to the whole instrument, and to every section and clause. *Lastro v. S.* 3 App. 363. In the construction of a statute with reference to its constitutionality, the rule is to ascertain whether the legislature is restricted or limited in its action by any provision of the constitution, with reference to the statute in question. *Logan v. S.* 5 App. 306. When the language of a legislative act is susceptible of two constructions, one in accordance with, and the other in violation of, the constitution, the construction which harmonizes the act with the constitution will be adopted. *Ry. Co. v. Gross*, 47 Tex. 428. As to construction of statutes, see, *ante*, §15 *et seq.*

**§1478—Declaring statutes unconstitutional.**—There is no question of the power of the courts to pronounce a statute unconstitutional and invalid. *Lastro v. S.* 3 App. 363. But legislative enactments will not be held invalid unless clearly inconsistent with the constitution. Where there is a reasonable doubt in the judicial mind whether an act of the legislature is in conformity with the constitution, the legislation must be supported. *Lastro v. S.* 3 App. 363; *Cordova v. S.* 6 App. 207. *Ex parte Mabry*, 5 App. 93; *Holley v. S.* 14 App. 505. See this doctrine criticized by Justice Lipscomb, in *Thomas v. S.* 9 Tex. 335. But where the conviction is clear, the duty of the court to condemn unwarranted legislation is imperious. The obligation of allegiance is to support the constitutive law; and that obligation is rendered eminently imperative upon the courts of last resort, they being the special depositories of the charter of the Nation's constitutional will, and its peculiar guardians against all infractions. If a legislative act impugn the principles of the constitution, the act must yield; and whenever it is brought before the courts, must be declared void. A government can scarcely be deemed free when the rights of the people are left solely dependent on the will of the legislative body, without any restraint. The judiciary is not only a co-ordinate branch of the government, but is a check interposed to keep the other branches within the limitations of the constitution; and the exercise of this great and paramount duty is essential to the existence and transmission of freedom. *Ex parte Mabry*, 5 App. 93. When a penal law prohibits two or more acts, it may be constitutional and valid as to one of the acts, and unconstitutional and invalid as to the other. *Ex parte Kennedy*, 23 App. 77; *Holley v. S.* 14 App. 506. The Constitution of the United States being framed for the establishment of a national government, it is a settled rule of construction of that instrument, that the limitations it imposes upon the powers of government are in all cases to be understood as limitations upon the government of the Union only, except where the states are expressly mentioned. The fifth

amendment to the Constitution of the United States is not, therefore, a limitation upon the states, and the power to prosecute crime by information, or by other mode than by indictment of a grand jury, not being surrendered by the states, they may, and some of them do, exercise such power. *Pitner v. S.* 23 App. 366. In all cases involving clearly and unquestionably the constitutionality and validity of state laws, with reference to provisions of the Constitution of the United States, the decisions of the Supreme Court of the United States clearly, certainly and unequivocally expressed, are binding upon state courts. But see this case for an instance in which a state court declines to follow a decision of the Supreme Court of the United States, for several reasons. *Asher v. S.* 23 App. 662. In determining the validity of a statute, assailed upon the ground that its enactment was not in conformity with some express requirement of the constitution, the courts are not confined to the verity usually imported on the face of the statute, if *prima facie* valid, but may go behind it to ascertain if the express requirement of the constitution was observed in its enactment. See a discussion of the decisions in *Blessings v. S.* 42 Tex. 641, and *Usener v. S.* 8 App. 177, which hold a contrary doctrine to that just stated. *Hunt v. S.* 22 App. 396. See, also, *Baldwin v. S.* 21 App. 591.

§1479—Constitutional law—Miscellaneous decisions—*Ex post facto* laws.—A statute authorizing amendment of the indictment as to the name of the defendant, was held to not be an *ex post facto* law. *S. v. Manning*, 14 Tex. 402. But a statute changing the mode of objecting to a grand jury was held to be *ex post facto*. *Martin v. S.* 22 Tex. 214. Also a statute providing for cumulative sentences. *Hannahan v. S.* 7 App. 664. Any change in the law of evidence, which authorizes a conviction on less or different evidence than was requisite at the time the offense was committed, is *ex post facto*. *Calloway v. S.* 7 App. 585; *Valesco v. S.* 9 App. 76; *Johnson v. S.* 16 App. 402. Or which authorizes a conviction for an offense on a prosecution for another offense. *Simco v. S.* 8 App. 406. Or which increases the punishment of an offense. *McInturff v. S.* 20 App. 335. See further, as to *ex post facto* laws, *ante*, §36; Const. Art. I, Sec. 16.

(a) AS TO LAW EMBRACING SUBJECT NOT EXPRESSED IN TITLE, ETC., see the following decisions: *Holden v. S.* 1 App. 225; *Hasselmeyer v. S.* *Id.* 690; *Ex parte Mabry*, 5 App. 93; *English v. S.* 7 App. 171; *Albrecht v. S.* 8 App. 216; *Robinson v. S.* 15 Tex. 312; *S. v. Shadle* 41 Tex. 404; *Geddings v. San Antonio*, 47 Tex. 548; *Stone v. Brown*, 54 Tex. 330; *State v. McCracken*, 42 Tex. 383; *Johnson v. S.* 9 App. 249; *Cox v. S.* 8 App. 254; *Breen v. Ry. Co.* 44 Tex. 302; *R. R. Co. v. Smith Co.* 54 Tex. 1; *R. R. Co. v. Odum*, 53 Tex. 343; *Tadlock v. Eccles*, 20 Tex. 782; *Cannon v. Hemphill*, 7 Tex. 184; *Davey v. Galveston County*, 45 Tex. 291; *Woods v. Durrutt*, 28 Tex. 429; *Ex parte House*, 36 Tex. 83; *Murphy v. Menard*, 11 Tex. 673; *S. v. Deltz*, 30 Tex. 511; *Roddy v. S.* 16 App. 502; *Stone v. Brown*, 54 Tex. 331; *Land Co. v. S.* 68 Tex. 526. See Const. Art. III, Sec. 35 and notes; also notes on p. 608.

(b) AS TO "PUBLIC AND LOCAL LAWS," see the following decisions: *Cordova v. S.* 6 App. 207; *Graves v. S.* *Id.* 228; *Bejarino v. S.* *Id.* 265; *Handline v. S.* *Id.* 347; *Cox v. S.* 8 App. 254; *Lastro v. S.* 3 App. 363; *Bohl v. S.* *Id.* 683; *Davis v. S.* 2 App. 425; *Ham v. S.* 4 App. 645; *Ex parte Lynn*, 19 App. 293; *Donaldson v. S.* 15 App. 25; *Beyman v. Black*, 47 Tex. 558; *Baldwin v. S.* 21 App. 591. See Const. Art. III, Secs. 56, 57; Art. XVI, Secs. 20, 22, 23; Art. XI, Secs. 5-8; Art. V, Sec. 22.

(c) AS TO "EMERGENCY CLAUSE," see *Graves v. S.* 6 App. 228; *Lanham v. S.* 7 App. 126; Const. Art. III, Sec. 39.

(d) FINES.—Fines are not "debts," and imprisonment to enforce their collection is constitutional. *Dixon v. S.* 2 Tex. 481; *Luckey v. S.* 14 Tex. 400. Const. Art. I, Sec. 18.

(e) AMENDING A STATUTE, MODE OF.—See *Hasselmeyer v. S.* 1 App. 690. Const. Art. III, Sec. 36.

(f) For other decisions upon constitutional questions, see Index, under appropriate heads.

## CH. 2.—THE GENERAL DUTIES OF OFFICERS CHARGED WITH THE ENFORCEMENT OF THE CRIMINAL LAWS.

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### I. THE ATTORNEY-GENERAL.

§1480—ART. 28.—Attorney-general shall represent the state, etc.—It is the duty of the attorney-general to represent the state in all criminal cases in the Court of Appeals, except in cases where he may have been employed adversely to the state, previously to his election; and he shall not appear as counsel against the state in any court. [O. C. 28.]

See Rev. Stat. Ch. 5, Title 48.

§1481—ART. 29.—Shall report to governor biennially.—He shall report to the governor biennially on the first Monday in December next preceding the expiration of his official term, and at such other times as the governor may require, the number of indictments which have been found by grand juries in this state for the two preceding years; the number of informations filed in this state during the same period; the offenses charged in such indictments or informations; the number of trials, convictions and acquittals for each offense; the number of indictments and informations which have been disposed of without the intervention of a petit jury, with the cause and manner of such disposition; and also a summary of the judgments rendered on conviction, specifying the offense, the nature and amount of penalties imposed, and the amount of fines collected. This report shall also give a general summary of all the business, civil and criminal, disposed of by the Supreme Court and Court of Appeals, so far as the State of Texas may be a party to such litigation, and of all civil causes to which the state is a party prosecuted or defended by him in any other courts, State or Federal. [Act May 11, 1846, p. 206, amended by Act March 28, 1885, pp. 61, 62.]

**§1482—ART. 30.—May require certain officers to report to him.**—He may require the several district and county attorneys, clerks of the district and county courts in the state, to communicate to him at such times as he may designate, and in such form as he may prescribe, all the information necessary for his compliance with the requirements of the preceding article. And whenever the clerk of the district court of any county neglects or fails within thirty days after the adjournment of a term of his court to report to the attorney-general the proceedings thereof, the comptroller shall thereafter, if notified of such failure, audit no more claims in favor of such clerk until receipt of such report by the attorney-general. [O. C. 944, amended by Act March 28, 1885, p. 62.]

## II. DISTRICT AND COUNTY ATTORNEYS.

**§1483—ART. 31.—Duties of district attorneys.**—It is the duty of each district attorney to represent the state in all criminal cases in the district courts of his district, except in cases where he has been, before his election, employed adversely, and he shall not appear as counsel against the state, in any court, and he shall not, after the expiration of his term of office, appear as counsel against the state in any case in which he may have appeared for the state. [O. C. 30.]

See Rev. Stat. Chs. 1 and 3; Title 11. Before the enactment of this provision it was questioned whether one who had been district attorney could afterwards appear against the state in a cause commenced by him while in such office. *McDonough v. S.* 19 Tex. 293; see, *post*, Art. 41.

**§1484—ART. 32.—Same subject.**—When any criminal proceeding is had before an examining court in his district, or before a judge upon *habeas corpus*, and he is notified of the same, and is at the time within the county where such proceeding is had, he shall represent the state therein, unless prevented by other official duties. [O. C. 31; *post*, §1651.]

**§1485—ART. 33.—Duties of county attorneys.**—It shall be the duty of the county attorney to attend the terms of the county and inferior courts of his county, and to represent the state in all criminal cases under examination or prosecution in said courts. He shall attend all criminal prosecutions before justices of the peace in his county, when notified of the pendency of such prosecutions, and when not prevented by other official duties. He shall conduct all prosecutions for crimes and offenses cognizable in such county and inferior courts of his county, and shall prosecute and defend all other actions in such courts in which the state or the county is interested. He shall also attend the terms of the district court in his county, and if there be a district attorney of the district including such county, and such district attorney be in attendance upon such court, the county attorney shall aid him when so requested, and when there is no such district attorney, or when he is absent, the county attorney shall represent the state in such court and perform the duties required by law of district attorneys.

Const. Art. V, Sec. 21; Act Aug. 7, 1876, p. 85; Act Aug. 21, 1876, p. 283; Sayles' Civil Statutes, Chaps. 2 and 3, Title 11; Act 18 Leg. p. 2.

**§1486—ART. 34.—Duty to present officer for neglect of duty, etc.**—It shall be the duty of the district or county attorney to present to the court having jurisdiction, any officer, by information, for the neglect or failure of any duty enjoined upon such officer, when such neglect or failure can be presented by information, whenever it shall come to the knowledge of said attorney that there has been a neglect or failure of duty upon the part of said officer; and it shall be his duty to bring to the notice of the grand jury all acts of violation of law, or neglect or failure of duty upon the part of any



officer, when such violation, neglect or failure are not presented by information, and whenever the same may come to his knowledge. [Act. Aug. 7, 1876, p. 86.]

§1487—ART. 35.—**Shall hear complaints, and what the same shall contain.**—Upon complaint being made before a district or county attorney that an offense has been committed in his district or county, he shall reduce the complaint to writing, and cause the same to be signed and sworn to by the complainant, and it shall be duly attested by said attorney. Said complaint shall state the name of the accused, if his name is known, and if his name is not known it shall describe him as fully as possible, and the offense with which he is charged shall be stated in plain and intelligible words, and it must appear that the offense was committed in the county where the complaint is filed, and within a time not barred by limitation. [Act. Aug. 7, 1876, p. 87, §13.]

For form of complaint, see Willson's Cr. Forms, 545.

§1488—**Decisions under preceding article.**—The jurat of the officer to the complaint is essential to its validity. And where the jurat bore a date anterior to the date of the commission of the offense as charged in the complaint, the repugnancy was held to invalidate the complaint, and a conviction had thereunder. *Lanham v. S.* 9 App. 232. A jurat cannot be affixed to a complaint after trial and conviction, and an information based upon a complaint not verified by the jurat of the officer before whom it was made, is a nullity. *Scott v. S.* 9 App. 434; *Dishough v. S.* 4 App. 158; *Morris v. S.* 2 App. 503. A county attorney is not competent to make the complaint, unless he be the only witness to the offense. *Daniels v. S.* 2 App. 353. A husband is not competent to make a complaint charging his wife with adultery. *Thomas v. S.* 14 App. 70. A convicted felon cannot make a complaint. *Perez v. S.* 10 App. 327. As to form, a substantial compliance with the statute will be sufficient. *Brown v. S.* 11 App. 451. See further, as to complaints, *post*, Arts. 236-431, 902, 903.

§1489—ART. 36.—**Duty when complaint has been made.**—If the offense be a misdemeanor, the attorney shall forthwith prepare an information, and file the same, together with the complaint, in the court having jurisdiction of the offense. If the offense charged be a felony, he shall forthwith file the complaint with a magistrate of the county, and cause the necessary process to be issued for the arrest of the accused. [Act Aug. 7, 1876, p. 87, §15.]

See, *post*, Art. 431, and notes thereto, and, *ante*, §1488.

§1490—ART. 37.—**May administer oaths.**—For the purposes mentioned in the two preceding articles, district and county attorneys are authorized to administer oaths. [Act Aug. 7, 1876, p. 87, §14.]

See, *post*, Art. 431.

§1491—ART. 38.—**Shall not dismiss case, unless.**—The district or county attorney shall not dismiss a case unless he shall file a written statement with the papers in the case, setting out his reasons for such dismissal, which reasons shall be incorporated in the judgment of dismissal, and no case shall be dismissed without the permission of the presiding judge, who shall be satisfied that the reasons so stated are good and sufficient to authorize such dismissal. [Act Aug. 7, 1876, p. 88, §20.]

See, *post*, Arts. 592 and 593, and notes thereto.

§1492—ART. 39.—**Attorney pro tem. may be appointed.**—Whenever any district or county attorney shall fail to attend any term of the district, county or justice's court, the judge of said court, or such justice, may appoint some competent attorney to perform the duties of such district or county attorney, who shall be allowed the same compensation for his services as are allowed the district or county attorney. Said appointment shall not extend beyond the term of the court at which it is made, and shall be vacated upon the appearance of the district or county attorney. [Act Aug. 7, 1876, p. 87, §12.]

In *habeas corpus* case, see, *post*, §1651.

§1493—Appointment of attorney pro tem.—Decisions as to.—It is within the power of the court to require any member of the bar to draw indictments and represent the state, and to impose adequate punishment upon an attorney who refuses, without good cause shown, to accept such appointment. But the court should not require an attorney to prepare a bill of indictment against a person who had already retained such attorney to defend him. *S. v. Johnson*, 12 Tex. 231; *Bennett v. S.* 27 Tex. 701. The appointment cannot extend beyond the term of the court at which it is made. It would be competent for the court to make such appointment for each day of the term, or for each case, or to terminate at the will and pleasure of the court. *S. v. Manlove*, 33 Tex. 798. The power of an attorney pro tem. is co-extensive with that of the regular district or county attorney. *S. v. Lackey*, 35 Tex. 357. Where an attorney was appointed to represent the state in a case, and qualified under said appointment, it was held not error, of which the defendant could complain, that said attorney, at a subsequent term of the court, prosecuted the case under said appointment, without being reappointed. *Marnoch v. S.* 7 App. 269. On appeal it will be presumed that an appointment of a district or county attorney pro tem. was legally made, if the contrary does not appear. *Eppes v. S.* 10 Tex. 197. The right of a person to exercise the office of district or county attorney cannot be raised on the trial by any mode known to the law. *S. v. Gonzales*, 26 Tex. 197.

§1493a—Duty to supervise records.—A rule of court makes it the duty of district and county attorneys to see that the judgments in criminal cases are properly entered by the clerks, and when practicable they should be present when the minutes are read. Rule 120, for district court.

§1494—ART. 40.—**Shall report to attorney-general when required.**—District and county attorneys shall, when required by the attorney-general, report to him at such times, and in accordance with such forms as he may direct, such information as he may desire in relation to criminal matters and the interests of the state, in their districts and counties. [Added in revising.]

See, *ante*, §1482.

§1495—ART. 41.—**Shall not be of counsel adverse to the state.**—District and county attorneys shall not be of counsel adversely to the state in any case, in any court, nor shall they, after they cease to be such officers, be of counsel adversely to the state in any case in which they have been of counsel for the state. [O. C. 30, amended in revising.]

The old article permitted him to be counsel adversely to the state, where he had been employed prior to his election, and did not expressly prohibit him from being counsel adversely to the state, after he had ceased to hold the office, in cases in which he had been counsel for the state. See, *ante*, §1483.

### III. MAGISTRATES.

§1496—ART. 42.—**Who are magistrates.**—Either of the following officers is a "magistrate" within the meaning of this Code: the judges of the supreme court, the judges of the court of appeals, the judges of the district court, the county judge of the county, either of the county commissioners, the justices of the peace, the mayor or recorder of an incorporated city or town. [O. C. 52.]

See, *post*, Art. 63.

§1497—ART. 43.—**Duty of magistrates.**—It is the duty of every magistrate to preserve the peace within his jurisdiction by the use of all lawful means; to issue all process intended to aid in preventing and suppressing crime; to cause the arrest of offenders, by the use of lawful means, in order that they may be brought to punishment. [O. C. 32.]

See, as to duty in case of false weights and measures, *ante*, Art. 476; as to suppression of riots, *post*, Art. 112; also, *post*, Chs. 2, 3, 4, Title 3.

### IV. PEACE OFFICERS.

§1498—ART. 44.—**Who are peace officers.**—The following are "peace officers:" the sheriff and his deputies, constable, the marshal, constable or policeman of an incorporated town or city, and any private person specially appointed to execute criminal process. [O. C. 53.]

*Ante*, §1358, amended in revising, by inserting "or policeman," see, *post*, Arts. 117-246; also Act April 22, 1879, pp. 130, 131, §6, making the members of a military company organized by said act, peace officers.

§1499—Decisions under preceding article.—A deputy sheriff is a peace officer. *Clayton v. S.* 21 App. 341. A policeman of an incorporated town or city was held to be an officer, though not named in the original article defining peace officers. *Sauner v. S.* 2 App. 458. But a deputy marshal of an incorporated town or city is not a peace officer, unless made so by the charter of such town or city; nor is an ex-bailiff of a grand jury. *Alford v. S.* 8 App. 545.

§1500—ART. 45.—Duties and powers of peace officers.—It is the duty of every peace officer to preserve the peace within his jurisdiction. To effect this purpose he shall use all lawful means. He shall, in every case where he is authorized by the provisions of this Code, interfere without warrant to prevent or suppress crime. He shall execute all lawful process issued to him by any magistrate or court. He shall give notice to some magistrate of all offenses committed within his jurisdiction, where he has good reason to believe there has been a violation of the penal law. He shall arrest offenders without warrant in every case where he is authorized by law, in order that they may be taken before the proper magistrate or court and be brought to punishment. [O. C. 34.]

As to specific duties, etc., see, *ante*, §452-605; *post*, Arts. 91, 92; see, also, *post*, Chs. 2, 3, 4, Title 3.

§1501—ART. 46.—May summon aid when resisted.—Whenever a peace officer meets with resistance in discharging any duty imposed upon him by law, he shall summon a sufficient number of citizens of his county to overcome the resistance, and all persons summoned are bound to obey, and if they refuse are guilty of the offense prescribed in article 229 of the Penal Code. [O. C. 44.]

*Ante*, §360; *post*, Arts. 109-113, 338; see, also, Rev. Stat. Arts. 4529-4538, making such refusal to aid an officer a contempt of court.

§1502—ART. 47.—Person refusing to obey liable to prosecution.—The peace officer who has summoned any person to assist him in performing any duty, shall report such person if he refuse to obey, to the district or county attorney of the proper district or county, in order that he may be prosecuted for the offense. [O. C. 45.]

See, *ante*, §360.

§1503—ART. 48.—Officer neglecting to execute process may be fined for contempt.—If any sheriff or other officer shall willfully refuse or fail from neglect, to execute any summons, *subpoena* or attachment for a witness, or any other legal process, which it is made his duty by law to execute, he shall be liable to a fine for contempt not less than ten nor more than two hundred dollars, at the discretion of the court having cognizance of the same, and the payment of said fine shall be enforced in the same manner as fines for contempt in civil cases. [Act Feb. 11, 1860.]

See Rev. Stat. Arts. 1120, 1168; also, see, *ante*, §§385-415, making such refusal and failure an offense. He may be fined for contempt for failing to return a *capias*. *Crow v. S.* 24 Tex. 12. For procedure in cases of contempt, see *S. v. Sparks*, 27 Tex. 627-705; *Ex parte Ireland*, 38 Tex. 344; *Ex parte Kilgore*, 3 App. 347.

## V. SHERIFFS.

§1504—ART. 49.—Shall be a conservator of the peace and arrest offenders.—Each sheriff shall be a conservator of the peace in his county, and shall arrest all offenders against the laws of the state, in his view or hearing, and take them before the proper court for examination or trial. He shall quell and suppress all assaults and batteries, affrays, insurrections and unlawful assemblies. He shall apprehend and commit to jail all felons and other offenders, until an examination or trial can be had. [Act May 12, 1846, p. 265; Pas. Dig. art. 5115.]

See, *ante*, the six preceding sections.

[3—Tex. C. C. P.]

**§1505—ART. 50.—Keeper of jail.**—Each sheriff is the keeper of the jail of his county, and responsible for the safe keeping of all prisoners committed to his custody. [O. C. 37.]

See Rev. Stat. Title 56, *Jordon v. S.* 2 App. 154.

**§1506—ART. 51.—Shall place in jail every person committed by lawful authority.**—When a prisoner is committed to jail by lawful warrant from a magistrate or court, he shall be placed in jail by the sheriff; and it is a violation of duty on the part of any sheriff to permit a defendant so committed to remain out of jail, except that he may, when a defendant is committed for want of bail, or when he arrests after indictment or information in a bailable case, give the person arrested a reasonable time to procure bail, but in the meanwhile he shall so guard the accused as to prevent escape. [O. C. 38; Rev. Stat. arts. 3003-3006.]

As to offense of permitting escape of a prisoner, see, *ante*, §§322-330.

**§1507—ART. 52.—Shall notify district and county attorneys of persons, etc.**—The sheriff shall, at each term of the District or County Court, give notice to the district or county attorney as to all prisoners in his custody, and of the authority under which he detains them. [O. C. 39.]

**§1508—ART. 53.—May appoint a jailer, who shall be responsible.**—The sheriff may appoint a jailer to take charge of the jail, and supply the wants of those therein confined; and the person so appointed is responsible for the safety of prisoners, and liable to punishment as provided by the law for negligently or willfully permitting a rescue or escape. But the sheriff shall, in all cases, exercise a supervision and control over the jail. [O. C. 40.]

See, *ante*, Penal Code, §§322 to 330 inclusive.

**§1509—ART. 54.—May rent room and employ guard, when.**—When there is no jail in a county, the sheriff may rent a suitable house and employ guards, all of which expenses shall be paid by the proper county. [O. C. 43.]

See, Rev. Stat. Art. 4522; *McDade v. Waller Co.* 3 App. C. C. §§110, 111.

**§1510—ART. 55.—Deputy may perform duties of sheriff.**—Whenever a duty is imposed by this Code upon the sheriff, the same duty may lawfully be performed by his deputy; and when there is no sheriff in a county, the duties of that office, as to all proceedings under the criminal law, devolve upon the officer who, under the law, is empowered to discharge the duties of sheriff, in cases of vacancy in the office. [O. C. 46; Rev. Stat. art. 4520.]

## VI. CLERKS OF THE DISTRICT AND COUNTY COURTS.

**§1511—ART. 56.—Shall file all papers, issue process, etc.**—It is the duty of every clerk of the district or county court to receive and file all papers in respect to criminal proceedings, to issue all process in such cases, and to perform all other duties imposed upon them by this Code or the penal laws of this state, and a willful failure to perform any such duties renders them liable to prosecution for an offense, in accordance with the provisions of the Penal Code. [O. C. 47.]

See, *ante*, Penal Code, §415.

**§1512—ART. 57.—Power of deputy clerks.**—Whenever a duty is imposed upon the clerk of the district or county court the same may be lawfully performed by his deputy. [O. C. 48; Rev. Stat. arts. 1104, 1146.]

**§1513—ART. 58.—Shall report to attorney-general when required.**—The clerks of the district and county courts shall, when required by the attorney-general, report to him at any such times, and in accordance with such forms as he may direct, such information in relation to criminal matters as may be shown by the records in their respective offices. [Added in revising.]

See, *ante*, §1482.

## CH. 3.—CONTAINING DEFINITIONS.

ART.	SEC.	ART.	SEC.
59. Words and phrases—How understood.	1514	61. Criminal action—How prosecuted.	1516
60. Same subject.	1515	62. "Officers," includes what.	1517
		63. "Examining court," defined.	1518

§1514—ART. 59.—**Words and phrases—How understood.**—All words and phrases used in this Code are to be taken and understood in their usual acceptation in common language, except where their meaning is particularly defined by law. [O. C. 49.]

*Ante*, §§15, 23, 24; Rev. Stat. Art. 3138.

§1515—ART. 60.—**Same subject.**—The words and terms made use of in this Code, unless herein specially excepted, have the meaning which is given to them in the Penal Code, and are to be construed and interpreted as therein declared. [O. C. 50.]

See, *ante*, Chap. 2, Title 1, Penal Code, p. 24.

§1516—ART. 61.—**Criminal action—How prosecuted.**—A criminal action is prosecuted in the name of the State of Texas against the person accused, and is conducted by some officer or person acting under the authority of the state, in accordance with its laws. [O. C. 51.]

See, *ante*, §63.

§1517—ART. 62.—**"Officers," includes what.**—The general term "officers" includes both magistrates and peace officers. [O. C. 54.]

It includes all persons legally authorized to perform public duties. *Sauner v. S.* 2 App. 458.

§1518—ART. 63.—**"Examining court," defined.**—When a magistrate sits for the purpose of inquiring into a criminal accusation against any person, this is called an "examining court." [O. C. 55.]

See, *post*, Chaps. 2, 3, 4, Title 5. When a justice of the peace sits as an "examining court" his judicial authority is co-extensive with his county. *Hart v. S.* 15 App. 202; *Kerry v. S.* 17 App. 178.

## TITLE 2.—OF THE JURISDICTION OF COURTS IN CRIMINAL ACTIONS.

CH. 1. WHAT COURTS HAVE CRIMINAL JURISDICTION.  
 2. OF THE COURT OF APPEALS.  
 3. OF THE DISTRICT COURTS.

CH. 4. OF COUNTY COURTS.  
 5. OF JUSTICES' AND OTHER INTERIOR COURTS

### CH. 1.—WHAT COURTS HAVE CRIMINAL JURISDICTION.

ART.	SEC.
64. What courts have criminal jurisdiction.	1519

§1519—ART. 64.—What courts have criminal jurisdiction.—The following courts have jurisdiction in criminal actions:

1. The court of appeals.
2. The district courts.
3. The county courts.
4. The justices' courts, and the mayors' and other courts of incorporated cities or towns. [O. C. 57; Const. art. V, §6.]

See also. Chs. 1, 2, 3, 4, Title 30, Rev. Stat. Criminal District Court, Art. V, Sec. 1; Act July 23, 1870, p. 37; Act May 18, 1871, p. 94.

### CH. 2.—OF THE COURT OF APPEALS.

ART.	SEC.	ART.	SEC.
65. Power to issue writ of <i>habeas corpus</i> .	1520	No jurisdiction when defendant is not in custody or under recognition.	1525
Writ will not be awarded, when.	1521	When appeal is returned to the wrong branch of the court.	1526
66. Its appellate jurisdiction.	1522	67. Does not extend to certain cases.	1527
Appeal can only be from a final judgment of conviction.	1523	Preceding article construed.	1528
Notice of appeal essential to jurisdiction.	1524	Other powers of the court of appeals.	1529

§1520—ART. 65.—Power to issue writ of *habeas corpus*.—The court of appeals, or either of the judges thereof, has original jurisdiction to inquire into the cause of the detention of persons imprisoned or detained in custody, and for this purpose may issue the writ of *habeas corpus*, and upon the return thereof may remand such person to custody, admit to bail or discharge the person imprisoned or detained, as the law and the nature of the case may require. [O. C. 58; Const. art. V, §6.]

As to *habeas corpus*, see, *post*, Ch. 8, Title 3; appeal in *habeas corpus*, see, *post*, Art. 881, *et seq*.

§1521—Writ will not be awarded, when.—Articles 138 and 139, *post*, while not mandatory, clearly indicate that, before a person detained upon a charge of misdemeanor resorts to the court of appeals for a writ of *habeas corpus*, he should apply for the writ to the county judge of the county in which the misdemeanor is charged to have been committed, or, if there be no county judge in such county, then to the nearest judge or court competent to grant the same. The jurisdiction of the court of appeals to grant the writ, even though it was not, in the first instance, applied for to the proper local court, is not to be questioned, but the discretion to

refuse the writ is one which the court of appeals should and will exercise in all cases. And when no valid reason is shown for failing to apply to the proper local court, the writ will be refused. *Ex parte* Lynn, 19 App. 120; *Ex parte* Gregory, 20 App. 210. The writ will not be awarded when the application therefor shows that the applicant is restrained of his liberty under a commitment issued by the district court after trial and judgment of conviction for a felony. *Ex parte* Fuller, 19 App. 241.

§1522—ART. 66.—**Its appellate jurisdiction.**—The court of appeals shall have appellate jurisdiction co-extensive with the limits of the state in all criminal cases of whatever grade.

Const. Art. V, Sec. 6. See, *post*, Title 10, APPEALS.

§1523—**Appeal can only be from a final judgment of conviction.**—An appeal can only be from a final judgment of conviction rendered and entered of record, and unless such a judgment appears of record on appeal, the appeal will be dismissed for want of jurisdiction. *Post*, Art. 837. *R. v. Laughlin*, Dallam 412; *Nash v. R. Id.* 631; *Shannon v. S.* 7 Tex. 492; *Shultz v. S.* 13 Tex. 403; *Burrell v. S.* 16 Tex. 147; *Calvin v. S.* 23 Tex. 577; *Henry v. S.* 24 Tex. 361; *Pierce v. S.* 26 Tex. 114; *Nathan v. S.* 28 Tex. 326; *Dooley v. S.* 33 Tex. 712; *Murray v. S.* 35 Tex. 472; *Fulcher v. S.* 38 Tex. 305; *Mayfield v. S.* 40 Tex. 289; *Thompson v. S.* 41 Tex. 523; *Anschincks v. S.* 43 Tex. 587; *Young v. S.* 1 App. 64; *Smith v. S. Id.* 408; *Labbalte v. S.* 4 App. 169; *Pennington v. S.* 11 App. 281; *Mirelles v. S.* 13 App. 346; *Braden v. S.* 14 App. 22; *Heatherey v. S. Id.* 21. A contrary doctrine to the above was held in *Ashworth v. S.* 9 Tex. 490; *Hoppe v. S.* 32 Tex. 388; *Nelson v. S. Id.* 71; but these cases have been expressly overruled. *Fulcher v. S.* 38 Tex. 505; *Mayfield v. S.* 40 Tex. 289; *Butler v. S.* 2 App. 529; *Roberts v. S.* 3 App. 47. In felony cases, except in a capital felony, an appeal cannot be entertained until after sentence has been pronounced and entered of record against the defendant. *Post*, Art. 794. *Pate v. S.* 21 App. 191; *Walters v. S.* 18 App. 8; *Hart v. S.* 14 App. 323. See further, as to final judgment and sentence, *post*, Ch. 8, Title 9, and Willson's Cr. Forms, 747 *et seq.*

§1524—**Notice of appeal essential to jurisdiction.**—*Post*, Art. 848. Notice of appeal given in open court, and entered of record, is essential to the jurisdiction of the court of appeals, and unless such notice appears in the record, the appeal will be dismissed. *Solari v. S.* 3 App. 482; *Fairchild v. S.* 23 Tex. 176; *Johnson v. S.* 8 App. 671. The proper time for a defendant to give notice of appeal is when the trial court has overruled his motion for a new trial. *Willson v. S.* 12 App. 481. But the notice may be given and entered of record at any time after conviction, during the term of the court at which the judgment of conviction is entered against him. *Bozier v. S.* 5 App. 220. It may be given and entered at a subsequent term upon the entry of a judgment or sentence *nunc pro tunc*. *O'Connell v. S.* 18 Tex. 343; *Scott v. S.* 26 Tex. 116; *Smith v. S.* 1 App. 408; *S. C. Id.* 516; *Mapes v. S.* 13 App. 85; *Madison v. S.* 17 App. 479. There is no prescribed form for the entry of a notice of appeal. See Willson's Cr. Forms, 807, 808, 809. But the entry of such notice upon the judge's docket merely will not be sufficient. It must be entered of record upon the minutes of the court. The statute is imperative. *Long v. S.* 3 App. 321. Where the term of the court at which the conviction was had has adjourned, without notice of appeal, the court of appeals has no jurisdiction. *Clark v. S.* 3 App. 338.

§1525—**No jurisdiction when defendant is not in custody or under recognizance.**—When the conviction is in a felony case he must be committed to jail until the decision of the court of appeals can be made. *Post*, Art. 841. Where an offense is punishable in the alternative, with imprisonment in the penitentiary, or by fine, and the defendant is convicted, and his punishment assessed at a fine, his conviction is in a felony case, and he is not entitled to appeal on recognizance. *Campbell v. S.* 22 App. 262, overruling *Sisk v. S.* 9 App. 90; *ante*, §§117, 118. In a misdemeanor case the defendant, upon appeal, may enter into recognizance. *Post*, Arts. 851, 852. If he does not enter into recognizance, he must be committed to jail pending his appeal, and the record on appeal must show a sufficient recognizance, or must show affirmatively that the defendant is in jail, otherwise the appeal will be dismissed. *Harris v. S.* 2 App. 134; *Young v. S.* 8 App. 81; *Evans v. S. Id.* 671; *Johnson v. S.* 26 Tex. 117; *White v. S.* 11 Tex. 769; *Alexander v. S.* 12 Tex. 540; *Lawrence v. S.* 14 Tex. 432; *Hicklin v. S.* 31 Tex. 492; *S. v. Watson*, 33 Tex. 337; *Crow v. S.* 41 Tex. 468; *Holman v. S.* 10 Tex. 558; *S. v. Paschall*, 22 Tex. 584. See further, upon this subject, *post*, Title 10, APPEALS.

§1526—**When appeal is returned to the wrong branch of the court.**—When an appeal is returned to a term of the court of appeals to which it is not returnable under the law, the said court is without jurisdiction to determine it at said term. But if it be a felony case, and has been returned under Article 843, *post*, the court has jurisdiction to determine it. *Ayres v. S.* 12 App. 450.

§1527—ART. 67.—**Does not extend to certain cases.**—The preceding article shall not be so construed as to embrace cases which have been appealed from justices', or mayors' or other inferior courts to the county court, and in which the judgment rendered or fine imposed by the county court shall not exceed one hundred dollars, exclusive of cost. In such cases the judgment of the county court shall be final. [Act June 18, 1876, p. 18, §3; Const. art. V, sec. 16.]

§1528—**Preceding article construed.**—If an appeal from a justice's to the county court, in a case in which the judgment of the justice exceeds twenty dollars, be dismissed in the county court without a trial *de novo*, an appeal will lie from such judgment to the court of appeals, although the judgment of the justice be for less than one hundred dollars. *Taylor v. S.* 16 App. 514; *Pevito v. Rogers*, 52 Tex. 581. But, if there be a trial *de novo* in the county court in such case the judgment is final. *Richardson v. S.* 3 App. 69; *Cherry v. S.* 4 App. 4.

§1529—**Other powers of the court of appeals.**—The court of appeals has power, under such regulations as may be prescribed by law, to issue such writs as may be necessary to enforce its own jurisdiction. It also has power upon affidavits or otherwise, as by the court may be thought proper, to ascertain such matters of fact as may be necessary to the exercise of its jurisdiction. Const. Art. V, Sec. 6; see *Sayles' Civil Stat. Arts.* 1069, 1070 and notes, and Art. 1013 and notes; see, also, *Ex parte Cole*, 14 App. 579; *Craddock v. S.* 15 App. 641.

### CH. 3.—OF THE DISTRICT COURTS.

ART.	SEC.	ART.	SEC.
68. Has exclusive jurisdiction of felonies.	1530	70. Misdemeanors involving official misconduct.	1534
69. Shall determine grades of the offense.	1531	Jurisdiction in misdemeanors—Decisions as to.	1535
Decisions under preceding article.	1532	In extradition cases.	1536
Jurisdiction of felonies exclusive and dependent upon indictment.	1533	71. Power to issue writs of <i>habeas corpus</i> .	1537
		Criminal district courts.	1538
		Organization and terms of court.	1539

§1530—**ART. 68.—Has exclusive jurisdiction of felonies.**—The district courts shall have exclusive original jurisdiction in criminal cases of the grade of felony. [Const. art. V, §8.]

For definition of "felony, see, *ante*, §§117, 118; see, also, as to jurisdiction, *post*, Ch. 2, Title 4, VENUE. *Post*, Art. 576 and Art. 75a *et seq.*, CHANGE OF VENUE.

§1531—**ART. 69.—Shall determine grades of the offense.**—Upon the trial of a felony case, whether the proof develop a felony or a misdemeanor, the court shall hear and determine the case as to any degree of offense included in the charge. [Act June 16, 1876, p. 18, §3.]

§1532—**Decisions under preceding article.**—The district court has jurisdiction to try an indictment which charges a felony that includes a misdemeanor, and to proceed to judgment not only as to the felony, but as to any lower grade of offense of which the verdict may find the accused guilty. This provision does not conflict with any provision of the constitution. *Nance v. S.* 21 App. 457; *Harberger v. S.* 4 App. 26; *Ingle v. S.* *Id.* 91; *Montgomery v. S.* *Id.* 140.

§1533—**Jurisdiction of felonies exclusive, and dependent upon indictment.**—The district courts of this state alone have jurisdiction to convict of felonies, and their jurisdiction of such cases is dependent upon indictments presented by grand juries. An indictment presented by a body composed of fewer or more than twelve men is not legally presented and does not confer jurisdiction. *Lott v. S.* 18 App. 627. See further, as to jurisdiction, Ch. 2, Title 4, VENUE. The district courts of this state have jurisdiction of the offense of counterfeiting. *Ante*, §777; *Martin v. S.* 18 App. 224. Also of the offense of forgery of titles to land in this state, though committed in another state. *Hanks v. S.* 13 App. 289; *ante*, §§770-772.

§1534—**ART. 70.—Misdemeanors involving official misconduct.**—The district court shall have exclusive original jurisdiction in cases of misdemeanor involving official misconduct. [Const. art. V, sec. 8.]

§1535—**Jurisdiction in misdemeanors—Decisions as to.**—The district court has no jurisdiction to try any indictment for misdemeanor, except one involving "official misconduct." *Cassaday v. S.* 4 App. 96. Negligently permitting the escape of a prisoner in the custody of the accused as an officer, is an offense which comes within the definition of official misconduct, and is triable in the district court. *Hatch v. S.* 10 App. 515, overruling *Watson v. S.* 9 App. 212. Intentionally managing a prosecution for vagrancy so as to procure an acquittal, knowing the



defendant to be guilty, constitutes official misconduct on the part of a county attorney. But it is not official misconduct for a county attorney to procure the acquittal of one accused of vagrancy, for the purpose of using him as a witness. *Trigg v. S.* 49 Tex. 645; see *Sayles' Civ. Stat. Arts. 3388-3393*. A conviction for misdemeanor may be had in the district court on an indictment charging a felony which includes a misdemeanor. *Ante*, §1532. For the statutes and decisions relating to the transfer of misdemeanor indictments to the courts having jurisdiction to try the same, see, *post*, Art. 435 *et seq.*

§1536—**In extradition cases.**—The courts of this state have no jurisdiction to try an accused who has been extradited for an offense provided for in the extradition treaty, for an offense for which he has not been extradited, and which is not provided for in the extradition treaty, and in such case a plea to the jurisdiction of the court may be interposed and should prevail. *Blandford v. S.* 10 App. 627; see, also, *Kelly v. S.* 13 App. 158, in which it was held such a plea was properly overruled.

§1537—**ART. 71.—Power to issue writs of habeas corpus.**—The district courts and the judges thereof shall have power to issue writs of *habeas corpus* in felony cases, and upon the return thereof may remand to custody, admit to bail, or discharge the person imprisoned or detained, as the law and the nature of the case may require. [Const. art. V, sec. 8.]

See, *post*, Ch. 8, Title 3, as to **HABEAS CORPUS**.

§1538—**Criminal district court.**—By Act of July 23, 1870, certain courts, styled "Criminal District Courts," were created. But one of these courts now exists, that is the Criminal District Court of Galveston and Harris counties, said court having been perpetuated by the constitution. Const. Art. V, Sec. 1. The statutory provisions relating to said court appear in the Revised Civil Statutes, Title 30, but were not incorporated by the revisers in the Code of Criminal Procedure, where, in the author's opinion, they properly belong, as the court is one of criminal jurisdiction only.

The whole of Title 30 is given in Appendix No. 1.

The statutes establishing other criminal district courts were abrogated by the adoption of the present state constitution, the Criminal District Court of Galveston and Harris counties alone being retained. *Long v. S.* 1 App. 707. The courts of this state take judicial notice of the Criminal District Court of Galveston and Harris counties, and who the judge of said court is. *Watson v. S.* 5 App. 11. For decisions relating to the other criminal district courts, while they were in existence, see *Johnson v. S.* 33 Tex. 570; *S. v. Rhodius*, 37 Tex. 165; *March v. S.* 44 Tex. 64. By the creation of the Criminal District Court of Galveston and Harris counties, the district courts of those counties were divested of all criminal jurisdiction. *Stubbs v. S.* 39 Tex. 564.

§1539—**Organization and terms of court.**—In case of the non-appearance of the judge on the day fixed by law for the opening of the court, and in case no special judge is elected, the law commands the sheriff, or, upon his default, any constable of the county, to open and adjourn the court from day to day for three days, and at noon of the fourth day to adjourn it until its next regular term. After the court has been thus adjourned until the next term, it is not competent for the judge to re-open and hold the term which has lapsed. *Garza v. S.* 12 App. 261. As to terms of the district courts, see *Sayles' Civ. Stat. Ch. 4, Title 27*. As to term in newly organized county, see *Ex parte Mato*, 19 App. 112.

## CH. 4.—OF COUNTY COURTS.

ART.	SEC.	ART.	SEC.
72. Have exclusive jurisdiction of misdemeanors, except, etc.	1540	73. Power to forfeit bail bonds, etc.	1545
Decisions under preceding article.	1541	74. Power to issue writs of <i>habeas corpus</i> .	1546
Concurrent jurisdiction.	1542	75. Appellate jurisdiction.	1547
Jurisdiction in particular counties.	1543	75a. Appeal, etc., to district court, when.	1548
Terms of county courts.	1544		

§1540.—**ART. 72.—Have exclusive jurisdiction of misdemeanors, except, etc.**—The county courts shall have exclusive original jurisdiction of all misdemeanors, except misdemeanors involving official misconduct, and except cases in which the highest penalty or fine that may be imposed under the

law, may not exceed two hundred dollars, and except in counties where there is established a criminal district court. [Const. art. V, sec. 16; Act June 16, 1876, p. 13, § 3; *ante*, §§1534, 1535.]

**§1541—Decisions under preceding article.**—Upon a trial for an aggravated assault in the county court, the defendant may be convicted of a simple assault, and the county court has jurisdiction in such case to adjudge and enforce the conviction. *Crutchfield v. S.* 1 App. 445. County courts have concurrent jurisdiction with justices' courts of misdemeanors cognizable in justices' courts. *Post*, Art. 76; *Woodward v. S.* 5 App. 296; *Solon v. S.* *Id.* 301; *Jennings v. S.* *Id.* 298; *Leatherwood v. S.* 6 App. 244; *Chaplin v. S.* 7 App. 87. But they have no jurisdiction to finally try a felony case. *Davis v. S.* 3 App. 184. But the county judge may sit as an examining court in felony cases, in which case the clerk of the county court may swear the witnesses. *Sullivan v. S.* 6 App. 319. Jurisdiction over misdemeanors, except those involving official misconduct, is conferred by the constitution upon the county and justices' courts, and district courts cannot exercise such jurisdiction, unless empowered to do so in the manner prescribed by Article V, Sec. 22, of the Constitution. *Chapman v. S.* 16 App. 76. As to misdemeanors, involving official misconduct, see, *ante*, §1535. County courts have jurisdiction of misdemeanors where a part of the punishment prescribed is imprisonment in the county jail. *Reddick v. S.* 4 App. 32. The jurisdiction of the county courts over misdemeanors included misdemeanors committed before the adoption of the Revised Statutes. *Whitsett v. S.* 9 App. 198. County courts have no jurisdiction over theft of hogs worth twenty dollars or more. *Blunt v. S.* 9 App. 234.

**§1542—Concurrent jurisdiction.**—When the jurisdiction is concurrent, the court which first takes jurisdiction acquires control to the exclusion of the other, and is entitled to proceed to judgment. *Burdett v. S.* 9 Tex. 43; *Clepper v. S.* 4 Tex. 242. But when a defendant is convicted in a court of concurrent jurisdiction, such conviction is a bar to a prosecution for the same offense in another court of concurrent jurisdiction, although the latter prosecution had been commenced before the former, and was pending at the time of the conviction. *Kain v. S.* 17 App. 282. The conferring upon an inferior court jurisdiction of a case of which a superior court has jurisdiction, renders their jurisdiction concurrent, but not inconsistent. *Johnson v. Happell*, 4 Tex. 96. Under the charter of the city of Dallas the mayor's court of that city has concurrent jurisdiction with the county court of the offense of keeping a disorderly house. *Handley v. S.* 16 App. 444; *Ex parte Wilson*, 14 App. 592; see, *post*, Art. 76.

**§1543—Jurisdiction in particular counties.**—For the statutes regulating the jurisdiction of county courts in particular counties, see *Sayles' Civ. Stat. Ch. 3, Title 28*, and the following decisions: *Chapman v. S.* 16 App. 76; *Galloway v. S.* 23 App. 398.

**§1544—Terms of county courts.**—For statutory provisions as to the terms of courts, see *Sayles' Civ. Stat. Ch. 4, Title 28*; and for decisions relating to terms for criminal business, see *Sewell v. S.* 15 App. 56; *Wilson v. S.* *Id.* 150; *Thomas v. S.* 14 App. 200.

**§1545—ART. 73.—Power to forfeit bail bonds, etc.**—County courts shall have jurisdiction in the forfeiture and final judgment of all bonds and recognizances taken in criminal cases, of which criminal cases said courts have jurisdiction. [Act June 16, 1876, p. 18, §3.]

See, *post*, Art. 440 *et seq.* If the court before which the principal obligor is bound to appear has no authority to require him to answer the charge against him, it has no power to adjudge a forfeiture of his bail bond or recognizance. *McGee v. S.* 11 App. 520.

**§1546—ART. 74.—Power to issue writs of habeas corpus.**—The county courts, or judges thereof, shall have the power to issue writs of *habeas corpus* in all cases in which the constitution has not conferred the power on the district courts or judges thereof; and upon the return of such writ may remand to custody, admit to bail, or discharge the person imprisoned or detained, as the law and nature of the case may require. [Const. art. V, sec. 16; Act June 16, 1876, p. 19, §5.]

See, *post*, Ch. 8, Title 3, *HABEAS CORPUS*; *ante*, §1537.

**§1547—ART. 75.—Appellate jurisdiction.**—The county courts shall have appellate jurisdiction in criminal cases, of which justices of the peace and other inferior tribunals have original jurisdiction. [Const. art. V, sec. 16; Act June 16, 1876, p. 18, §3.]

See, *post*, Title 10, *APPEALS*. This appellate jurisdiction does not exist in the county courts of Galveston and Harris counties. *Ante*, §1538; *post*, Art. 839.

**§1548—ART. 75a.—Appeal, etc., to district court, when.**—In all counties in which the civil and criminal jurisdiction, or either, of county courts has been transferred to the district courts, appeals and writs of

*certiorari* may be prosecuted to remove a case tried before a justice of the peace to the district court in the same manner and under the same circumstances under which appeals and writs of *certiorari* are allowed by general law to remove causes to the county court. [Act April 21, 1879, p. 125.]

Same as Sayles' Civ. Stat. Art. 1638a; see, *post*, Title 10, APPEAL.

## CH. 5.—OF JUSTICES' AND OTHER INFERIOR COURTS.

ART.	SEC.	ART.	SEC.
76. Original concurrent jurisdiction.	1549	78. Mayors' and other inferior courts.	1552
Decisions as to justices' jurisdiction.	1550	79. May sit at any time to try causes.	1553
77. Power to forfeit bail bonds.	1551		

§1549.—ART. 76.—Original concurrent jurisdiction.—Justices of the peace shall have and exercise original concurrent jurisdiction with other courts in all cases arising under the criminal laws of this state in which the punishment is by fine only, and where the maximum of such fine may not exceed two hundred dollars, except in cases involving official misconduct. [Const. art. V, sec. 19; Act Aug. 17, 1876, p. 155, § 3.]

See, *post*, Title 11.

§1550.—Decisions as to justices' jurisdiction.—Justices' courts have no jurisdiction to finally determine any criminal action when the punishment prescribed by law may be by a fine exceeding two hundred dollars, or may be imprisonment for any length of time. *Tuttle v. S. 1 App. 364; Billingsly v. S. 3 App. 686; Uecker v. S. 4 App. 234; Ex parte McGrew. 40 Tex. 472; S. v. Newhous, 41 Tex. 185.* The ordinary jurisdiction of a justice of the peace is circumscribed by the limits of his own precinct; but when a justice of the peace holds an examining court, to inquire into the commission of an offense, his judicial authority is co-extensive with his county. *Hart v. S. 15 App. 202; Kerry v. S. 17 App. 178.* A warrant of arrest was issued by a justice of the peace of DeWitt county, returnable before the county judge of Gonzales county, charging the accused with a felony; held, that a justice of the peace of Gonzales county had jurisdiction of the case as an examining court. *Arrington v. S. 13 App. 551.* A justice of the peace has no authority to hear a complaint after an indictment for the same offense. *Burdette v. S. 9 Tex. 43.* A justice of the peace may imprison for non-payment of fines imposed. *Tuttle v. S. 1 App. 364.* The jurisdiction of justices in criminal cases is not exclusive, but concurrent with that of the county court. *Ante*, §§1541, 1542. For other decisions under former statutes, see *Johnson v. S. 17 Tex. 515; Ex parte Valasques, 26 Tex. 178; Wilson v. S. 16 Tex. 246; Norton v. S. 14 T. 387; Neil v. S. 43 Tex. 91; Hilliard v. S. 37 Tex. 358.*

§1551.—ART. 77.—Power to forfeit bail bonds.—They shall also have the power to take forfeitures of all bail-bonds given for the appearance of any parties at their courts, regardless of the amount, where the conditions of said bonds have not been complied with. [Act Aug. 17, 1876, p. 155, § 3.]

This power existed in justices of the peace before the enactment of the above articles. *Garner v. S. 40 Tex. 505; see, post*, Art. 440 *et seq.*

§1552.—ART. 78.—Mayors' and other inferior courts.—Mayors and recorders of incorporated cities or towns shall have and exercise the same jurisdiction as justices of the peace, within the limits of their respective corporations, and the provisions of this Code governing justices' courts shall apply to mayors' and recorders' courts. [O. C. 65.]

These officers had no *ex officio* jurisdiction under the Constitution of 1869. *Holmes v. S. 44 Tex. 631; Bigby v. Tyler, Id. 351; see, post*, Title 11.

§1553.—ART. 79.—May sit at any time to try causes.—Justices of the peace, mayors and recorders, may sit at any time to try criminal causes over which they have jurisdiction. [O. C. 65.]

See, *post*, Art. 911.

## TITLE 3.—OF THE PREVENTION AND SUPPRESSION OF OFFENSES, AND THE WRIT OF HABEAS CORPUS.

<b>CH. 1. PREVENTING OFFENSES BY THE ACT OF A PRIVATE PERSON.</b> <b>2. PREVENTING OFFENSES BY THE ACT OF MAGISTRATES AND OTHER OFFICERS.</b> <b>3. PROCEEDINGS BEFORE MAGISTRATES FOR THE PURPOSE OF PREVENTING OFFENSES.</b> <b>4. SUPPRESSION OF RIOTS, UNLAWFUL ASSEMBLIES, AND OTHER DISTURBANCES.</b>	<b>CH. 5. SUPPRESSION OF OFFENSES INJURIOUS TO PUBLIC HEALTH.</b> <b>6. SUPPRESSION OF OBSTRUCTIONS OF PUBLIC HIGHWAYS.</b> <b>7. SUPPRESSION OF OFFENSES AFFECTING REPUTATION.</b> <b>8. SUPPRESSION OF OFFENSES AGAINST PERSONAL LIBERTY.</b>
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### CH. 1.—OF PREVENTING OFFENSES BY THE ACT OF A PRIVATE PERSON.

<b>ART. 80 May be prevented how. 1554</b> <b>81 Rules as to prevention of by resistance. 1555</b> <b>82 Same subject. 1556</b> <b>83 Resistance may be in proportion to, etc. 1557</b>	<b>ART. 84 Same subject. 1558</b> <b>85 When other person, etc., may prevent. 1559</b> <b>86 Same rules shall govern in such case, as, etc. 1560</b> <b>Decisions under preceding articles. 1561</b>
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**§1554—ART. 80.—May be prevented, how.—**The commission of offenses may be prevented, either—

1. By lawful resistance; or,
2. By the intervention of the officers of the law.

Resistance to the offender may be made as hereinafter pointed out, either by the person about to be injured, or by the person in his behalf. [O. C. 66.]

**§1555—ART. 81.—Rules as to prevention of by resistance.—**Resistance by the party about to be injured may be used to prevent the commission of any offense which, in the Penal Code, is classed as an “offense against the person.” [O. C. 67.]

**§1556—ART. 82.—Same subject.—**Resistance may also in like manner be made by the person about to be injured, to prevent any illegal attempt by force to take or injure property in his lawful possession. [O. C. 68.]

**§1557—ART. 83.—Resistance may be in proportion to, etc.—**The resistance which the person about to be injured may make, to prevent the commission of the offense, must be proportioned to the injury about to be inflicted. It must be only such as is necessary to repel the aggression. [O. C. 69.]

**§1558—ART. 84.—Same subject.—**If the person about to be injured, in respect either to his person or property, uses a greater amount of force to resist such injury than is necessary to repel the aggressor and protect his own person or property, he is himself guilty of an illegal act, according to the nature and degree of the force which he has used. [O. C. 70.]

**§1559—ART. 85.—When other person, etc., may prevent.—**Any person other than the party about to be injured may also, by the use of necessary means, prevent the commission of the offense. [O. C. 71.]

**§1560—ART. 86.—Same rules shall govern in such case, as, etc.—**The same rules which regulate the conduct of the person about to be injured, in repelling the aggression, are also applicable to the conduct of him

who interferes in behalf of such person. He may use a degree of force proportioned to the injury about to be inflicted, and no greater. [O. C. 72.]

§1561—Decisions under preceding articles.—A party may resist an unlawful arrest by the use of such means as may be strictly necessary to effect a prevention; but if the means resorted to are excessive, dangerous, and unnecessary, he is guilty of an assault. Deadly weapons may be resorted to, but the facts justifying such extremity must be shown. *Stockton v. S.* 25 Tex. 772. If an arrest is attempted for misdemeanor, and the officer unlawfully fires on the party fleeing, the latter may return the fire, and if the officer is killed, the killing is not necessarily unlawful. *Tiner v. S.* 44 Tex. 128. If an officer act outside of authority, or exercises his authority unlawfully, his homicide may be justified or extenuated by these facts. *James v. S.* 44 Tex. 314; *Alford v. S.* 8 App. 545. When a person illegally restrained kills the officer, the offense is not of a higher grade than manslaughter. *Goodman v. S.* 4 App. 349. If an arrest is attempted by an unauthorized person, and in the melee such person is cut by the defendant, the offense is not greater than an aggravated assault and battery. *Johnson v. S.* 5 App. 43. See further, *ante*, §976; and for other decisions bearing upon the preceding articles, see, *ante*, §§969-974, 975-977, 978, 979, 980.

## CH. 2.—OF PREVENTING OFFENSES BY THE ACT OF MAGISTRATES AND OTHER OFFICERS.

ART.	SEC.	ART.	SEC.
87 Duty of magistrate to prevent.	1562	91 Duty of peace officer to prevent.	1566
88 Same subject.	1563	92 Same subject.	1567
89 Same subject.	1564	93 Conduct of, etc.—How regulated.	1568
90 May compel offender to give security.	1565		

§1562—ART. 87. **Duty of magistrate to prevent.**—It is the duty of every magistrate when he may have heard, in any manner, that a threat has been made by one person to do some injury to the person or property of another, immediately to give notice to some peace officer, in order that such peace officer may use lawful means to prevent the injury. [O. C. 73.]

As to who are magistrates, see, *ante*, §1496. As to who are peace officers, see, *ante*, §1498; see, *post*, Ch. 2, of this Title.

§1563—ART. 88.—**Same subject.**—Whenever, in the presence or within the observation of a magistrate, an attempt is made by one person to inflict an injury upon the person or property of another, it is his duty to use all lawful means to prevent the injury. This may be done either by verbal order to a peace officer to interfere and prevent the injury, or by the issuance of an order of arrest against the offender, or by arresting the offender; for which purpose he may call upon all persons present to assist in making the arrest. [O. C. 74.]

See, *post*, Ch. 2, of this Title; also, *post*, Ch. 1, Title 5.

§1564—ART. 89.—**Same subject.**—If within the hearing of a magistrate one person shall threaten to take the life of another, he shall issue a warrant for the arrest of the person making the threat, or, in case of emergency, he may himself immediately arrest such person. [O. C. 75.]

*Post*, Arts. 226, 227-234. As to the offense of threat to take life, see, *ante*, §1410 *et seq.*

§1565—ART. 90.—**May compel offender to give security.**—When the person making such threat is brought before a magistrate, he may compel him to give security to keep the peace, or commit him to custody in the manner hereafter provided. [O. C. 76.]

See, *post*, Ch. 3, of this Title as to proceedings in such case.

§1566—ART. 91.—**Duty of peace officer to prevent.**—It is the duty of every peace officer, when he may have been informed in any manner that a threat has been made by one person to do some injury to the person or property of another, to prevent the threatened injury, if within his power, and in order to do this he may call in aid any number of citizens in his county. He may take such measures as the person about to be injured might for the prevention of the offense. [O. C. 77.]

As to who are peace officers, see, *ante*, §1498; see, *post*, Ch. 4, of this Title, as to duty, etc., in case of riots, etc.; see, also, *post*, §1581.

§1567—ART. 92.—**Same subject.**—Whenever, in the presence of a peace officer, or within his view, one person is about to commit an offense against the person or property of another, it is his duty to prevent it, and for this purpose he may summon any number of citizens of his county to his aid. He must use the amount of force necessary to prevent the commission of the offense, and no greater. [O. C. 92.]

See, *ante*, §1500; *post*, Ch. 4, of this Title; also, *post*, Art. 106.

§1568—ART. 93.—**Conduct of, etc., how regulated.**—The conduct of peace officers, in preventing offenses about to be committed in their presence, or within their view, is to be regulated by the same rules as are prescribed to the action of the person about to be injured. They may use all force necessary to repel the aggression. [O. C. 79.]

See, *ante*, §948 *et seq*; also, §969 *et seq*.

### CH. 3.—PROCEEDINGS BEFORE MAGISTRATES FOR THE PURPOSE OF PREVENTING OFFENSES.

ART.	SEC.	ART.	SEC.
94. Magistrate shall issue warrant to prevent, when.	1569	101. Defendant shall be discharged, when.	1576
95. Proceedings when accused is brought before magistrate.	1570	102. May discharge defendant, when.	1577
96. What shall be a sufficient peace bond.	1571	103. May require bond of person charged with libel.	1578
97. Oath required of surety, and bond to be filed, etc.	1572	104. Where defendant has committed a crime.	1579
98. Amount of bail, how fixed.	1573	105. Accused shall pay costs, when.	1580
99. How surety may exonerate himself.	1574	106. May direct that person or property threatened shall be protected.	1581
100. Defendant failing or refusing to give bond shall be committed.	1575	107. Suit on bond.	1582
		108. Same subject.	1583

§1569—ART. 94.—**Magistrate shall issue warrant to prevent, when.**—Whenever a magistrate is informed upon oath that an offense is about to be committed against the person or property of the informant, or of another, or that any person has threatened to commit such offense, it is his duty immediately to issue a warrant for the arrest of the accused, that he may be brought before such magistrate, or before some other named in the warrant. [O. C. 80.]

For forms of oath and warrant of arrest, see Willson's Cr. Forms, 845, 846.

§1570—ART. 95.—**Proceedings when accused is brought before magistrate.**—When the person accused has been brought before the magistrate, he shall hear proof as to the accusation, and if he be satisfied that there

is just reason to apprehend that the offense was intended to be committed, or that the threat was seriously made, he shall make an order that the accused enter into bond in such sum as he may in his discretion require, conditioned that he will not commit such offense, and that he will keep the peace toward the person threatened, or about to be injured, and toward all others, for one year from the date of such bond. [O. C. 81.]

For form of order requiring peace bond, see Willson's Cr. Forms, 847.

§1571—ART. 96.—**What shall be a sufficient peace bond.**—The bond provided for in the preceding article shall be sufficient if it be payable to the State of Texas, recite plainly the nature of the accusation against the defendant, be for some certain sum, and be signed by the defendant and his surety, and dated. No error of form shall vitiate such bond, and no error in the proceedings prior to the execution of the bond shall be available as a defense in an action thereupon. [O. C. 84.]

For form of peace bond, see Willson's Cr. Forms, 852. A condition to appear and answer the charge may be inserted in the peace bond. *Lawton v. S.* 5 Tex. 272. This decision, however, was made under a different law from the present one.

§1572—ART. 97.—**Oath required of surety, and bond to be filed, etc.**—The officer taking such bond shall require the sureties of the defendant to make oath as to the value of their property in the manner pointed out with regard to recognizances and bail bonds. And such officer shall forthwith deposit such bond and oaths in the office of the clerk of the county court of the county where such bond is taken, to be filed and safely kept by said clerk in his office. [O. C. 90.]

See, as to requisites of sureties' oath, *post*, Art. 294; Willson's Cr. Forms, 599.

§1573—ART. 98.—**Amount of bail, how fixed.**—Magistrates, in fixing the amount of such bonds, shall be governed by the pecuniary circumstances of the accused, and the nature of the offense threatened or about to be committed. [O. C. 90.]

See, also, *post*, Art. 296.

§1574—ART. 99.—**How surety may exonerate himself.**—A surety upon any such bond may, at any time before a breach thereof, exonerate himself from the obligations of the same by delivering to any magistrate of the county where such bond was taken the person of the defendant, and such magistrate shall, in that case, again require of the defendant bond with other security in the same amount as the first bond, and the same proceedings shall be had as in the first instance, but the one year's time shall commence to run from the date of the first order. [O. C. 89.]

See Willson's Cr. Forms, 854.

§1575—ART. 100.—**Defendant failing or refusing to give bond shall be committed.**—If the defendant fail or refuse to give bond he shall be committed to the jail of the county, or, if there be no jail, to the custody of the sheriff, for the period of one year from the date of the first order requiring such bond. [O. C. 82.]

§1576—ART. 101.—**Defendant shall be discharged, when.**—If the defendant has been committed for failing or refusing to give bond, he shall be discharged by the officer having him in custody upon giving the required bond, or at the expiration of the time for which he has been committed. [O. C. 86.]

§1577—ART. 102.—**May discharge defendant, when.**—If the magistrate be of opinion from the evidence that there is no good reason to apprehend that the offense was intended or will be committed, or that no serious threat was made by the defendant, he shall discharge the person so accused,

and may, in his discretion, tax the cost of the proceeding against the party making the complaint. [O. C. 85.]

For form of such order, see Willson's Cr. Forms, 848.

**§1578—ART. 103.—May require bond of person charged with libel.**—If any person shall make oath, and shall convince the magistrate that he has good reason to believe that another is about to publish, sell or circulate, or is continuing to sell, publish or circulate any libel against him, or any such publication as is made an offense by the penal law of the state, the person accused of such intended publication may be required to enter into bond with security not to sell, publish or circulate such libelous publication, and the same proceedings be had as in the cases before enumerated in this chapter. [O. C. 95.]

As to offense of libel, see, *ante*, §1085 *et seq.*, see, also, *post*, Art. 129. For form of complaint, warrant and bond, see Willson's Cr. Forms, 850, 851, 852, 853.

**§1579—ART. 104.—Where defendant has committed a crime.**—When, from the evidence before the magistrate, it appears that the defendant has committed an offense against the penal law, the same proceedings shall be had as in other cases where parties are charged with crime. [O. C. 91.]

See Willson's Cr. Forms, 847-849.

**§1580—ART. 105.—Accused shall pay costs, when:**—In cases where accused parties are found subject to the charge, and required to give bond, the costs of the proceeding shall be adjudged against them. [O. C. 95.]

See Willson's Cr. Forms, 847.

**§1581—ART. 106.—May direct that person or property threatened shall be protected.**—When, from the nature of the case and the proof offered to the magistrate, it may appear necessary and proper, he shall have a right to order any peace officer to protect the person or property of any individual threatened; and such peace officer shall have the right to summon aid by requiring any number of citizens of his county to assist in giving the protection. [O. C. 92.]

See Willson's Cr. Forms, 847; see, *ante*, §1566.

**§1582—ART. 107.—Suit on bond.**—If the condition of a bond, such as is provided for in this chapter, be forfeited, it shall be sued upon in the name of "The State of Texas," in the court having jurisdiction of the amount thereof, and in the county where such bond was taken. The suit shall be instituted and prosecuted by the district or county attorney, and the full amount of such bond may be recovered against the principal and sureties. [O. C. 87.]

See Lawton v. S. 5 Tex. 272.

**§1583—ART. 108.—Same subject.**—Suits upon such bonds shall be commenced within two years from the breach of the same, and not thereafter, and shall be governed by the rules applicable to civil actions, except that the sureties may be sued, without joining the principal. It shall only be necessary in order to entitle the state to recover to prove that the defendant did commit the offense which he bound himself not to commit, or failed to keep the peace according to his undertaking. [O. C. 88.]



# CH. 4.—OF THE SUPPRESSION OF RIOTS, UNLAWFUL ASSEMBLIES AND OTHER DISTURBANCES.

ART.	SEC.	ART.	SEC.
109. Officer may require aid of citizens and military when he apprehends resistance.	1584	113. Officer may call to his aid the power of the county.	1588
110. Governor may order military to aid in executing process.	1585	114. What means may be adopted to suppress.	1589
111. Conduct of military in suppressing riots.	1586	115. Unlawful assembly.	1590
112. Duty of magistrates and peace officers to suppress, etc.	1587	116. Suppression of riot, unlawful assembly, etc., at election.	1591
		117. Power of special constables in such cases.	1592

§1584—ART. 109.—**Officer may require aid of citizens and military when he apprehends resistance.**—When any officer authorized to execute process is resisted, or when he has sufficient reason to believe that he will meet with resistance in executing the same, he may command as many of the citizens of his county as he may think proper, and the sheriff may call any military company in the county to aid him in overcoming the resistance, and, if necessary, in seizing and arresting the persons engaged in such resistance, so that they may be brought to trial. [O. C. 95.]

*Ante*, §§1501, 1502; also, see Rev. Stat. Art. 3331, given at end of this chapter.

§1585—ART. 110.—**Governor may order military to aid in executing process.**—If it be represented to the governor in such manner as to satisfy him that the power of the county is not sufficient to enable the sheriff to execute process, he may, on application, order any military company of volunteers, or militia company from another county, to aid in overcoming such resistance. [O. C. 98.]

See Rev. Stat. Arts. 3245, 3246, 3361, given at end of this chapter.

§1586—ART. 111.—**Conduct of military in suppressing riots.**—Whenever, for the purpose of suppressing riots or unlawful assemblies, the aid of military or militia companies is called, they shall obey the orders of the civil officer who is engaged in suppressing the same. [O. C. 104.]

See Const. Art. 1, Sec. 24; also, Rev. Stat. 3335, given at end of this chapter.

§1587—ART. 112.—**Duty of magistrates and peace officers to suppress, etc.**—Whenever a number of persons are assembled together in such a manner as to constitute a riot, according to the penal law of the state, it is the duty of every magistrate or peace officer to cause such persons to disperse. This may either be done by commanding them to disperse, or by arresting the persons engaged, if necessary, either with or without warrant. [O. C. 99.]

As to Riots, see, *ante*, §258, and Ch. 2, Title 9; and as to Unlawful Assemblies, see, *ante*, Ch. 1, Title 9.

§1588—ART. 113.—**Officer may call to his aid the power of the county.**—In order to enable the officer to disperse a riot, he may call to his aid the power of the county in the same manner as is provided where it is necessary for the execution of process. [O. C. 100.]

See, *ante*, §1584.

§1589—ART. 114.—**What means may be adopted to suppress.**—The officer engaged in suppressing a riot, and those who aid him, are authorized and justified in adopting such measures as are necessary to suppress the riot, but are not authorized to use any greater degree of force than is requisite to accomplish that object. [O. C. 102.]

See, *ante*, §1568.

§1590—ART. 115.—**Unlawful assembly.**—All the articles of this chapter relating to the suppression of riots, apply equally to an unlawful assembly, and other unlawful disturbances, as defined by the Penal Code. [O. C. 103.]

See, *ante*, Ch. 1, Title 9, as to Unlawful Assemblies; also, *ante*, §259.

§1591—ART. 116.—**Suppression of riot, unlawful assembly, etc., at election.**—For the purpose of suppressing riots, unlawful assemblies and other disturbances at elections, any magistrate may appoint a sufficient number of special constables. Such appointments shall be made to each special constable, shall be in writing, dated and signed by the magistrate, and shall recite the purposes for which such appointment is made, and the length of time it is to continue, and before the same is delivered to such special constable he shall take an oath before the magistrate to suppress, by lawful means, all riots, unlawful assemblies and breaches of the peace of which he may receive information, and to act impartially between all parties and persons interested in the result of the election. [O. C. 106.]

For form of appointment, etc., of special constable, see Willson's Cr. Forms, 855.

§1592—ART. 117.—**Power of special constable in such cases.**—Special constables so appointed shall, during the time for which they are appointed, exercise the powers and perform the duties properly belonging to peace officers. [O. C. 117.]

See, *ante*, §§1500, 1501, 1566, 1567, 1568.

#### ARTICLES FROM THE CIVIL STATUTE.

ART. 3245. **Governor, commander-in-chief.** The governor shall be the commander-in-chief of the military forces, except when they are called into actual service of the United States. [Const. art. 4, §7.]

ART. 3246. **May call forth militia for what.** He shall have power to call forth the militia to execute the laws, to suppress insurrections, repel invasions and protect the frontier from hostile incursions by Indians or other predatory bands. [Const. art. 4, §7.]

ART. 3330. **Duty in case of invasion or insurrection.** When an invasion of or insurrection in the state is made or threatened, the commander-in-chief shall call upon the volunteer guards to repel or suppress the same, and it is made their duty to respond immediately to such call.

ART. 3331. **In case of riot or resistance to the laws.** When there is in any county, city or town a tumult, riot, mob or a body of men acting together by force with intent to commit a felony or breach of the peace, or to do violence to persons or property, or by force and violence to break or resist the laws, or when such tumult, riot, mob, or other unlawful act or violence is threatened, and that fact is made to appear to the commander-in-chief, or to the sheriff of such county, or the mayor of such city or town, the commander-in-chief may issue his order, or such sheriff or mayor may issue a writ directed to any commander of a brigade, regiment, battalion or company of volunteer guards, directing him to order his command, or part thereof, to appear at a time and place therein specified, to aid the civil authority in suppressing such violence and in executing the laws.

ART. 3332. **Form of the writ.** The writ provided for in the preceding article shall be in substance as follows, to-wit:

"THE STATE OF TEXAS,

"To [insert official title] A B, commanding [insert his command]:

"Whereas, it has been made to appear to me [the sheriff of.....county, or the mayor of....., as the case may be,] that [here state one of the causes of such writ provided for in the preceding article], and that military force is necessary to aid the civil authority in suppressing the same; you are, therefore, ordered and required to cause your command [or such part thereof as may be desired] to parade immediately at....., armed and equipped, with ammunition, and with proper officers, then and there to obey such orders as may be given, according to law.

"Herein fall not at your peril, and have you then and there this writ as your authority for such parade.

"Witness my hand officially, on this the.....day of....., 18....

"C D.

"Sheriff of.....county, Texas [or mayor of....., as the case may be]."

ART. 3333. **Copy to commander-in-chief.** The writ may be varied to suit the circumstances of the particular case, and shall be delivered to the officer therein named, and a copy thereof forwarded immediately by the sheriff or mayor to the commander-in-chief.

ART. 3334. **Officer's duty on receipt of writ.** The officer to whom the order of the commander-in-chief or such writ is directed shall, upon its receipt, forthwith order his command, or such portion thereof as may be called for, to parade at the time and place appointed; and shall immediately notify the commander-in-chief of such proceeding, by telegraph if practicable, and also by mail.

ART. 3335. **Duty of the troops.** When such troops have appeared at the appointed place, they shall obey and execute such orders as they may then and there receive from the civil

authorities charged by law with the suppression of the riot or tumult, or with the enforcement of the laws so threatened or resisted, or the preservation of the public peace.

**ART. 3336.** Troops may be used in guarding prisoners, etc. The commander-in-chief may detail any organization of volunteer guards, or a part thereof, to assist the civil authorities in guarding prisoners, or in conveying prisoners to any point in this state, or discharging other duties in connection with the execution of the laws, as the public interest or safety at any time seem to require.

## CH. 5.—OF THE SUPPRESSION OF OFFENSES INJURIOUS TO PUBLIC HEALTH.

ART.	SEC.	ART.	SEC.
118 Court may restrain a person from carrying on a trade, etc., injurious to public health.		120 Requisites of bond.	1595
		121 Suit on bond.	1596
119 Proceeding when party refuses to give bond.	1593	122 Same subject.	1597
	1594	123 Unwholesome food, etc., may be seized and destroyed.	1598

**§1593—ART. 118.—Court may restrain a person from carrying on a trade, etc., injurious to public health.**—After an indictment or information has been presented against any person for carrying on a trade, business or occupation, injurious to the health of those in the neighborhood, the court shall have power, on the application of any one interested, and after hearing proof both for and against the accused, to restrain the defendant in such penalty as may be deemed proper, from carrying on such trade, business or occupation, or may make such order respecting the manner and place of carrying on the same as may be deemed advisable; and if, upon trial, the defendant be convicted the restraint shall be made perpetual, and the party shall be required to enter into bond with security not to continue such trade, business or occupation to the detriment of the health of such neighborhood, or of any other neighborhood within the county. [O. C. 108.]

*Ante*, §649. For forms in this proceeding, see Willson's Cr. Forms, 856, 857, 858, 859, 860, 861, 862.

**§1594—ART. 119.—Proceeding when party refuses to give bond.**—If the party refuses to give bond when required under the provisions of the preceding article, the court may either commit him to jail, or make an order requiring the sheriff to seize upon the implements of such trade, business or occupation, or the goods and property used in conducting such trade, business or occupation, and destroy the same. [O. C. 108.]

**§1595—ART. 120.—Requisites of bond.**—Such bond shall be payable to the State of Texas, in a reasonable amount to be fixed by the court, conditioned that the defendant will not carry on such trade, business or occupation, naming the same, at such place, naming the place, or at any other place in the county, to the detriment of the health of the neighborhood. Said bond shall be signed by the defendant and his sureties and dated, and shall be approved by the court taking the same, and filed in such court. [O. C. 109.]

**§1596—ART. 121.—Suit upon bond.**—Any such bond, upon the breach thereof, may be sued upon by the district or county attorney, in the name of the State of Texas, in any court having jurisdiction of the amount thereof, within two years after such breach, and not afterwards, and such suits shall be governed by the same rules as civil actions. [O. C. 109.]

§1597—ART. 122.—**Same subject.**—It shall be sufficient proof of the breach of any such bond to show that the party continued, after executing the same, to carry on the trade, business or occupation which he bound himself to discontinue. And the full amount of such bond may be recovered of the defendant and his sureties. [O. C. 110.]

§1598—ART. 123.—**Unwholesome food, etc., may be seized and destroyed.**—After conviction for selling unwholesome food or liquor, or adulterated medicine, the court shall enter and issue an order to the sheriff or other proper officer, to seize and destroy such as remains in the hands of the defendant, which order shall forthwith be executed. [O. C. 108.]

*Ante*, Ch. 2, Title 12, §652 *et seq.*

## CH. 6.—OF THE SUPPRESSION OF OBSTRUCTIONS OF PUBLIC HIGHWAYS.

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125 Order to remove obstructions, etc.	1600	128 When defendant is convicted, obstructions shall be removed at his cost.	1603
126 Suit upon bond of applicant.	1601		

§1599—ART. 124.—**Public highway shall not be obstructed, except, etc.**—Whenever any road, bridge, or the crossing of any stream is made, by the proper authority, a public highway, no person shall place an obstruction across such highway or in any manner prevent the free use of the same by the public, except when expressly authorized by law. [O. C. 112.]

See, *ante*, Ch. 1, Title 13, §679 *et seq.*

§1600—ART. 125.—**Order to remove obstructions, etc.**—After indictment or information presented against any person for violating the preceding article, any one, in behalf of the public, may apply to the county judge of the county in which such highway is situated, and upon hearing proof such judge, either in term time or in vacation, may issue his written order to the sheriff or other proper officer of the county, directing him to remove the obstruction; but before the issuance of such order the applicant therefor shall give bond with security in an amount to be fixed by the judge, to indemnify the accused, in case of his acquittal, for the loss he sustains. Such bond shall be approved by the county judge and filed among the papers in the cause. [O. C. 113.]

For forms of this proceeding, see Willson's Cr. Forms, 863, 864, 865, 866.

§1601—ART. 126.—**Suit upon bond of applicant.**—If the defendant, in such indictment or information, be acquitted after a trial upon the merits of the case, he may maintain a civil action against the applicant, and his sureties upon such bond, and may recover the full amount of the bond or such damages, less than the full amount thereof, as may be assessed by a jury; *provided*, he shows on the trial that the place was not in fact, at the time he placed the obstruction or impediment thereupon, a public highway, established by proper authority, but was in fact his own property or in his lawful possession. [O. C. 114.]

§1602—ART. 127.—**No defect of form, etc.**—No mere defect of form shall vitiate any order or proceeding of the commissioners' court in establishing a highway. [O. C. 115.]

§1603—ART. 128.—**When defendant is convicted, obstructions shall be removed at his costs.**—Upon the conviction of a defendant for obstructing the free use of any public highway, if such obstruction still exists, the court shall order the sheriff or other proper officer to forthwith remove the same at the costs of the defendant, which costs shall be taxed and collected as other costs in the case. [Added in revising.]

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## CH. 7.—OF THE SUPPRESSION OF OFFENSES AFFECTING REPUTATION.

ART.

129 On conviction for libel, court may order copies destroyed.

SEC.

1604

§1604—ART. 129.—**On conviction for libel, court may order copies destroyed.**—On conviction for making, writing, printing, publishing, selling or circulating a libel, the court may, if it be shown that there are in the hands of the defendant, or other person, copies of such libel intended for publication, sale or distribution, order all such copies to be seized by the sheriff, or other proper officer, and destroyed. [O. C. 116.]

See Willson's Cr. Forms, 887.

## CH. 8.—OF THE SUPPRESSION OF OFFENSES AGAINST PERSONAL LIBERTY.

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§1605—ART. 130.—**Writ of habeas corpus.**—The writ of *habeas corpus* is the remedy to be used when any person is restrained of his liberty. [O. C. 117.]

See, *post*, Arts. 153, 194, 195. Writ shall not be suspended, etc., *ante*, §1446; see, also, BAIL and APPEAL.

§1606—When the writ is available—Decisions as to.—*Habeas corpus* has always been recognized as an appropriate mode of testing a right to bail. It may be used for the purpose of obtaining bail in a capital case, when the applicant has become entitled to bail under Art. 524, *post*. *Ex parte Walker*, 3 App. 668. It may be used to obtain a reduction of excessive bail, in which case the petition should be framed with a view to that relief, and complain that the amount of bail which has been required of him is excessive. *Hernandez v. S.* 4 App. 425. It may be used to relieve from restraint under a judgment or order of a court rendered without jurisdiction, or a judgment or order which for any reason is a nullity. *Ex parte McGrew*, 40 Tex. 472; *Darrah v. Westerlage*, 44 Tex. 388; *Holman v. Mayor*, 34 Tex. 668; *Ex parte Kilgore*, 3 App. 247; *Martin v. S.* 16 App. 265. It may be used to relieve from restraint under any proceeding which is *absolutely void*. *Ex parte Kramer*, 19 App. 123; *Ex parte Mato*, *Id.* 112; *Ex parte McGill*, 6 App. 498; *Ex parte Kilgore*, 3 App. 247; *Ex parte Slaren*, *Id.* 662; *Ex parte Schwartz*, 2 App. 74; *Ex parte Grace*, 9 App. 381; *Ex parte Boland*, 11 App. 159; *Perry v. S.* 41 Tex. 488. It is available to test the constitutionality of a law under which the applicant is restrained of his liberty. *Ex parte Mato*, 19 App. 112; *overruling Parker v. S.* 5 App. 579. Or to test the validity of a "local option" election. *Ex parte Kramer*, 19 App. 123; *Ex parte Kennedy*, 23 App. 77. Or to test the validity of an ordinance of an incorporated town or city. *Ex parte Gregory*, 20 App. 210; *Ex parte Gregory*, 1 App. 753; *Ex parte Slaren*, 3 App. 662; *Ex parte Grace*, 9 App. 381; *Ex parte Boland*, 11 App. 159. Or when the indictment under which the applicant is held was presented by an illegal grand jury, and there has been no trial and conviction upon such indictment. *Ex parte Swain*, 19 App. 241. It cannot be used to invoke a "speedy public trial." *Hernandez v. S.* 4 App. 425. But may be availed of when a defendant's constitutional right of trial by due course of law is denied him for an unreasonable length of time. *Rutherford v. S.* 16 App. 649.

§1607—When the writ is not available.—The writ cannot be made to serve the purpose of a writ of error, *certiorari*, or appeal. *Ex parte Schwartz*, 2 App. 74; *Ex parte Oliver*, 3 App. 345; *Ex parte Slaren*, *Id.* 662; *Ex parte Mabry*, 5 App. 93; *Griffin v. S.* *Id.* 457; *Ex parte McGill*, 6 App. 498; *Ex parte Boland*, 11 App. 159; *Perry v. S.* 41 Tex. 488; *Darrah v. Westerlage*, 44 Tex. 388. It does not reach such errors or irregularities as would render a judgment *voidable* only, but only such illegalities as render it void; that is radical defect; that which is contrary to the principles of law, as distinguished from mere rules of procedure; that which constitutes a complete defect in the proceedings, and not a mere irregularity in the proceedings. *Ex parte McGill*, 6 App. 498; *Ex parte Schwartz*, 2 App. 75. The writ will not be issued when the application shows that the applicant is restrained by virtue of a judgment of conviction for a felony, although such conviction was had upon an indictment presented by an illegal grand jury, the same being composed of more than twelve men. *Ex parte Fuller*, 19 App. 241; *Ex parte Ezell*, 40 Tex. 451; *Ex parte McGrew*, *Id.* 476; *Darrah v. Westerlage*, 44 Tex. 388. It cannot be invoked to enforce a "speedy public trial." *Hernandez v. S.* 4 App. 425. But see *Rutherford v. S.* 16 App. 265. It does not lie to revise the action of a court in punishing for a contempt. *Jordan v. S.* 14 Tex. 436. Unless the contempt was committed with reference to a matter over which the court had no jurisdiction. *Holman v. Mayor*, 34 Tex. 668; *Yarborough v. S.* 2 Tex. 519; *Ex parte Kilgore*, 3 App. 247. Former jeopardy cannot be availed of by *habeas corpus*. *Perry v. S.* 41 Tex. 488; *Pitner v. S.* 44 Tex. 578; *Griffin v. S.* 5 App. 457; *contra*, *Mosely v. S.* 33 Tex. 671. A person arrested on a magistrate's warrant for a felony committed in another county, is not entitled to the writ until an examination is had in the county where the offense is alleged to have been committed. *Robertson v. S.* 36 Tex. 346. The writ is not available to test the right to an office, that is, the writ cannot be used to attack a judgment collaterally upon the ground that the judge or justice rendering such judgment was not such officer legally. *Ex parte McCall*, 2 App. 497.

## I. DEFINITION AND OBJECT OF THE WRIT.

§1608—ART. 131.—**What a writ of habeas corpus is, etc.**—A writ of *habeas corpus* is an order issued by a court or judge of competent jurisdiction, directed to any one having a person in his custody, or under his restraint, commanding him to produce such person, at a time and place named in the writ, and show why he is held in custody, or under restraint. [O. C. 118.]

§1609—ART. 132.—**To whom directed, etc.**—The writ, as all other process, runs in the name of "The State of Texas." It is to be addressed to a person having another under restraint, or in his custody, describing, as near as may be, the name of the office, if any, of the person to whom it is directed, and the name of the person said to be detained. It shall fix the time and place

of return, and be signed by the judge or by the clerk, with his seal, where issued by a court. [O. C. 119.]

See Willson's Cr. Forms, 874.

§1610—ART. 133.—**Not invalid for want of form.**—The writ of *habeas corpus* is not invalid, nor shall it be disobeyed for any want of form, if it substantially appear that it is issued by competent authority, and the writ sufficiently show the object and design of its issuance. [O. C. 120.]

§1611—ART. 134.—**Provisions relating to, how construed.**—Every provision relating to the writ of *habeas corpus* shall be most favorably construed, in order to give effect to the remedy and protect the rights of the person seeking relief under it. [O. C. 121.]

*Ex parte* Trader, 24 App. 393.

## II. BY WHOM AND WHEN GRANTED

§1612—ART. 135.—**By whom writ may be granted.**—The court of appeals or either of the judges, the district courts or any judge thereof, the county courts or any judge thereof, have power to issue the writ of *habeas corpus*; and it is their duty, upon proper application, to grant the writ under the rules herein prescribed. [O. C. 122.]

See, *ante*, §§1520-1537, 1538-1546.

§1613—ART. 136.—**Before indictment, writ returnable where, etc.**—Before indictment found the writ may be made returnable to any county of the state. [O. C. 123.]

See, *post*, §1620.

§1614—ART. 137.—**After indictment, returnable where, etc.**—After indictment found the writ must be made returnable in the county where the offense has been committed, on account of which the applicant stands indicted. [O. C. 124.]

See, *post*, §1620.

§1615—**Writ returnable where—Decisions as to.**—After indictment, the writ must be made returnable in the county where the offense is alleged to have been committed. *Ex parte* Trader, 24 App. 393; *Ex parte* Alnsworth, 27 Tex. 731. Where the venue was changed from G. to C. county, and in the latter county was twice continued by the state, the defendant having never asked a continuance, it was held that the district court of C. county had jurisdiction to hear a writ of *habeas corpus* brought by the defendant under Article 567, *post*, and grant bail. *Ex parte* Walker, 3 App. 668.

§1616—ART. 138.—**When the applicant is charged with felony.**—In all cases where a person is confined on a charge of felony, and indictment has been found against him, he may apply to the judge of the district court for the district in which he is indicted, or if there be no judge within the district, then to the judge of any district whose residence is nearest to the court-house of the county in which the applicant is held in custody. [O. C. 125.]

§1617—**Decisions under preceding article.**—After indictment found for felony, the application for the writ of *habeas corpus* must, primarily and ordinarily, be made to the judge of the district in which the indictment was found. The denial of the writ by one judge is not conclusive against the applicant, but he may apply to another and have the opinion of any one, or all of the judges, as to the legality of his restraint. *Ex parte* Alnsworth, 27 Tex. 731. But where the venue of the cause has been changed to another district than that in which the indictment was found, in a capital case, the judge of the district in which the cause is pending may hear an application for bail based upon the ground prescribed by Art. 524, *post*. *Ex parte* Walker, 3 App. 668. The preceding article and article 139, *post*, while not mandatory, clearly indicate that the application for the writ should primarily be made to the local judge or court competent to grant the same, if there be such, and if none such, then to the nearest court or judge competent to grant the same. *Ex parte* Lynn, 19 App. 120.

§1618—ART. 139.—**When the applicant is charged with misdemeanor.**—In all cases where a person is confined on a charge of misdemeanor, he may apply to the county judge of the county in which the misdemeanor is charged to have been committed, or if there be no county



judge in said county, then to the county judge whose residence is nearest to the court-house of the county in which the applicant is held in custody. [Added in revising.]

§1619—**Decisions under preceding article.**—The two preceding articles, while not mandatory in their language, clearly indicate that, before a person detained upon a charge of misdemeanor can properly resort to the court of appeals for a writ or *habeas corpus*, he should apply for the writ to the county judge of the county in which the offense was committed, or if there be no county judge in such county, then to the nearest judge or court competent to grant the same. One of the cardinal principles of our system of government is, as far as practicable, to localize the administration of the law, to try causes in the county, and before the court, having the primary jurisdiction thereof. It is not a sufficient excuse for not making application to the local judge, that he is prejudiced against the applicant or his case, and would not administer the law impartially. If the judge refuses the writ, the applicant is not without his remedy. Another judge or court competent to grant it can be applied to. If the judge grants the writ, but upon a hearing thereof refuses to grant the relief to which the applicant may be entitled, he then has his remedy by appeal. *Ex parte* Lynn, 19 App. 120; *Ex parte* Gregory, 20 App. 210.

§1620—**ART. 140.—Proceedings under the writ.**—When application has been made to a judge under the circumstances set forth in the two preceding articles, it shall be his duty to appoint a time when he will examine the cause of the applicant, and issue the writ returnable at that time, in the county where the offense is charged in the indictment or information to have been committed. He shall also specify some place in the county where he will hear the application. [O. C. 129.]

See, *ante*, §§1613, 1614, 1615.

§1621—**ART. 141.—Time appointed for hearing.**—The time so appointed shall be the earliest day which the judge can devote to hearing the cause of the applicant, consistently with his other duties. [O. C. 127.]

§1622—**ART. 142.—Who may present petition for relief.**—Either the party for whose relief the writ is intended, or any person for him, may present a petition to the proper authority for the purpose of obtaining relief. [O. C. 128.]

§1623—**ART. 143.—The word "applicant" refers to.**—The word "applicant," as used in this chapter, refers to the person for whose relief the writ is asked, though, as above provided, the petition may be signed and presented by any other person. [O. C. 129.]

§1624—**ART. 144.—Requisites of petition.**—The petition must state substantially—

1. That the person for whose benefit the application is made is illegally restrained in his liberty, and by whom—naming both parties, if their names are known, or, if unknown, designating and describing them.

2. When the party is confined or restrained by virtue of any writ, order or process, or under color of either, a copy shall be annexed to the petition, or it shall be stated that a copy cannot be obtained.

3. When the confinement or restraint is not by virtue of any writ, order or process, the petition may state only that the party is illegally confined or restrained of his liberty.

4. There must be a prayer in the petition for the writ of *habeas corpus*.

5. Oath must be made that the allegations of the petition are true, according to the belief of the petitioner. [O. C. 130.]

For forms of petitions, see Willson's Cr. Forms, 868, 873.

§1625—**Decisions as to the petition.**—If the detention is alleged to be by virtue of a commitment issued by order of a court, a copy must be annexed, and a statement that such copy "cannot be obtained without delay" will not be sufficient. *Ex parte* Hill, 43 Tex. 75; Willson's Cr. Forms, 869. If the object be to obtain a reduction of bail, the petition should be framed with that view, and should aver that the bail exacted is excessive. *Hernandez v. S.* 4 App. 425; Willson's Cr. Forms, 870; *post*, Art. 154. If the application be under article 155, after conviction it must show expressly that any species of confinement will endanger the life of the applicant. *Thomas v. S.* 40 Tex. 6; Willson's Cr. Forms, 871.

**§1626—ART. 145.—The writ shall be granted without delay, unless, etc.**—The writ of *habeas corpus* shall be granted without delay by the judge or court receiving the petition, unless it be manifest by the statements of the petition itself, or some documents annexed to it, that the party is entitled to no relief whatever. [O. C. 131.]

**§1627—It is a writ of right, but may be refused, when.**—Under former laws (Hart. Dig. Art. 1576), it seems the writ was not a matter of right, but the judge must have "probable cause to believe" that the applicant was detained without lawful authority. *Jordan v. S.* 14 Tex. 463. But, under the law as it now is, the writ is one of right, yet if the petition or documents annexed show that the applicant is entitled to no relief, the writ may and should be refused. But the writ should not be refused, except it clearly appears that the applicant is not entitled to relief. *Ex parte Ainsworth*, 27 Tex. 731. For a case discussing the right to the writ by a fugitive from justice from another state, who has been arrested upon an order issued by the governor of this state upon a requisition, and for suggestions as to the dangers of the abuse of the writ, see *Hibler v. S.* 43 Tex. 197. The right to the writ does not depend upon the legality or illegality of the original caption, but of the present detention. The purpose of the writ is not to punish the respondent, or to afford redress for the illegal detention, but only to relieve from illegal restraint. *Ex parte Coupland*, 26 Tex. 386; *Ex parte Trader*, 24 App. 393. See, *ante*, §§1606, 1607.

**§1628—ART. 146.—Writ may be issued without application, when.**—A judge of the district or county court who has knowledge that any person is illegally confined or restrained in his liberty within his district or county, may, if the case be one within his jurisdiction, issue the writ of *habeas corpus* without any application being made for the same. [O. C. 132.]

See Willson's Cr. Forms, 874.

**§1629—ART. 147.—Judge may issue a warrant of arrest, when.** Whenever it shall be made to appear, by satisfactory evidence, to a judge of the court of appeals, or a judge of the district or county court, that any one is held in illegal confinement or custody, and there is good reason to believe that he will be carried out of the state, or suffer some irreparable injury before he can obtain relief in the usual course of law, or whenever the writ of *habeas corpus* has been issued and disregarded, the said judges, or either of them, if the case be one in which they have power to grant the writ of *habeas corpus*, may issue a warrant to any peace officer, or to any person specially named by said judge, directing him to take and bring such person before such judge, to be dealt with according to law. [O. C. 133.]

See, also, *post*, Art. 166, Willson's Cr. Forms, 875.

**§1630—ART. 148.—The person having custody of the prisoner may be arrested, when.**—Where it appears by the proof offered under circumstances mentioned in the preceding article, that the person charged with having illegal custody of the prisoner is by such act guilty of an offense against the law, the judge may, in the warrant, order that he be arrested and brought before him; and, upon examination, he may be committed, discharged, or held to bail, as the law and the nature of the case may require. [O. C. 134.]

See Willson's Cr. Forms, 875.

**§1631—ART. 149.—Proceedings under the warrant.**—The officer charged with the execution of the warrant shall bring the persons therein mentioned before the judge or court issuing the same, who shall inquire into the cause of the imprisonment or restraint, and make an order thereon, as in cases of *habeas corpus*, according to the rules laid down in this chapter, either remanding into custody, discharging or admitting to bail the party so imprisoned or restrained. [O. C. 135.]

**§1632—ART. 150.—Officer executing warrant may exercise same power, etc.**—The same power may be exercised by the officer executing the

warrant (and in like manner) in cases arising under the foregoing articles as is exercised in the execution of warrants of arrest according to the provisions of this Code. [O. C. 136.]

See, *post*, Art. 225 *et seq.*

§1633—ART. 151.—The words “confined,” “imprisoned,” etc., refer to, etc.—The words “confined,” “imprisoned,” “in custody,” “confinement,” “imprisonment,” refer not only to the actual, corporeal and forcible detention of a person, but likewise to any and all coercive measures by threats, menaces or the fear of injury, whereby one person exercises a control over the person of another and detains him within certain limits. [O. C. 137.]

§1634—ART. 152.—By “restraint” is meant, etc.—By “restraint” is meant the kind of control which one person exercises over another, not to confine him within certain limits, but to subject him to the general authority and power of the person claiming such right. [O. C. 138.]

§1635—ART. 153.—The writ of *habeas corpus* is intended to be applicable, when.—The writ of *habeas corpus* is intended to be applicable to all such cases of confinement and restraint, where there is no lawful right in the person exercising the power, or where, though the power in fact exists, it is exercised in a manner or degree not sanctioned by law. [O. C. 139.]

See, *ante*, §§1605, 1606, 1607; *post*, §§1681, 1682.

§1636—ART. 154.—Person committed in default of bail is entitled to the writ, when.—Where a person has been committed to custody for failing to enter into bond, he is entitled to the writ of *habeas corpus*, if it be stated in the petition that there was no sufficient cause for requiring bail, or that the bail required is excessive; and if the proof sustains the petition it will entitle the party to be discharged, or have the amount of the bail reduced, according to the facts of the case. [O. C. 141.]

For requisites and form of petition under preceding article, see, *ante*, §§1624, 1625; Willson's Cr. Forms, 869.

§1637—ART. 155.—Person afflicted with disease may be removed, when.—When a judge or court authorized to grant writs of *habeas corpus* shall be satisfied, upon investigation, that a person in legal custody is afflicted with a disease which will render a removal necessary for the preservation of life, an order may be made for the removal of the prisoner to some other place where his health will not be likely to suffer, or he may be admitted to bail when it appears that any species of confinement will endanger his life. [O. C. 141.]

Willson's Cr. Forms, 871; *post*, Arts. 187, 188; *Ex parte* Wilson, 20 App. 498.

§1537a—Decisions under preceding article.—If the application for the writ be *after* conviction, it must expressly show that any species of confinement will endanger the life of the applicant. *Thomas v. S.* 40 Tex. 6. A party who is in legal custody, and is afflicted with disease rendering his removal necessary, is entitled to the writ, and for this ground he is entitled to the writ, although he has previously resorted to the writ upon other grounds. *Ex parte* Wilson, 20 App. 498.

### III. SERVICE AND RETURN OF THE WRIT, AND PROCEEDINGS THEREON.

§1638—ART. 156.—Who may serve writ.—The service of the writ may be made by any person competent to testify. [O. C. 143, amended.]

As to persons competent to testify, see, *post*, Art. 730.

§1639—ART. 157.—How the writ may be served and returned.—The writ may be served by delivering a copy of the original to the person who is charged with having the party under restraint or in custody, and exhibiting the original, if demanded; if he refuse to receive it, he shall be informed verbally of the purport of the writ. If he refuse admittance to the person wish-

ing to make the service, or conceal himself, a copy of the writ may be fixed upon some conspicuous part of the house where such person resides, or conceals himself, or of the place where the prisoner is confined; and the person serving the writ of *habeas corpus* shall, in all cases, state fully, in making return, the manner and the time of the service of the writ. [O. C. 144.]

For forms of returns of service, see Willson's Cr. Forms, 879, 880, 881, 882, 883.

§1640—ART. 158.—**The return shall be under oath, if made by a person other than an officer.**—The return of a writ of *habeas corpus* under the provisions of the preceding article, if made by any person other than an officer, shall be under oath. [O. C. 145.]

§1641—ART. 159.—**The person on whom the writ is served shall obey same, etc.**—The person on whom the writ of *habeas corpus* is served, shall immediately obey the same, and make the return required by law, upon the copy of the original writ served on him, and this whether the writ be directed to him or not. [O. C. 146.]

When there is a refusal to obey, see, *post*, Arts. 164, 165.

§1642—ART. 160.—**How the return shall be made.**—The return is made by stating in plain language upon the copy of the writ, or some paper connected with it—

1. Whether it is true or not, according to the statement of the petition, that he has in his custody, or under his restraint, the person named or described in such petition.

2. By virtue of what authority, or for what cause he took and detains such person.

3. If he had such person in his custody or under restraint at any time before the service of the writ, and has transferred him to the custody of another, he shall state particularly to whom, at what time, for what reason, or by what authority he made such transfer.

4. He shall annex to his return the writ or warrant by virtue of which he holds the person in custody, if any writ or warrant there be.

5. The return must be signed and sworn to by the person making it. [O. C. 147, 148.]

See Willson's Cr. Forms, 884, 885.

§1643—ART. 161.—**The person in custody shall be brought before the judge, etc.**—The person on whom the writ is served shall bring also before the judge the person in his custody or under his restraint, unless it be made to appear that by reason of sickness he cannot be removed, in which case another day may be appointed by the judge or court for hearing the cause and for the production of the person confined; or the application may be heard and decided without the production of the person detained, by the consent of his counsel. [O. C. 149.]

Body of applicant must be produced, or good reason shown why it is not. *Ex parte Coupland*, 26 Tex. 386.

§1644—ART. 162.—**Custody of prisoner pending examination on habeas corpus.**—When the return of the writ has been made, and the applicant brought before the court, he is no longer detained on the original warrant or process, but under the authority of the *habeas corpus*, and the safe keeping of the prisoner, pending the examination or hearing, is entirely under the direction and authority of the judge or court issuing the writ, or to which the return is made. He may be bailed from day to day, or be remanded to the same jail whence he came, or to any other place of safe keeping under the control of the judge or court, till the case is finally determined. [Added in revising.]

See *S. v. Sparks*, 27 Tex. 627-705. But the control of the court over the prisoner ceases when it has made its final order, and the applicant cannot be admitted to bail pending an appeal. *Ex parte Erwin*, 7 App. 288. For form of bail bond in such case, see Willson's Cr. Forms, 596.

§1645—ART. 163.—**The court shall allow reasonable time.**—The court or judge granting the writ of *habeas corpus* shall allow reasonable time for the production of the person detained in custody. [O. C. 150.]

§1646—ART. 164.—**Person having the illegal custody of another, who refuses to obey the writ, etc., shall be punished, how.**—When service has been made upon a person charged with the illegal custody of another, if he refuses to obey the writ and make the return required by law, or if he refuses to receive the writ, or conceals himself, the court or judge issuing the writ shall issue a warrant directed to any officer or other suitable person willing to execute the same, commanding him to arrest the person charged with the illegal custody or detention of another, and bring him before such court or judge; and when such person shall have been arrested and brought before the court or judge, if he still refuse to return the writ, or do not produce the person in his custody, he shall be committed to prison and remain there until he is willing to obey the writ of *habeas corpus*, and until he pays all the costs of the proceeding. [O. C. 151.]

See Willson's Cr. Forms, 876-890; *post*, §1679.

§1647—ART. 165.—**Further penalty, etc., for disobeying writ.**—Any person disobeying the writ of *habeas corpus*, shall also be liable to a civil action at the suit of the party detained, and shall pay in such suit fifty dollars for each day of illegal detention and restraint, after service of the writ, to be recovered in any court of competent jurisdiction; and it shall be deemed that a person has disobeyed the writ who detains a prisoner a longer time than three days after service thereof, and one additional day for every twenty miles he must necessarily travel in carrying the person held from the place of his detention to the place where the application is to be heard, unless where further time is allowed in the writ for making the return thereto. [O. C. 152.]

See, *post*, §1679.

§1648—ART. 166.—**Applicant for writ may be brought before court.**—In case of the disobedience of the writ of *habeas corpus*, the person for whose relief it is intended may also be brought before the court or judge having competent authority, by an order for that purpose issued to any peace officer or other proper person specially named. [O. C. 153.]

See Willson's Cr. Forms, 875; *ante*, §1629.

§1649—ART. 167.—**Death, etc., of applicant, sufficient return to writ.**—It is a sufficient return to the writ of *habeas corpus* that the person once detained has died or escaped, or that by some superior force he has been taken from the custody of the person making the return; but where any such cause shall be assigned for not producing the applicant the court or judge shall proceed to hear testimony, and the facts so stated in the return shall be proved by satisfactory evidence. [O. C. 154.]

See Willson's Cr. Forms, 885.

§1650—ART. 168.—**Proceedings when a prisoner dies.**—When a prisoner confined in jail, or who is in legal custody, shall die, the officer having charge of him shall forthwith report the same to a justice of the peace of the county, who shall hold an inquest to ascertain the cause of his death, which may be done by calling in any number of physicians and surgeons. All the proceedings had in such cases shall be reduced to writing, certified and returned as in other cases of inquest, a certified copy of which proceedings

shall be sufficient proof of the death of the prisoner, at the hearing of an application under *habeas corpus*. [O. C. 158.]

See *INQUESTS*, *post*, Ch. 1, Title 13.

§1651—ART. 169.—**Who shall represent the state in habeas corpus cases.**—In felony cases it shall be the duty of the district attorney of the district where the case is pending, if there be one, and he be present, to represent the state in the proceeding by *habeas corpus*. If no district attorney be present, the county attorney, if present, shall represent the state. If neither of said officers are present the court or judge may appoint some well-qualified practicing attorney to represent the state, who shall be paid the same fee as is allowed district attorneys for like services. [O. C. 156.]

See, *ante*, §§1484-1492, 1493.

§1652—ART. 170.—**Prisoner shall be discharged, when.**—The judge or court, before whom a person is brought by writ of *habeas corpus*, shall examine the writ and the papers attached to it, and if no legal cause be shown for the imprisonment or restraint, or if it appear that the imprisonment or restraint, though at first legal, cannot, for any cause be lawfully prolonged, the applicant shall be discharged. [O. C. 157.]

See Willson's Cr. Forms, 886.

§1653—ART. 171.—**Where party is indicted for capital offense.**—If it appear by the return and papers attached that the party stands indicted for a capital offense, the judge or court having jurisdiction of the case shall nevertheless proceed to hear such testimony as may be offered on the part both of the applicant and the state, and may either remand the defendant or admit him to bail, as the law and the facts of the case may justify. [O. C. 158.]

See Willson's Cr. Forms, 887, 888.

§1654—**Burden of proof after indictment found.**—When the return shows the applicant in custody under an indictment for a capital felony, the applicant must show that he is entitled to bail, and he is required to introduce his testimony before requiring any showing from the state. In other words, the burden of proof is upon the applicant to show facts which entitle him to bail. *Ex parte Smith*, 23 App. 100; *Ex parte Scoggin*, 6 App. 546; *Ex parte Randon*, 12 App. 145. While the applicant is required to take the initiative and introduce evidence from which the court can determine the issue, the law does not exact that the evidence shall affirmatively exculpate him. The issue is to be determined upon the entire evidence adduced for and against him, and without regard to the *prima facie* case made by the indictment. He is entitled to bail, unless the evidence as an entirety satisfies the court that the proof of his guilt is evident. *Ex parte Randon*, 12 App. 145. See, *ante*, §1445 for decisions as to bail.

§1655—ART. 172.—**When court has no jurisdiction.**—If it appear by the return and papers attached that the case is one over which the court or judge has no jurisdiction, such court or judge shall at once remand the applicant to the person from whose custody he has been taken. [Added in revising.]

§1656—ART. 173.—**Where no indictment has been found, etc.**—In all cases where no indictment has been found, it shall not be deemed that any presumption of guilt has arisen from the mere fact that a criminal accusation has been made before a competent authority. [O. C. 159.]

See, *ante*, §1654.

§1657—ART. 174.—**Action of court upon examination.**—The judge or court after having examined the return and all documents attached, and heard the testimony offered on both sides, shall, according to the facts and circumstances of the case, proceed either to remand the party into custody, admit him to bail, or discharge him; *provided*, that no defendant shall be discharged after indictment without bail. [O. C. 160.]

See, *ante*, §1653. The questions both of law and fact are for the determination of the judge. *McFarland v. Johnson*, 27 Tex. 105. For forms of orders, see Willson's Cr. Forms, 886, 887, 888.

**§1658—ART. 175.—If the commitment be informal or void, etc.—** If it shall appear that the applicant is detained or held under a warrant of commitment which is informal, or void, yet if from the document on which the warrant was based, or from the proof on the hearing of the *habeas corpus*, it appears that there is probable cause to believe that an offense has been committed by the prisoner, he shall not be discharged, but shall be committed or held to bail by the court or judge trying the application under *habeas corpus*. [O. C. 161.]

See a case where a prisoner was discharged, because of uncertainty in the description of the offense attempted to be charged against him. *R. v. Bynum, Dallam*, 376.

**§1659—ART. 176.—If there be probable cause to believe an offense has been committed.—**Where, upon an examination under *habeas corpus*, it shall appear to the court or judge that there is probable cause to believe that an offense has been committed by the prisoner, he shall not be discharged, but shall be committed or admitted to bail, according to the facts and circumstances of the case. [O. C. 162.]

See *Ex parte Swain*, 19 App. 323.

**§1660—ART. 177.—The court may summon the magistrate who issued the warrant.—**For the purpose of ascertaining the grounds on which an informal or void warrant has been issued, the judge or court may cause to be summoned the magistrate who issued the warrant, and may, by an order, require him to bring with him all the papers and proceedings touching the matter. The attendance of such magistrate, and the production of such papers, may be enforced by warrant of arrest if necessary. [O. C. 163.]

See Willson's Cr. Forms, 877, 878.

**§1661—ART. 178.—A written issue in case under habeas corpus not necessary.—**It shall not be necessary, on the trial of any cause arising under *habeas corpus*, to make up a written issue, though it may be done by the applicant for the writ. He may except to the sufficiency of, or controvert the return of any part thereof, or allege any new matter in avoidance. If written denial on his part be not made, it shall be considered, for the purpose of investigation, that the statements of said return are contested by a denial of the same, and the proof shall be heard accordingly, both for and against the applicant for relief. [O. C. 164.]

**§1662.—ART. 179.—The applicant shall open and conclude the argument.—**The applicant shall have the right to open and conclude, by himself or counsel, the argument upon the trial under *habeas corpus*. [O. C. 165.]

See, *ante*, §1654; *Ex parte Smith*, 23 App. 100.

**§1663—ART. 180.—Costs of the proceedings, how disposed of.—**The court or judge trying the cause under *habeas corpus* may make such order as is deemed advisable or right concerning the cost of bringing the defendant before him, and all other costs of the proceedings, awarding the same either against the person to whom the writ was directed, the person seeking relief, or may award no costs at all. [O. C. 166.]

**§1664—ART. 181.—If the court be in session the clerk shall record the proceedings.—**If a writ of *habeas corpus* be made returnable before a court in session, all the proceedings had shall be entered of record by the clerk thereof, as would be done in any other case pending in such court; and when the application is heard out of the county where the offense was committed, or in the court of appeals, the clerk shall transmit a certified copy of all the proceedings upon the application to the clerk of the court which has jurisdiction of the offense. [O. C. 167.]

See Willson's Cr. Forms, 891.

§1665—**Preceding article construed.**—The preceding article does not affect at all the mode of making up and authenticating a statement of facts on appeal. The statement of facts must be made up and certified or approved by the judge as in other criminal cases. *Ex parte Cole*, 14 App. 579; *Ex parte Barbee*, 16 App. 369; *Ex parte Barrier*, 17 App. 585.

§1666—**ART. 182.—If the proceedings be had before a judge in vacation, etc.**—If the return is made and the proceedings had before a judge of a court in vacation, he shall cause all the proceedings to be written, shall certify to the same, and cause them to be filed with the clerk of the court which has jurisdiction of the offense, whose duty it shall be to keep them safely. [O. C. 168.]

*Ex parte Barrier*, 17 App. 585.

§1667—**ART. 183.—Provisions of the two preceding articles refer to, etc.**—The provisions of the two preceding articles refer only to cases where an applicant is held under accusation for some offense; in all other cases, the proceedings had before the judge shall be filed and kept by the clerk of the court hearing the case. [O. C. 169.]

§1668—**ART. 184.—Court may grant all necessary orders, etc.**—The court or judge granting a writ of *habeas corpus* may grant all necessary orders to bring before him the testimony taken before the examining court, and may issue all process for enforcing the attendance of witnesses, which is allowed in any other proceedings in a criminal action. [O. C. 170.]

§1669—**ART. 185.—Meaning of "return."**—The word "return," as used in this chapter, refers to and means the report made by the officer or person charged with serving the writ of *habeas corpus*, and also the answer made by the person served with such writ. [O. C. 171.]

#### IV. GENERAL PROVISIONS.

§1670—**ART. 186.—A person discharged before indictment shall not be again imprisoned, unless, etc.**—Where a person, before indictment found against him, has been discharged or held to bail on *habeas corpus* by order of a court or judge of competent jurisdiction, he shall not be again imprisoned or detained in custody on an accusation for the same offense until after he shall have been indicted, unless delivered up by his bail in order to release themselves from their liability. [O. C. 172.]

See *Ex parte Porter*, 16 App. 321.

§1671—**ART. 187.—A person once discharged, or admitted to bail, may be committed, when.**—Where a person once discharged, or admitted to bail, is afterward indicted for the same offense for which he has been once arrested, he may be committed on the indictment, but shall be again entitled to the writ of *habeas corpus*, and may, notwithstanding the indictment, be admitted to bail, if the facts of the case render it proper; but in cases where, after indictment found, the cause of the defendant has been investigated on *habeas corpus*, and an order made either remanding him to custody, or admitting him to bail, he shall neither be subject to be again placed in custody, unless when surrendered by his bail, or when the trial of his cause commences before a petit jury, nor shall he be again entitled to the writ of *habeas corpus*, except in the special cases mentioned in articles 155 and 189. [O. C. 173.]

See, *post*, §1674.

§1672—**Preceding article construed.**—Under a proper construction of the preceding article, an accused, who, prior to indictment, has had a hearing under the writ of *habeas corpus*, is after indictment entitled to a second writ, and notwithstanding the indictment, and previous hearing upon the first writ, is entitled to bail, if the facts warrant bail. But after indictment found a second writ is not allowable, except in the special cases arising under Art. 155, *ante*, and 189, *post*; *Wilson v. S.* 20 App. 498.



§1673—ART. 188.—A person committed for a capital offense shall not be entitled to the writ, unless, etc.—If the accusation against the defendant for a capital offense has been heard on *habeas corpus* before indictment found, and he shall have been committed after such examination, he shall not be entitled to the writ unless in the special cases mentioned in articles 155 and 189. [O. C. 174.]

§1674—ART. 189.—A party may obtain the writ a second time, when, etc.—A party may obtain the writ of *habeas corpus* a second time by stating in the application therefor that since the hearing of his first application important testimony has been obtained which it was not in his power to produce at the former hearing. He shall also set forth the testimony so newly discovered, and if it be that of a witness the affidavit of the witness shall also accompany such second application. [O. C. 175.]

See, *ante*, Art. 155; Willson's Cr. Forms, 873.

§1675—Second writ—Decisions as to.—An application for a second writ of *habeas corpus* under the preceding article must show, that since the hearing of the first application important evidence not obtainable then has been obtained, which evidence should be set out, and be substantiated by the affidavit of the witness. The application must also show diligence, and why the testimony was not available on the first hearing, and conform substantially to the requirements of a motion for a new trial. *Ex parte Foster*, 5 App. 625. After indictment, a party is entitled to the writ, although he has, before indictment, had the benefit of the writ. *Ex parte Wilson*, 20 App. 498. Except in a capital case where, before indictment, he has been committed, on examination, without bail. *Ante*, §1674. If an original application is made to the court of appeals, and after the issuance of the writ the cause is abandoned, and the applicant remanded to custody, such judgment is in legal contemplation a judgment upon a hearing, and a subsequent application is a "second application." *Ex parte Hibbler*, 43 Tex. 197. And when an applicant appeals from a judgment refusing bail, and the judgment is affirmed, he is not entitled to a second writ. *Miller v. S.* 43 Tex. 579.

§1676—Article 190 repealed.—Article 190 (O. C. 176) was repealed by the Act of March 25, 1887, p. 47. Said article was as follows:

"ART. 190. The preceding article shall not apply where there has been an appeal to the court of appeals from the decision of a court or judge upon the first application."

§1677—ART. 191.—Officer refusing to execute writ, etc., shall be punished, etc.—Any officer to whom a writ of *habeas corpus*, or other writ, warrant or process, authorized by this chapter, shall be directed, delivered or tendered, who shall refuse to execute the same according to his directions, or who shall wantonly delay the service or execution of the same, is guilty of an offense, and shall be punished according to the provisions of the Penal Code; he shall also be liable to fine as for contempt of court. [O. C. 178.]

See, *ante*, §385.

§1678—ART. 192.—Any one having the custody of another, who refuses to obey the writ, etc., shall be punished, how.—Any one having another in his custody, or under his power, control or restraint, who refuses to obey a writ of *habeas corpus*, or who evades the service of the same, or places the person illegally detained under the control of another, removes him, or in any other manner attempts to evade the operation of the writ, is guilty of a penal offense, and shall be punished as provided in the Penal Code, and shall also be dealt with as provided in article 164 of this Code. [O. C. 178.]

*Ante*, §§1646, 1647. See, *ante*, Penal Code, §§883-893. The offense mentioned in the above article does not appear to have been specifically denounced by the Penal Code.

§1679—ART. 193.—Any jailer, etc., who refuses to furnish copy of process under, etc.—Any jailer, sheriff or other officer who has a prisoner in his custody, and refuses, upon demand, to furnish a copy of the process under which he holds the person, is guilty of an offense. [O. C. 179.]

See, *ante*, Penal Code, §§413, 414, 415.

§1680—ART. 194.—**Person shall not be discharged under writ of habeas corpus, when.**—No person shall be discharged under the writ of *habeas corpus* who is in custody by virtue of a commitment for any offense exclusively cognizable by the courts of the United States, or by order or process issuing out of such courts in cases where they have jurisdiction, or who is held by virtue of any *legal* engagement or enlistment in the army, or who, being *rightfully* subject to the rules and articles of war, is confined by any one *legally* acting under the authority thereof, or who is held as a prisoner of war under the authority of the United States. [O. C. 180.]

For decisions under the conscript laws of the Confederate States, see *S. v. Sparks*, 27 Tex. 705; *Ex parte Blumer*, *Id.* 734; *Ex parte Mayer*, *Id.* 715; *Ex parte Coupland*, 26 Tex. 386; *Ex parte Turman*, *Id.* 708.

§1681—ART. 195.—**This chapter applies to what cases.**—This chapter applies to all cases of *habeas corpus* for the enlargement of persons illegally held in custody, or in any manner restrained of their personal liberty; for the admission of prisoners to bail; and for the discharge of prisoners before indictment, upon a hearing of the testimony. Instead of the writ of *habeas corpus* in other cases where heretofore used, a simple order shall be substituted. [O. C. 181.]

*Ante*, §§1605, 1606, 1607, 1635. For other decisions pertinent to *habeas corpus*, see, *ante*, §§1442, 1445, 1447. *Post*, Art. 881 *et seq.*, APPEALS.

§1682—**Where the restraint is not under a criminal charge.**—A proceeding by *habeas corpus*, when not used to relieve against restraint under a criminal charge, cannot, in the proper sense of the term, be regarded as a civil suit; it should rather, it seems, be held the exercise of a special jurisdiction conferred by the constitution and laws upon either the courts or judges for the prompt relief of the citizen against any improper interference with his personal liberty. *McFarland v. Johnson*, 27 Tex. 105.

## TITLE 4.—THE TIME AND PLACE OF COMMENCING AND PROSECUTING CRIMINAL ACTIONS.

CH. 1. THE TIME WITHIN WHICH CRIMINAL ACTIONS MAY BE COMMENCED.  
2. THE COUNTY IN WHICH OFFENSES MAY BE PROSECUTED.

### CH. 1.—THE TIME WITHIN WHICH CRIMINAL ACTIONS MAY BE COMMENCED.

ART.	SEC.	ART.	SEC.
196. For treason and felony.	1683	202. Absence from the state not com-	1690
197. For rape, one year.	1684	puted.	
198. For theft, etc., five years.	1685	203. An indictment is "presented,"	1691
199. Other felonies.	1686	when.	
Decisions under preceding article.	1687	204. An information is presented, when.	1692
200. Misdemeanors, two years.	1688	Limitation—Other decisions as to.	1693
201. Days to be excluded from computa-	1689		
tion of time.			

§1683—ART. 196.—For treason and forgery.—An indictment for treason may be presented within twenty years, and for forgery, or the uttering, using, or passing of forged instruments, within ten years from the time of the commission of the offense, and not afterward. [O. C. 182.]

The original article read, for "murder or forgery," but was amended as above in revising.

§1684—ART. 197.—For rape, one year.—An indictment for the offense of rape may be presented within one year, and not afterward. [O. C. 184.]

But an assault with intent to rape is not barred until the lapse of *three* years after the commission of the offense. *Moore v. S. 20 App. 275; post, —.*

§1685—ART. 198.—For theft, etc., five years.—An indictment for theft punishable as a felony, arson, burglary, robbery and counterfeiting, may be presented within five years, and not afterward. [O. C. 183.]

See *Wimberly v. S. 22 App. 506.*

§1686—ART. 199.—Other felonies.—An indictment for all other felonies may be presented within three years from the commission of the offense, and not afterward; except murder, for which an indictment may be presented at any time. [O. C. 185.]

Amended in revising by adding to the original article the words "except murder, for which an indictment may be presented at any time."

§1687—Decisions under preceding article.—The offense of manslaughter is barred if not presented by indictment within three years after the commission of the offense. *White v. S. 4 App. 488; Temple v. S. 15 App. 304.* And the offense of assault with intent to commit rape is not barred if presented by indictment within three years after its commission, although the offense of rape is barred within one year. *Moore v. S. 20 App. 275.* An indictment for the offense of embezzlement may be presented within three years and not afterward. *Cohen v. S. 20 App. 224.*

§1688—ART. 200.—Misdemeanors, two years.—For all misdemeanors an indictment or information may be presented within two years from the commission of the offense, and not afterward. [O. C. 186.]

Negligent homicide is a misdemeanor, and barred after the lapse of two years from its commission. *Whitaker v. S. 12 App. 436.*

§1689—ART. 201.—Days to be excluded from computation of time.—The day on which the offense was committed, and the day on which the indictment or information is presented, shall be excluded from the computation of time. [Added in revising.]

Before the enactment of this article, the day upon which the offense was committed was included in the computation. *S. v. Asbury, 26 Tex. 82.*

§1690—ART. 202.—Absence from the state not commuted.—The time during which a person accused of an offense is absent from the state shall not be computed in the period of limitation. [O. C. 187.]

See Whitaker v. S. 12 App. 436.

§1691—ART. 203.—An indictment is “presented,” when.—An indictment is to be considered as “presented” when it has been duly acted upon by the grand jury and received by the court. [O. C. 188.]

§1692.—ART. 204.—An information is “presented,” when.—An information is to be considered as “presented” when it has been filed by the proper officer in the proper court. [O. C. 189.]

See DeOlles v. S. 20 App. 145.

§1693—Limitation—Other decisions as to.—Statutes of limitation do not have a retroactive effect in the absence of express provision to that effect, and offenses committed anterior to the law are barred according to the times designated, dating from its passage. *Martin v. S.* 24 Tex. 61. The legislature cannot give such statute retroactive effect by extending the time, so as to authorize a prosecution already barred before the law went into effect. *S. v. Sneed*, 25 Tex. Sup. 66. Statutes of limitation are construed liberally in favor of defendants. *White v. S.* 4 App. 488. Acts of limitation, being acts affecting the remedy only, are peculiarly within the scope of legislative action and control, and are regulated by no inflexible rules as to the time prescribed within which they are to operate. They may be changed or may be fixed arbitrarily at any time, so as that they are not made to apply to rights already vested. *Moore v. S.* 20 App. 275. Limitation need not be pleaded by the defendant, as the state is required to both allege and prove that the offense was committed within the period of limitation. And on appeal, if the record shows that the prosecution is barred, the error is fatal. *Bingham v. S.* 2 App. 21; *Shoefercater v. S.* 5 App. 207. It is incumbent on the state to prove an offense not barred by limitation, but when nothing in the evidence raises a doubt whether the prosecution was barred, there is no occasion for instructions to the jury on the subject. *Vincent v. S.* 10 App. 330; *Cohen v. S.* 20 App. 224; *Hay v. S.* 11 App. 32. But see a state of facts which demand such a charge, and wherein an insufficient charge was given. *Wimberly v. S.* 22 App. 506. For an erroneous charge on limitation. *Whitaker v. S.* 12 App. 437. See further, upon the subject of limitation and the allegation of time in indictments and informations, *post*, Art. 420, sub. 6 and notes thereto. Also *Willson's Cr. Forms*, 6.

CH. 2.—OF THE COUNTY WITHIN WHICH OFFENSES MAY BE PROSECUTED.

ART.	SEC.	ART.	SEC.
205. For offenses committed wholly or in part without the state.	1694	217. Offenses committed out of the state by commissioner of deeds, prosecuted where.	1707
206. Forgery and uttering forged papers may be prosecuted, where.	1695	218. Offenses committed on vessels within the state, prosecuted where.	1708
207. Counterfeiting, where.	1696	219. Offense of embezzlement, prosecuted where.	1709
208. Perjury and false swearing, where.	1697	220. False imprisonment, kidnapping and abduction, prosecuted where.	1710
209. Offenses committed on the boundary of two counties.	1698	221. Conspiracy, where prosecuted.	1711
210. Person dying out of the state of an injury inflicted in the state.	1699	222. Conviction or acquittal in another state bar to prosecution in this state.	1712
211. Person within the state inflicting injury on another out of the state, prosecuted where.	1700	223. Conviction etc., in one county bar to prosecution in another.	1713
212. Person without the state inflicting an injury on one within the state, prosecuted where.	1701	224. Proof of jurisdiction sufficient to sustain allegation of venue, when.	1714
213. An offense committed on a stream, the boundary of this state, where prosecuted.	1702	Allegation of venue.	1715
214. Person receiving an injury in one county, and dying in another, offender where prosecuted.	1703	225. Offenses not enumerated, prosecuted where.	1716
215. An offense committed on a stream, etc., the boundary between two counties, punishable where.	1704	Venue of certain offenses not enumerated.	1717
216. Property stolen in one county and carried to another, offender prosecuted where.	1705	Judicial knowledge of venue.	1718
Decisions under preceding article.	1706	Proof of venue.	1719
		On appeal, record must show proof of.	1720
		Charge of the court as to venue.	1721

§1694—ART. 205.—**For offenses committed wholly or in part without the state.**—Prosecutions for offenses committed wholly or in part without, and made punishable by law within this state, may be commenced and carried on in any county in which the offender is found. [O. C. 190.]

See, *ante*, §§769, 770, 771, 772; *post*, §1711.

§1695—ART. 206.—**Forgery and uttering forged papers may be prosecuted, where.**—The offense of forgery may be prosecuted in any county where the written instrument was forged, or where the same was used or passed, or attempted to be used or passed; all forgeries and uttering, using or passing, of forged instruments in writing, which concern or affect the title to land in this state, may also be prosecuted in the county in which the seat of government is located, or in the county in which the land, or a part thereof, concerning or affecting the title to which the forgery has been committed, is situated. [O. C. 190a.]

See, *ante*, §§769, 770, 771, 772. Prior to the adoption of the Code, forgery could only be prosecuted in the county where the forged instrument was made. *Henderson v. S.* 14 Tex. 503.

§1696—ART. 207.—**Counterfeiting, where.**—The offense of counterfeiting may be prosecuted in any county where the offense was committed, or where the counterfeit coin was passed or attempted to be passed. [O. C. 207.]

See, *ante*, §777 *et seq.*

§1697—ART. 208.—**Perjury and false swearing, where.**—The offenses of perjury and false swearing may be prosecuted in the county where committed, or in the county where the false statement is used or attempted to be used. [O. C. 190a.]

See, *ante*, §§297 *et seq.*; 315 *et seq.*

§1698—ART. 209.—**Offenses committed on the boundary of two counties.**—An offense committed on the boundary of any two counties, or

within four hundred yards thereof, may be prosecuted and punished in either county, and the indictment or information may allege the offense to have been committed in the county where it is prosecuted. [O. C. 191.]

See *Cameron v. S.* 9 App. 332; *Willis v. S.* 10 App. 493; *Chivarrio v. S.* 15 App. 330; *Mendiola v. S.* 18 App. 462; *post*, §1704. (This article does not authorize a peace officer to execute a warrant of arrest beyond the limits of his own county. *Ledbetter v. S.* 23 App. 247.

§1699—ART. 210.—**Person dying out of the state of an injury inflicted in the state, etc.**—If any person, being at the time within this state, shall inflict upon another, also within this state, an injury of which such person afterward dies without the limits of this state, the person so offending shall be liable to prosecution in the county where the injury was inflicted. [O. C. 192.]

§1700—ART. 211.—**Person within the state inflicting injury on another out of the state, where prosecuted.**—If a person, being at the time within this state, shall inflict upon another out of this state, an injury by reason of which the injured person dies without the limits of this state, he may be prosecuted in the county where he was when the injury was inflicted. [O. C. 193.]

§1701—ART. 212.—**Person without the state inflicting an injury on one within the state, where prosecuted.**—If a person, being at the time without the limits of this state, shall inflict upon another who is at the time within this state, an injury causing death, he may be prosecuted in the county where the person injured dies. [O. C. 194.]

§1702—ART. 213.—**An offense committed on a stream, the boundary of this state, where prosecuted.**—If an offense be committed upon any river or stream, the boundary of this state, it may be prosecuted in the county the boundary of which is upon such stream or river, and the county seat of which is nearest the place where the offense was committed. [O. C. 195.]

In the absence of express treaty to the contrary, the jurisdiction of this state extends to the middle of the stream. *Spears v. S.* 8 App. 467. As to the rules governing when the stream changes its channel, see *Collins v. S.* 3 App. 323.

§1703—ART. 214.—**Person receiving an injury in one county and dying in another, offender where prosecuted.**—If a person receive an injury in one county and dies in another by reason of such injury, the offender may be prosecuted in the county where the injury was received or where the death occurred. [O. C. 196.]

At common law an offense commenced in one county, but consummated in another, could not be prosecuted in either. *Searcy v. S.* 4 Tex. 450.

§1704—ART. 215.—**An offense committed on a stream, etc., the boundary between two counties, punishable where.**—Where a river or other stream or highway is the boundary between two counties, any offense committed on such river, stream or highway, at a place where it is such boundary, is punishable in either county, and it may be alleged in the information or indictment that the offense was committed in the county where it is prosecuted. [O. C. 197.]

See, *ante*, §1698. As to change in the channel of the stream, see *Collins v. S.* 3 App. 323.

§1705—ART. 216.—**Property stolen in one county and carried to another, offender prosecuted where.**—Where property is stolen in one county and carried off by the offender to another, he may be prosecuted either in the county where he took the property, or in any other county through or into which he may have carried the same. [O. C. 198.]

See, *ante*, §§1252, 1253.

§1706—**Decisions under preceding article.**—Theft may be prosecuted either in the county where the property was taken, or in any other county through or into which it was carried by the thief. *Cox v. S.* 41 Tex. 1; *Connell v. S.* 2 App. 422; *Cameron v. S.* 9 App. 332; *Roth v. S.* 10 App. 27; *Dixon v. S.* 15 App. 480. This rule applies to all species of theft. *Shubert v. S.* 20 App. 320; *McElmurray v. S.* 21 App. 691; *Clark v. S.* 22 App. 612. Except theft from the person, which can only be prosecuted in the county of the original caption. *Gage v. S.* 22 App. 123.

§1707—**ART. 217.—Offenses committed out of the state by commissioner of deeds, prosecuted where.**—Offenses committed out of this state by a commissioner of deeds, or other officer acting under the authority of this state, may be prosecuted in any county of this state. [O. C. 200.]

See, *ante*, §361.

§1708—**ART. 218.—Offenses committed on vessels within the state, prosecuted where.**—Where an offense is committed on board a vessel which is, at the time upon any navigable water within the boundaries of this state, the offense may be prosecuted in any county through which the vessel is navigated in the course of her voyage, or in the county where the voyage commences or terminates. [O. C. 201.]

But in one case this article seems to have been overlooked. *Jenkins v. S.* 36 Tex. 345.

§1709—**ART. 219.—Offense of embezzlement prosecuted where.**—The offense of embezzlement may be prosecuted in any county in which the offender may have taken or received the property, or through or into which he may have undertaken to transport it. [C. C. P. 203.]

See, *ante*, §§1369-1372.

§1710—**ART. 220.—False imprisonment, kidnapping and abduction, prosecuted where.**—The jurisdiction for the trial of the offenses of false imprisonment, kidnapping and abduction, belongs either to the county in which the offense was committed, or to any county through, into or out of which the person falsely imprisoned, kidnapped or taken in such manner as to constitute abduction, may have been carried. [O. C. 204.]

See, *ante*, §§883, 895, 899.

§1711—**ART. 221.—Conspiracy, where prosecuted.**—The offense of conspiracy may be prosecuted in the county where the conspiracy was entered into, or in the county where the same was agreed to be executed, and when the conspiracy is entered into in another state, territory or county, to commit an offense in this state, the offense may be prosecuted in the county where such offense was agreed to be committed, or in any county where any one of the conspirators may be found, or in the county where the seat of government is located. [Added in revising.]

See, *ante*, §1400 *et seq.*; also, §1694.

§1712—**ART. 222.—Conviction or acquittal in another state, bar to prosecution in this state.**—When an act has been committed out of this state by an inhabitant thereof, and such act is an offense by the laws of this state, and is also an offense by the laws of the place where the same was done, a conviction or acquittal of the offender, under the laws of the place where the offense was committed, is a bar to the prosecution in this state. [O. C. 205.]

See, *ante*, §1451 *et seq.*; *post*, Art. 553.

§1713—**ART. 223.—Conviction, etc., in one county, bar to prosecution in another, when.**—Where different counties have jurisdiction of the same offense, a conviction or acquittal of the offense in one county is a bar to any further prosecution in any other county. [O. C. 206.]

See, *ante*, §1451 *et seq.*; *post*, Art. 553.

§1714—**ART. 224.—Proof of jurisdiction sufficient to sustain allegation of venue, when.**—In all cases mentioned in the foregoing articles

of this chapter, the indictment or information, or any proceeding in the case, may allege that the offense was committed in the county where the prosecution is carried on; and to sustain the allegation of venue, it shall only be necessary to prove that by reason of the facts existing in the case, the county where such prosecution is carried on has jurisdiction. [O. C. 207.]

See, *post*, §1719.

**§1715—Allegation of venue.**—The venue of the offense must be alleged. *Post*, §§1949-1953. *Searcy v. S. 4 Tex. 450; S. v. Jordan, 12 Tex. 205; S. v. Warren, 14 Tex. 406; Collins v. S. 6 App. 647; Robins v. S. 9 App. 666; Jack v. S. 3 App. 72.* It must be alleged in a complaint. *Smith v. S. 3 App. 549.* But when a complaint stated in its caption the proper county and the state, and charged that the defendant did "then and there" commit the offense, it was held sufficient. *Strickland v. S. 7 App. 34.* An allegation of venue in a complaint will not supply the want of such allegation in an information. *Lawson v. S. 13 App. 83.* An allegation that the offense was committed "at" instead of "in" the county, is sufficient. *Augustine v. S. 20 Tex. 450.* To allege that the offense was committed in a named county, without alleging "in the State of Texas," or "in said county," is sufficient. *S. v. Jordan, 12 Tex. 205; Pierce v. S. Id. 210; Satterwhite v. S. 6 App. 609.* Where an offense is committed in an unorganized county, attached to an organized county for judicial purposes, the venue must be laid in the unorganized county, alleging that said county was attached for judicial purposes to the county of the prosecution. *Miles v. S. 23 App. 419; Chivarrio v. S. 15 App. 330.* Where the territory within which the offense was committed has subsequently been created into a new county, the venue should be laid in the old county, although the prosecution is instituted in the new county. *Nelson v. S. 1 App. 41.* An allegation of venue is a matter of substance, and cannot be amended. *Collins v. S. 6 App. 647; see further, post, Arts. 420, 424, 430.*

**§1716—ART. 225.—Offenses not enumerated, prosecuted where.—**

In all cases, except those enumerated in previous articles of this chapter, the proper county for the prosecution of offenses is that in which the offense was committed. [O. C. 208.]

See *Chivarrio v. S. 15 App. 330.*

**§1717—Venue of certain offenses not enumerated.**—Misapplication of public money, in certain cases, may be prosecuted in Travis county, or in the county where the money was received. *Ante*, §175. The offense of unlawfully disposing of an estray, must be prosecuted in the county in which the unlawful act of disposition was committed. *Ante*, §§1348, 1349. The offense of fraudulently disposing of mortgaged property, must be prosecuted in the county where the fraudulent disposition was made. *Robberson v. S. 3 App. 502.* The offense of purchasing and receiving cattle, without taking a bill of sale therefor, must be prosecuted in the county where the cattle were purchased. *Brockman v. S. 16 App. 54; ante*, §§1360, 1361. The offense of unlawfully fencing, using, etc., public lands, may be prosecuted in Travis county. *Ante*, §172.

**§1718—Judicial knowledge of venue.**—General statutes, which recognize the location of a named town, will authorize judicial knowledge of such location. In the absence of such a statute, however, and in the absence of proof, courts will not take cognizance that a named town is in the county of the forum. *Hoffman v. S. 12 App. 406; Terrill v. S. 41 Tex. 463.* The boundaries and limits of counties are matters of judicial knowledge. *S. v. Jordan, 12 Tex. 205.* (But courts do not take notice that particular places are, or are not, in particular counties. *Boston v. S. 6 App. 383.*)

**§1719—Proof of venue.**—The plea of not guilty puts in issue the allegation of venue, and the state must prove such allegation, or a conviction will not be warranted, and the venue must be proved as alleged. It is not incumbent upon the defendant to put the venue in issue by special plea, nor to disprove the allegation of venue. *Searcy v. S. 4 Tex. 450; Hightower v. S. 22 Tex. 605; Tharp v. S. 28 Tex. 696; Scott v. S. 31 Tex. 409; Vance v. S. 32 Tex. 396; Field v. S. 34 Tex. 39 (overruling Myers v. S. 33 Tex. 525); Shadle v. S. 34 Tex. 572; Hill v. S. Id. 623; Busch v. S. 43 Tex. 376; Higbee v. S. 2 App. 407; Logan v. S. Id. 408; Higgins v. S. Id. 421; Jack v. S. 3 App. 72; Harrison v. S. Id. 558; Cady v. S. 4 App. 238; Turman v. S. Id. 586; Yarbrough v. S. 5 App. 125; Boston v. S. Id. 383; Ellison v. S. 6 App. 248; Pipplin v. S. 9 App. 269; White v. S. Id. 390; Perry v. S. Id. 410; Cross v. S. 11 App. 84; Dreyer v. S. Id. 503; Bowling v. S. 13 App. 338; Williamson v. S. Id. 514; Ledberry v. S. 14 App. 233; Winn v. S. 15 App. 169; Briggs v. S. 20 App. 106; West v. S. 21 App. 427.* Proof of the alleged venue is indispensable, notwithstanding the judge and jury may personally know the *locus in quo* to be within the jurisdiction of the court. *Miles v. S. 23 App. 410.* It is an issue which must be affirmatively, and not inferentially, proved. *McDevro v. S. 23 App. 429; Ryan v. S. 22 App. 699; Jack v. S. 3 App. 72; Harrison v. S. Id. 559; Moore v. S. 2 App. 350; Higbee v. S. Id. 407; Bell v. S. 1 App. 81.* It is not essential that the venue be established by positive testimony, but only that from the facts in evidence the jury may reasonably conclude that the offense was committed in the county alleged. The doctrine of reasonable doubt does not apply to the issue of venue. *McReynolds v. S. 4 App. 327; Diggs v. S. 7 App. 359 (explaining Higbee v. S. 2 App. 407); Achterberg v. S. 8 App. 463; Barara v. S. 42 Tex. 266; Hoffman v. S. 12 App. 406.* Circumstantial evidence is as competent to establish the venue as it is to



establish any other issue in the case. *Nance v. S.* 17 App. 385. **Proof** that the offense was committed within four hundred yards of the boundary line of the county of the prosecution, sustains the allegation of venue. *Willis v. S.* 10 App. 493; *Mendiola v. S.* 18 App. 462; *Chevarrio v. S.* 15 App. 330. In prosecutions for all species of theft, except theft from the person, proof that the stolen property was carried by the defendant through or into the county of the prosecution, sustains the allegation of venue. *Ante*, §§1705, 1253. And in prosecutions for embezzlement proof that the defendant undertook to transport the property through or into the county of the prosecution, sustains the allegation of venue. *Ante*, §§1709, 1372. Where cattle stolen were last seen near the county line of the county of prosecution, but were recovered in an adjoining county, it was held that this evidence sustained the allegation of venue. *Wafford v. S.* 44 Tex. 439.

And so in a prosecution for the theft of a mare, the state proved that the animal was running in her accustomed range in the county of the prosecution, a week prior to her being found in defendant's possession in another county, it was held that this was sufficient proof that the animal when taken was in the county of the prosecution. *Ashlock v. S.* 16 App. 13. But the mere statement that the stolen animal ranged in the county of the prosecution, without evidence as to where it was killed, or where the parties were arrested with its hide, was held insufficient proof of venue. *Moore v. S.* 2 App. 350. General reputation is admissible to prove county boundaries. *Cox v. S.* 41 Tex. 1; *Nelson v. S.* 1 App. 41.

**§1720—On appeal record must show proof of.**—The record on appeal must show that the venue of the offense was proved on the trial, or the conviction will be set aside. *Bell v. S.* 1 App. 81; *Higbee v. S.* 2 App. 407; *Huggins v. S.* *Id.* 421; *Jack v. S.* 3 App. 72; *Boston v. S.* 5 App. 383; *Pippin v. S.* 9 App. 269; *White v. S.* *Id.* 390; *Cross v. S.* 11 App. 84; *Dreyer v. S.* *Id.* 503; *Winn v. S.* 15 App. 169; *Temple v. S.* *Id.* 304; *Gonzales v. S.* 16 App. 152; *Burton v. S.* *Id.* 156; *Williams v. S.* 21 App. 256; *Wells v. S.* 22 App. 18; *Perry v. S.* *Id.* 19.

**§1721—Charge of court as to venue.**—The court is not required to charge that the venue must be proved beyond a reasonable doubt. *McReynolds v. S.* 4 App. 327; *Diggs v. S.* 7 App. 359; *Achterberg v. S.* 8 App. 463; *Hoffman v. S.* 12 App. 406. Where the venue of the cause has been changed it is not error for the trial judge to inform the jury in his charge of that fact. *Kemp v. S.* 11 App. 175. In a trial for horse theft the court charged the jury, that if the horse, prior to the theft, was last seen in the county where the venue was laid, the law presumed that it was stolen in that county, it was held erroneous, because there is no such legal presumption, and the charge was on the weight of evidence. *Williams v. S.* 11 App. 275. Where the venue of the offense was alleged in the organized county of W., but the proof showed that the offense was committed in the unorganized county of E. attached to W. county for judicial purposes, it was held error to instruct the jury that the venue was proved, if the offense was proved to have been committed in E. county. *Chevarrio v. S.* 15 App. 330.

within four hundred yards thereof, may be prosecuted and punished in either county, and the indictment or information may allege the offense to have been committed in the county where it is prosecuted. [O. C. 191.]

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**§1717—Venue of certain offenses not enumerated.**—Misapplication of public money, in certain cases, may be prosecuted in Travis county, or in the county where the money was received. *Ante*, §175. The offense of unlawfully disposing of an estray, must be prosecuted in the county in which the unlawful act of disposition was committed. *Ante*, §§1348, 1349. The offense of fraudulently disposing of mortgaged property, must be prosecuted in the county where the fraudulent disposition was made. *Robberson v. S. 3 App. 502*. The offense of purchasing and receiving cattle, without taking a bill of sale therefor, must be prosecuted in the county where the cattle were purchased. *Brockman v. S. 16 App. 54*; *ante*, §§1360, 1361. The offense of unlawfully fencing, using, etc., public lands, may be prosecuted in Travis county. *Ante*, §712.

**§1718—Judicial knowledge of venue.**—General statutes, which recognize the location of a named town, will authorize judicial knowledge of such location. In the absence of such a statute, however, and in the absence of proof, courts will not take cognizance that a named town is in the county of the forum. *Hoffman v. S. 12 App. 406*; *Terrill v. S. 41 Tex. 463*. The boundaries and limits of counties are matters of judicial knowledge. *S. v. Jordan*, 12 Tex. 205. (But courts do not take notice that particular places are, or are not, in particular counties. *Boston v. S. 6 App. 383*.)

**§1719—Proof of venue.**—The plea of not guilty puts in issue the allegation of venue, and the state must prove such allegation, or a conviction will not be warranted, and the venue must be proved as alleged. It is not incumbent upon the defendant to put the venue in issue by special plea, nor to disprove the allegation of venue. *Searcy v. S. 4 Tex. 450*; *Hightower v. S. 22 Tex. 605*; *Tharp v. S. 28 Tex. 696*; *Scott v. S. 31 Tex. 409*; *Vance v. S. 32 Tex. 396*; *Field v. S. 34 Tex. 39* (overruling *Myers v. S. 33 Tex. 525*); *Shadle v. S. 34 Tex. 572*; *Hill v. S. Id. 623*; *Busch v. S. 43 Tex. 376*; *Higbee v. S. 2 App. 407*; *Logan v. S. Id. 408*; *Higgins v. S. Id. 421*; *Jack v. S. 3 App. 72*; *Harrison v. S. Id. 558*; *Cady v. S. 4 App. 238*; *Turman v. S. Id. 586*; *Yarborough v. S. 5 App. 125*; *Boston v. S. Id. 383*; *Ellison v. S. 6 App. 248*; *Pipplin v. S. 9 App. 269*; *White v. S. Id. 390*; *Perry v. S. Id. 410*; *Cross v. S. 11 App. 84*; *Dreyer v. S. Id. 503*; *Bowling v. S. 13 App. 338*; *Williamson v. S. Id. 514*; *Ledberry v. S. 14 App. 233*; *Winn v. S. 15 App. 169*; *Briggs v. S. 20 App. 106*; *West v. S. 21 App. 427*. Proof of the alleged venue is indispensable, notwithstanding the judge and jury may personally know the *locus in quo* to be within the jurisdiction of the court. *Miles v. S. 23 App. 410*. It is an issue which must be affirmatively, and not inferentially, proved. *McDevro v. S. 23 App. 429*; *Ryan v. S. 22 App. 699*; *Jack v. S. 3 App. 72*; *Harrison v. S. Id. 559*; *Moore v. S. 2 App. 350*; *Higbee v. S. Id. 407*; *Bell v. S. 1 App. 81*. It is not essential that the venue be established by positive testimony, but only that from the facts in evidence the jury may reasonably conclude that the offense was committed in the county alleged. The doctrine of reasonable doubt does not apply to the issue of venue. *McReynolds v. S. 4 App. 327*; *Diggs v. S. 7 App. 359* (explaining *Higbee v. S. 2 App. 407*); *Achterberg v. S. 8 App. 463*; *Barara v. S. 42 Tex. 266*; *Hoffman v. S. 12 App. 406*. Circumstantial evidence is as competent to establish the venue as it is to

establish any other issue in the case. *Nance v. S.* 17 App. 385. Proof that the offense was committed within four hundred yards of the boundary line of the county of the prosecution, sustains the allegation of venue. *Willis v. S.* 10 App. 493; *Mendiola v. S.* 18 App. 462; *Chevarrio v. S.* 15 App. 330. In prosecutions for all species of theft, except theft from the person, proof that the stolen property was carried by the defendant through or into the county of the prosecution, sustains the allegation of venue. *Ante*, §§1705, 1253. And in prosecutions for embezzlement proof that the defendant undertook to transport the property through or into the county of the prosecution, sustains the allegation of venue. *Ante*, §§1709, 1372. Where cattle stolen were last seen near the county line of the county of prosecution, but were recovered in an adjoining county, it was held that this evidence sustained the allegation of venue. *Wafford v. S.* 44 Tex. 439.

And so in a prosecution for the theft of a mare, the state proved that the animal was running in her accustomed range in the county of the prosecution, a week prior to her being found in defendant's possession in another county, it was held that this was sufficient proof that the animal when taken was in the county of the prosecution. *Ashlock v. S.* 16 App. 13. But the mere statement that the stolen animal ranged in the county of the prosecution, without evidence as to where it was killed, or where the parties were arrested with its hide, was held insufficient proof of venue. *Moore v. S.* 2 App. 350. General reputation is admissible to prove county boundaries. *Cox v. S.* 41 Tex. 1; *Nelson v. S.* 1 App. 41.

**§1720—On appeal record must show proof of.**—The record on appeal must show that the venue of the offense was proved on the trial, or the conviction will be set aside. *Bell v. S.* 1 App. 81; *Higbee v. S.* 2 App. 407; *Huggins v. S.* *Id.* 421; *Jack v. S.* 3 App. 72; *Boston v. S.* 5 App. 383; *Pippin v. S.* 9 App. 269; *White v. S.* *Id.* 390; *Cross v. S.* 11 App. 84; *Dreyer v. S.* *Id.* 503; *Winn v. S.* 15 App. 169; *Temple v. S.* *Id.* 304; *Gonzales v. S.* 16 App. 152; *Burton v. S.* *Id.* 156; *Williams v. S.* 21 App. 256; *Wells v. S.* 22 App. 18; *Perry v. S.* *Id.* 19.

**§1721—Charge of court as to venue.**—The court is not required to charge that the venue must be proved beyond a reasonable doubt. *McReynolds v. S.* 4 App. 327; *Diggs v. S.* 7 App. 359; *Achterberg v. S.* 8 App. 463; *Hoffman v. S.* 12 App. 406. Where the venue of the cause has been changed it is not error for the trial judge to inform the jury in his charge of that fact. *Kemp v. S.* 11 App. 175. In a trial for horse theft the court charged the jury, that if the horse, prior to the theft, was last seen in the county where the venue was laid, the law presumed that it was stolen in that county, it was held erroneous, because there is no such legal presumption, and the charge was on the weight of evidence. *Williams v. S.* 11 App. 275. Where the venue of the offense was alleged in the organized county of W., but the proof showed that the offense was committed in the unorganized county of E. attached to W. county for judicial purposes, it was held error to instruct the jury that the venue was proved, if the offense was proved to have been committed in E. county. *Chevarrio v. S.* 15 App. 330.

## TITLE 5.—OF ARREST, COMMITMENT AND BAIL.

CH. 1. ARREST WITHOUT WARRANT.  
2. ARREST UNDER WARRANT.CH. 3. COMMITMENT OR DISCHARGE OF THE  
ACCUSED.  
4. BAIL.

## CH. 1.—OF ARREST WITHOUT WARRANT

ART.	SEC.	ART.	SEC.
226. Arrest without warrant, when.	1722	229. May arrest without warrant when	
227. Same subject.	1723	felony has been committed.	1726
Decisions under preceding articles.	1724	230. In all such cases the officer may	
228. Municipal authorities may authorize		adopt the same measures as, etc.	1727
arrest without warrant, when.	1725	231. In such cases must take the offender	
		before the nearest magistrate.	1728

§1722—ART. 226.—Arrest without warrant, when.—A peace officer or any other person, may, without warrant, arrest an offender, when the offense is committed in his presence or within his view, if the offense is one classed as a felony, or as an "offense against the public peace." [O. C. 209.]

*Ante*, §§1498, 1500, 1566, 1567, 1587, 1591, 1592.

§1723—ART. 227.—Same subject.—A peace officer may arrest without warrant when a felony or breach of the peace has been committed in the presence or within the view of a magistrate, and such magistrate shall verbally order the arrest of the offender. [O. C. 210.]

§1724—Decisions under preceding articles.—A peace officer is empowered to make an arrest without a warrant where a felony or a breach of the peace is committed in his presence or within his view, or when ordered verbally by a magistrate within whose presence or view such offenses are committed, or when there is no time to procure a warrant, and the offender is about to escape, or in the prevention of offenses as prescribed in chapters 2 and 3 of title 3, *ante*. Johnson v. S. 5 App. 43. And for unlawfully carrying arms. *Ante*, §480; Hodges v. S. 6 App. 615. No person other than an officer can make an arrest, except for a felony or breach of the peace committed in his presence, or within his view, unless he be specially appointed by a magistrate to execute a particular warrant, or is summoned to the aid of an officer, as part of the *posse comitatus*. Alford v. S. 8 App. 545. A private person cannot arrest another on suspicion that he is a horse thief. The provisions of the law relating to arrests without warrant must be construed in subordination to the constitutional provision against unreasonable searches and seizures. Lacy v. S. 7 App. 403; *ante*, §§1440, 1441. See, also, upon the subject of arrest without warrant, Ross v. S. 10 App. 455; Weaver v. S. 19 App. 547; Staples v. S. 14 App. 136.

§1725—ART. 228.—Municipal authorities may authorize arrest without warrant, when.—The municipal authorities of towns and cities may establish rules authorizing the arrest without warrant of persons found in suspicious places, and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace; or threaten, or are about to commit some offense against the laws. [O. C. 211.]

The authority need not be *expressly* given. If from all the circumstances, by a fair construction, the arrest is authorized, it will be legal. Beville v. S. 16 App. 70.

§1726—ART. 229.—May arrest without warrant when felony has been committed.—Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the person accused. [O. C. 212.]

See, *ante*, §§1500, 1724.

§1727—ART. 230.—In all such cases the officer may adopt the same measures as, etc.—In all the cases enumerated where arrests may

be lawfully made without warrant, the officer or other person making the arrest is justified in adopting all the measures which he might adopt in cases of arrest under warrant, as provided in this Code. [O. C. 213.]

*Post*, Arts. 247-254, 255, 256, 257. He has no authority beyond the limits of his county, to make an arrest. *Ledbetter v. S.* 23 App. 247. See, also, *ante*, §957.

**§1728—ART. 231.—In such cases must take the offender before the nearest magistrate.**—In all the cases enumerated in this chapter the person making the arrest shall immediately take the person arrested before the magistrate who may have ordered the arrest, or before the nearest magistrate where the arrest was made, without an order. [O. C. 214.]

He cannot take bail in a felony case. *Short v. S.* 16 App. 44. But may take bail in misdemeanors which justices of the peace have jurisdiction to try. *Post*, Art. 908.

## CH. 2.—OF ARREST UNDER WARRANT.

ART.	SEC.	ART.	SEC.
232. Definition of warrant of arrest.	1729	246. Cannot be compelled to execute warrant, etc.—Has same right as peace officer.	1745
233. Is sufficient if it have, etc.	1730	247. How warrant is executed.	1746
Must name or describe the accused.	1731	248. Arrest in one county for felony committed in another.	1747
234. Magistrate may issue warrant of arrest, in what cases.	1732	Decisions under preceding article.	1748
235. "Complaint" is what.	1733	249. Arrest in one county for misdemeanor committed in another.	1749
236. Requisites of complaint.	1734	250. Proceeding when party arrested for misdemeanor, etc., fails to give bond.	1750
Decisions as to complaints.	1735	251. Duty of sheriff receiving notice, etc.	1751
237. Warrant issued by supreme judge, etc., extends to every part of the state.	1736	252. Prisoner shall be discharged if not demanded in thirty days.	1752
238. Warrant issued by other magistrate does not extend, etc., except, etc.	1737	253. A person is said to be arrested, when.	1753
239. Warrant of arrest may be forwarded by telegraph, etc.	1738	254. An arrest may be made, when.	1754
240. Complaint by telegraph and proceedings thereon.	1739	255. What force may be used.	1755
241. Certified copy of warrant or complaint to be deposited with telegraph manager, etc.	1740	Decisions under preceding article.	1756
242. Duty of telegraph manager at the office of delivery.	1741	256. In case of felony, may break door.	1757
243. Warrant or complaint must be under official seal, etc.	1742	257. Authority to make arrest must be made known.	1758
244. Telegram to be prepaid, unless, etc.	1743	258. Person escaping, etc., may be taken without warrant.	1759
245. Warrant may be directed to any suitable person, when.	1744		

**§1729—ART. 232.—Definition of "warrant of arrest."**—A "warrant of arrest" is a written order from a magistrate, directed to a peace officer or some other person specially named, commanding him to take the body of the person accused of an offense, to be dealt with according to law. [O. C. 215.]

**§1730—ART. 233.—Is sufficient if it have, etc.**—It issues in the name of "The State of Texas," and shall be deemed sufficient without regard to form, if it have these substantial requisites:

1. It must specify the name of the person whose arrest is ordered, if it be known, if not known, then some reasonably definite description must be given of him.

2. It must state that the person is accused of some offense against the laws of the state, naming the offense.

3. It must be signed by the magistrate, and his office be named in the body of the warrant, or in connection with his signature. [O. C. 216.]

See Willson's Cr. Forms, 816-818; *post*, Arts. 245, 905-909.

§1731—**Must name or describe the accused, etc.**—The warrant of arrest must name the accused, if his name be known, or, if unknown, must give a reasonably definite description of him. A fictitious name cannot be assigned him, in lieu of his true name, nor can an arresting officer interpolate the true name in the warrant. Nor can a warrant be held valid because the person arrested, though described neither by name nor otherwise, proved to be the person the complaint was intended for. *Alford v. S.* 8 App. 545.

§1732—**ART. 234.—Magistrate may issue warrant of arrest in what cases.**—Magistrates may issue warrants of arrest in the following cases:

1. In all cases in which they are by law authorized to order verbally the arrest of an offender.

2. When any person shall make oath before such magistrate that another has committed some offense against the laws of the state.

3. In all cases named in this Code where they are specially authorized to issue such warrants. [O. C. 217, 218.]

See *Pierce v. S.* 17 App. 232; *post*, Art. 901.

§1733—**ART. 235.—“Complaint” is what.**—The affidavit made before the magistrate, which charges the commission of an offense, is called a *complaint*. [O. C. 219.]

§1734—**ART. 236.—Requisites of complaint.**—The complaint shall be deemed sufficient without regard to form, if it have these substantial requisites:

1. It must state the name of the accused, if known, and if not known must give some reasonably definite description of him.

2. It must state that the accused has committed some offense against the laws of the state, naming the offense, or that the affiant has good reason to believe, and does believe, that the accused has committed such offense.

3. It must state the time and place of the commission of the offense, as definitely as can be done by the affiant.

4. It must be in writing, and signed by the affiant, if he is able to write his name, otherwise he may place his mark at the foot of the complaint. [O. C. 220.]

See, *ante*, §§1487, 1488; *post*, Arts. 431, 902, 903; Willson's Cr. Forms, 817, 818, 821.

§1735—**Decisions as to complaints.**—See, *ante*, §1488. No form for a complaint is prescribed, and substantial compliance with the provisions of the statute will be sufficient. Where the complaint alleges the commission of the offense not positively, but to “the best of the knowledge and belief” of the affiant, it is sufficient. *Brown v. S.* 11 App. 451; *Clark v. S.* 23 App. 260. A complaint is not required to set forth the offense with the same particularity that is required in an indictment or information. *Arrington v. S.* 13 App. 551; *Bell v. S.* 18 App. 53. Substantial conformity to the statute, without technical particularity, is all that is required in a complaint. *Pittman v. S.* 14 App. 576. Where the offense was charged in the complaint to have been committed on July 29, 1884, and was sworn to and filed on the same day, and did not state the offense was committed *anterior* to the time of its filing, it was held sufficient, but if such defect appears in an information, it is fatal. *Williams v. S.* 17 App. 521. But if a complaint alleges the commission of the offense on an impossible date, it will not support an information based upon it. *Hefner v. S.* 16 App. 573. Before a warrant based upon a complaint made before a magistrate can legally issue, it must appear that the facts exist which would authorize a verbal arrest, or the facts must present a case in which the magistrate is specially authorized to issue the warrant, or there must be made by some person before a magistrate a complaint charging the commission of an offense, said complaint containing the requisites prescribed in the preceding article. *Pierce v. S.* 17 App. 232. Article 431, *post*, requires that the affiant shall be a *credible* person. This means that the affiant shall be *competent* to testify, as well as *credible*. *Thomas v. S.* 14 App. 70; *Nixon v. Armstrong*, 38 Tex. 296. The complaint need not commence with the words “In the name and by the authority of the State of Texas,” as is required in an indictment or information. *Jefferson v. S.* 24 App. 535.



§1736—ART. 237.—**Warrant issued by supreme judge, etc., extends to every part of the state.**—A warrant of arrest issued by a judge of the supreme court, court of appeals, district or county court, shall extend to every part of the state. [O. C. 221.]

See Hart v. S. 15 App. 202.

§1737—ART. 238.—**Warrant issued by other magistrate does not extend, etc., except, etc.**—When a warrant of arrest is issued by a magistrate other than those named in the preceding article, it cannot be executed in another county than the one in which it issues, except—

1. It be indorsed by some one of the magistrates named in the preceding article, in which case it can be executed anywhere in the state; or,

2. If it be indorsed by any magistrate of the county in which the accused is found, it may be executed in such county. The indorsement may be, "Let this warrant be executed in the county of \_\_\_\_\_," or, if the indorsement is by a magistrate named in the preceding article, "Let this warrant be executed in any county of the State of Texas." Any other words expressing the same meaning will be sufficient. The indorsement shall be dated and signed officially by the magistrate making it. [O. C. 222.]

See Willson's Cr. Forms, 819; Hart v. S. 15 App. 202; Peter v. S. 23 App. 684; Ledbetter v. S. *Id.* 247.

§1738—ART. 239.—**Warrant of arrest may be forwarded by telegraph, etc.**—A warrant of arrest may be forwarded by telegraph from any telegraph office to another in this state. If it be issued by any magistrate named in article 237, the peace officer receiving the same shall execute it without delay. If it be issued by any other magistrate than is named in article 237, the peace officer receiving the same shall forthwith proceed with it to the nearest magistrate of his county, who shall indorse thereon, in substance, these words: "Let this warrant be executed in the county of \_\_\_\_\_," which indorsement shall be dated and signed officially by the magistrate making the same. [Act April 17, 1871, p. 39.]

See Willson's Cr. Forms, 820.

§1739—ART. 240.—**Complaint by telegraph and proceedings thereon.**—A complaint in writing, in accordance with article 236, may be telegraphed, as provided in the preceding article, to any magistrate in the state, and the magistrate who receives the same shall forthwith issue a warrant for the arrest of the accused, and the accused when arrested shall be dealt with as provided in this chapter in similar cases. [Act April 17, 1871, p. 39.]

§1740—ART. 241.—**Certified copy of warrant or complaint to be deposited with telegraph manager, etc.**—A certified copy of the original warrant or complaint, certified to by the magistrate issuing or taking the same, shall be deposited with the manager of the telegraph office from which the same is to be forwarded, and it shall be at once forwarded, taking precedence over other business, to the place of its destination, or to the telegraph office nearest thereto, precisely as it is written, including the certificate of the seal attached. [Act April 17, 1871, p. 39.]

§1741—ART. 242.—**Duty of telegraph manager at the office of delivery.**—When a warrant or complaint is received at a telegraph office for delivery, it shall be delivered to the party to whom it is addressed as soon as practicable, written on the proper blanks of the telegraph company, and certified to by the manager of the telegraph office as being a true and correct copy of the warrant or complaint received at his office. [Act April 17, 1871, p. 39.]

For the offense of divulging contents of warrant, etc., see, *ante*, §345.

**§1742—ART. 243.—Warrant or complaint must be under official seal, etc.**—No manager of a telegraph office shall receive and forward a warrant or complaint, as herein provided, unless the same shall be certified to under the seal of a court of record, or by a justice of the peace, with the certificate under seal of the clerk of the district or county court of his county, that he is a legally qualified justice of the peace of such county; nor shall it be lawful for any magistrate to indorse a warrant received by telegraph, or issue a warrant upon a complaint received by telegraph, unless all the requirements of the law in relation thereto have been fully complied with. [Act April 17, 1871, p. 39.]

See Willson's Cr. Forms, 820.

**§1743—ART. 244.—Telegram to be prepaid, unless, etc.**—The party presenting a warrant or complaint to the manager of a telegraph office, to be forwarded by telegraph, shall pay for the same in advance, unless by the rules of the company it may be sent "collect." [Act April 17, 1871, p. 39.]

**§1744—ART. 245.—Warrant may be directed to any suitable person, when.**—In cases where it is made known by satisfactory proof to the magistrate that a peace officer cannot be procured to execute a warrant of arrest, or that so much delay will be occasioned in procuring the services of a peace officer, that a person accused will probably escape, the warrant of arrest may be directed to any suitable person who is willing to execute the same, and in such case his name shall be set forth in the warrant. [O. C. 223.]

See Willson's Cr. Forms, 816, note 2.

**§1745—ART. 246.—Cannot be compelled to execute warrant, etc.—Has same rights as peace officer.**—No person other than a peace officer can be compelled to execute a warrant of arrest; but if any person shall undertake the execution of the warrant, he shall be bound to do so under all the penalties to which a peace officer would be liable. He has the same rights and is governed by the same rules as are prescribed to peace officers. [O. C. 224.]

See *Smith v. S.* 13 App. 507; *post*, Art. 254 *et seq.*

**§1746—ART. 247.—How warrant is executed, etc.**—The officer or person executing a warrant of arrest shall take the person whom he is directed to arrest forthwith before the magistrate who issued the warrant, or before the magistrate named in the warrant. [O. C. 225.]

Officer making the arrest for felony cannot take bail. *Short v. S.* 16 App. 44; *ante*, §1190. But may take bail in misdemeanor which justices of the peace have jurisdiction to try. *Post*, Arts. 303, 908.

**§1747—ART. 248.—Arrest in one county for felony committed in another.**—If any person be arrested in one county for felony committed in another, he shall, in all cases, be taken before some magistrate of the county where it was alleged the offense was committed. [O. C. 226.]

See Willson's Cr. Forms, 821.

**§1748—Decisions under preceding article.**—The defendant was arrested under a warrant issued by a justice of the peace of DeWitt county, founded upon a complaint charging the commission of a felony in Gonzales county. The warrant was made returnable before the county judge of the latter county, but the examination of the case was had before a justice of the peace of Gonzales county. Held, that said justice of the peace had jurisdiction of the case as an examining court. *Arrington v. S.* 13 App. 551. When an arrest is made in one county for a felony committed in another, the warrant should be made returnable to the county in which the offense was committed. *Robertson v. S.* 36 Tex. 346.

**§1749—ART. 249.—Arrest in one county for misdemeanor committed in another.**—If the arrest be for a misdemeanor, he shall be taken

before a magistrate of the county where the arrest takes place, who shall be authorized to take bail, and whose duty it shall be to transmit immediately the bond so taken to the court having jurisdiction of the offense. [O. C. 226.]

§1750—ART. 250.—**Proceedings when party arrested for misdemeanor, etc., fails to give bond.**—If the accused fails or refuses to give bail, as provided in the preceding article, he shall be committed to the jail of the county where he was arrested, and the magistrate committing him shall forthwith notify the sheriff of the county in which the offense is alleged to have been committed of the arrest and commitment, which notice may be given by telegraph, by mail or by other written notice. [Added in revising.]

§1751—ART. 251.—**Duty of sheriff receiving notice, etc.**—It shall be the duty of the sheriff receiving the notice provided for in the preceding article, forthwith to go or send for the prisoner and have him brought before the proper court or magistrate. [Added in revising.]

§1752—ART. 252.—**Prisoner shall be discharged if not demanded in thirty days, etc.**—Should the sheriff or other proper officer of the county, where the offense is alleged to have been committed, not demand the prisoner and take charge of him within thirty days from the day he is committed, such prisoner shall be discharged from custody. [Added in revising.]

§1753—ART. 253.—**A person is said to be arrested, when.**—A person is said to be arrested when he has been actually placed under restraint, or taken into custody by the officer or person executing the warrant of arrest. [O. C. 227.]

See Conoly v. S. 2 App. 412; Grosse v. S. 11 App. 364.

§1754—ART. 254.—**An arrest may be made, when.**—An arrest may be made on any day, or at any time of the day or night. [O. C. 228.]

§1755—ART. 255.—**What force may be used.**—In making an arrest all reasonable means are permitted to be used to effect it. No greater force, however, shall be resorted to than is necessary to secure the arrest and detention of the accused. [O. C. 229.]

See, *ante*, §§95, 948, 957.

§1756—**Decisions under preceding article.**—In attempting to make an arrest for a petty offense, the officer is not authorized to shoot at the party fleeing from such arrest. *Tiner v. S.* 44 Tex. 128. Nor to kill a prisoner who is not attacking or resisting him, but merely running away from him. *Caldwell v. S.* 41 Tex. 86; *Plasters v. S.* 1 App. 673. Nor to strike a prisoner except in necessary self-defense. *Skidmore v. S.* 43 Tex. 93. See other decisions upon this subject collated in §957, *ante*.

§1757—ART. 256.—**In case of felony, may break door.**—In cases of felony, the officer may break down the door of any house for the purpose of effecting an arrest, if he be refused admittance after giving notice of his authority and purpose. [O. C. 230.]

§1758—ART. 257.—**Authority to arrest must be made known.**—In executing a warrant of arrest, it shall always be made known to the person accused under what authority the arrest is made, and if requested the warrant shall be exhibited to him. [O. C. 231.]

See *Plasters v. S.* 1 App. 673.

§1759—ART. 258.—**Prisoner escaping, etc., may be retaken without warrant.**—If a person arrested shall escape, or be rescued, he may be retaken without any other warrant; and for this purpose all the means may be used which are authorized in making the arrest in the first instance. [O. C. 232.]

See, *ante*, §957; *Wright v. S.* 44 Tex. 645; *James v. S.* *Id.* 314; *Washington v. S.* 1 App. 647.

## CH. 3.—OF THE COMMITMENT OR DISCHARGE OF THE ACCUSED.

ART.	SEC.	ART.	SEC.
259. Proceeding when brought before a magistrate.	1760	271. Attachment shall be executed forthwith.	1773
260. When examination postponed for reasonable time—Custody and disposition of the accused during that time.	1761	272. Manner of postponing examination to procure testimony.	1773
261. Defendant shall be informed of his right to make statement, etc.	1762	273. Capital offenses—Who may discharge.	1776
262. Voluntary statement of accused.	1763	274. Proceeding when insufficient bail has been taken.	1775
263. Witnesses may be placed under the rule.	1764	275. When committed, discharged or admitted to bail.	1776
264. Right of counsel to examine witnesses.	1765	276. When no safe jail, etc.	1777
265. Same rules of evidence govern as on final trial.	1766	277. To whom warrant is directed in such case.	1778
266. Witnesses shall be examined in presence of the accused.	1767	278. Warrant of commitment—Its requisites.	1779
267. Testimony shall be reduced to writing, signed and certified.	1768	279. When prisoner sent to jail of another county, etc.	1780
268. Magistrate may issue attachment for witnesses.	1769	280. Duty of sheriff in reference to prisoners.	1781
269. May issue attachment to another county, when.	1770	281. Discharge shall not prevent, etc. Depositions in examining trials.	1782
270. Witnesses need not be tendered fees, etc.	1771	Justices of the peace—Jurisdiction as magistrates.	1784

§1760—ART. 259.—**Proceeding when brought before a magistrate.**—When a person accused of an offense has been brought before a magistrate, that officer shall proceed to examine into the truth of the accusation made, allowing the accused, however, sufficient time to procure the aid of counsel. [O. C. 233.]

§1761—ART. 260.—**When examination postponed for reasonable time—Custody and disposition of the accused during that time.**—The magistrate may at the request of the prosecutor or person representing the state, or of the defendant, postpone for a reasonable time the examination so as to afford an opportunity to procure testimony, but the accused shall, in the meanwhile, be detained in the custody of the sheriff or other duly authorized officer, unless he give bail to be present from day to day before the magistrate, until the examination is concluded, which he may do in all cases, except murder and treason. [O. C. 234.]

§1762—ART. 261.—**Defendant shall be informed of his right to make statement, etc.**—Before the examination of the witnesses, the magistrate shall inform the defendant that it is his right to make a statement relative to the accusation brought against him, but shall, at the same time, also inform him that he cannot be compelled to make any statement whatever, and that if he does make such statement it may be used in evidence against him. [O. C. 235-241]

See, *post*, Art. 750 and notes thereto.

§1763—ART. 262.—**Voluntary statement of accused.**—If the accused shall desire to make a voluntary statement, he may do so before the examination of any of the witnesses, but not afterward. His statement shall be reduced to writing by the magistrate, or by some one under his direction, or by the accused or his counsel, and shall be signed by the accused, but shall not be sworn to by him. If the accused be unable to write his name, he shall sign the statement by making his mark at the foot of the same, and the magis-

trate shall, in every case, attest by his own certificate and signature to the execution and signing of the statement. [O. C. 235, 242, 243.]

See, *post*, Art. 750 and notes thereto. Willson's Cr. Forms, 832.

§1764—ART. 263.—**Witnesses may be placed under rule.**—The magistrate shall, if requested by the accused or his counsel, or by the person prosecuting, have all the witnesses placed in charge of an officer, except the witness who is testifying, so that the testimony given by any one witness shall not be heard by any of the others. [O. C. 235.]

As to placing witnesses under rule, see, *post*, Arts. 662-666 and notes thereto.

§1765—ART. 264.—**Right of counsel to examine witness.**—If any person appear to prosecute as counsel for the state, he shall have the right to put the questions to the witnesses on the direct or cross-examination, and the accused or his counsel has the same right. Should no counsel appear, either for the state or for the defendant, the magistrate may examine the witnesses, and the accused has the same right. [O. C. 236.]

§1766—ART. 265.—**Same rules of evidence govern as on final trial.**—The same rules of evidence shall apply to and govern a trial before an examining court that apply to and govern a final trial. [Added in revising.]

For rules of evidence, see, *post*, Chs. 7 and 8, Title 8.

§1767—ART. 266.—**Witnesses shall be examined in presence of the accused.**—The examination of each witness shall be in the presence of the accused. [O. C. 240.]

§1768—ART. 267.—**Testimony shall be reduced to writing, signed and certified.**—The testimony of each witness examined shall be reduced to writing by the magistrate, or some one under his direction, and shall then be read over to the witness, or he may read it over himself, and such corrections shall be made in the same as the witness may direct, and he shall then sign the same by affixing thereto his name or mark. All the testimony thus taken shall be certified to by the magistrate taking the same. [O. C. 238.]

*Post*, Ch. 8, Title 8; Willson's Cr. Forms, 833. A separate certificate to the testimony of each witness is not required. *Evans v. S.* 13 App. 225. See, also, *Kerry v. S.* 17 App. 178. As to the disposition to be made of the testimony, see, *post*, Arts. 314, 315, 316.

§1769—ART. 268.—**Magistrate may issue attachment for witnesses.**—The magistrate has the power in all cases where a witness resides, or is in the county where the prosecution is pending, to issue an attachment for the purpose of enforcing the attendance of such witness; this he may do without having previously issued a *subpoena* for that purpose. [O. C. 244.]

See Willson's Cr. Forms, 667.

§1770—ART. 269.—**May issue attachment to another county, when.**—The magistrate may issue an attachment for a witness to any county in the state, when affidavit is made by the party applying therefor that the testimony of the witness is material to the prosecution, or the defense, as the case may be; and the affidavit shall further state the facts which it is expected will be proved by the witness, and if the facts set forth are not considered material by the magistrate, or if they be admitted to be true by the adverse party, the attachment shall not issue. [O. C. 246.]

See Willson's Cr. Forms, 665, 666, 667; *post*, Art. 489.

§1771—ART. 270.—**Witness need not be tendered fees, etc.**—It shall not be necessary where a witness is attached to tender his witness fees or expenses to him. [O. C. 246.]

§1772—ART. 271.—**Attachment shall be executed forthwith.**—The officer receiving the attachment shall execute it forthwith, by bringing before

the magistrate the witness named therein, unless such witness shall give bail for his appearance before the magistrate at the time and place required by the writ. [O. C. 245.]

For officer's returns on attachments, see Willson's Cr. Forms, 668, 669.

§1773—ART. 272.—**Manner of postponing examination to procure testimony.**—After examining the witnesses in attendance, if it satisfactorily appear to the magistrate that there is other important testimony which may be had by a postponement of the examination, he shall, at the request of the prosecutor or of the defendant, postpone the further examination for a reasonable time, to enable such testimony to be procured; but in such case the accused shall remain in the custody of the proper officer until the day fixed for such further examination. No postponement shall take place unless a statement on oath be made by the defendant or the person prosecuting, setting forth the name and residence of the witness, and the facts which it is expected will be proved; or if it be testimony other than that of a witness, the statement made shall set forth the nature of the evidence. If the magistrate is satisfied that the testimony is not material, or if the same be admitted to be true by the adverse party, the postponement shall be refused. [O. C. 239.]

§1774—ART. 273.—**Capital offense—Who may discharge.**—Upon examination of a person accused of a capital offense, no magistrate other than a judge of the supreme court, a judge of the court of appeals, a judge of the district court or a judge of the county court, shall have power to discharge the defendant. Any magistrate may admit to bail, except in capital cases, where the proof is evident. [O. C. 248.]

As to "capital cases," and "proof evident," see, *ante*, §§1444, 1445.

§1775—ART. 274.—**Proceeding when insufficient bail has been taken.**—Where it is made to appear by complaint, on oath, to a judge of the supreme court, court of appeals, district or county court, that the bail taken in any case is insufficient in amount, or that the securities are not good for the amount, or that the bond is for any reason defective or insufficient, such judge shall issue a warrant of arrest, and require of the defendant sufficient bond and security, according to the nature of the case. [O. C. 249.]

See Willson's Cr. Forms, 842, 843, 844.

§1776—ART. 275.—**When committed, discharged or admitted to bail.**—After the voluntary statement of the accused, if any, and the examination of the witnesses has been fully completed, the magistrate shall proceed to make an order committing the defendant to the jail of the proper county, if there be one, discharging him or admitting him to bail, as the law and facts of the case may require. [O. C. 250.]

See Willson's Cr. Forms, 834, 835, 836; *post*, Arts. 308, 309, 311.

§1777.—ART. 276.—**When no safe jail, etc.**—Where there is no safe jail in the county in which the prosecution is carried on, the magistrate may commit to the nearest safe jail of any other county. [O. C. 251.]

See Willson's Cr. Forms, 886, note 2.

§1778—ART. 277.—**To whom warrant is directed in such case.**—The warrant of commitment in the case mentioned in the preceding article shall be directed to the sheriff of the county to which the defendant is sent, but the sheriff of the county from which the defendant is taken shall be required to deliver the prisoner into the hands of the sheriff of the county to which he is sent. [O. C. 251.]

See Willson's Cr. Forms, 837, note 2.

**§1779—ART. 278.—Warrant of commitment—Its requisites.**—A warrant of commitment is an order signed by the proper magistrate, directing a sheriff to receive and place in jail the person so committed. It will be sufficient if it have the following requisites:

1. That it run in the name of "The State of Texas."
2. That it be addressed to the sheriff of the county, to the jail of which the defendant is committed.
3. That it state in plain language the offense for which the defendant is committed, and give his name if it be known, or if unknown contain an accurate description of the defendant.
4. That it state to what court and at what time the defendant is to be held to answer.
5. When the prisoner is sent out of the county where the prosecution arose, the warrant shall state that there is no safe jail in the proper county.
6. If it be a case in which bail has been granted the amount of bail shall be stated in the warrant. [O. C. 253.]

See Willson's Cr. Forms, 837. The order of the court is itself a *mittimus*. *Shrader v. S.* 30 Tex. 386.

**§1780—ART. 279.—When prisoner sent to jail of another county, etc.**—In every case where, for want of a safe jail in the proper county, a prisoner is committed to the jail of another county, the last named county shall have the right to recover by civil action, in a court of competent jurisdiction, of the county from which the prisoner was sent, an amount of money not exceeding seventy-five cents per day, on account of the expenses attending the custody and safe keeping of a prisoner. [O. C. 254.]

See, *post*, Arts. 1073-1074.

**§1781—ART. 280.—Duty of sheriff in reference to prisoners.**—It is the duty of every sheriff to keep safely a person committed to his custody. He shall use no cruel or unusual means to secure this end, but shall adopt all necessary measures to prevent the escape of a prisoner. He may summon a guard of sufficient number in case it become necessary to prevent an escape from jail or the rescue of a prisoner. [O. C. 255.]

See, *ante*, §§1505, 1506, 1508, 1509.

**§1782—ART. 281.—Discharge will not prevent, etc.**—A discharge by a magistrate upon an examination of any person accused of an offense, shall not prevent a second arrest of the same person for the same offense. [O. C. 256.]

See, *Ex parte* Porter, 16 App. 321.

**§1783—Depositions in examining trials.**—Depositions may be taken and used in evidence, in certain cases, in trials before examining courts. For the rules governing depositions in such cases, see, *post*, Chap. 8. Title 7. EVIDENCE.

**§1784—Justices of the peace—Jurisdiction as magistrates.**—When a justice of the peace sits for the purpose of inquiring into a criminal accusation, he sits, not as a justice of the peace, but as a magistrate, and the court which he then holds is not a justice's, but an examining court. When holding such a court his functions as a magistrate are the same as those of the judges of the county, district, court of appeals or supreme court, when they sit as magistrates to hold an examining trial. The same rules govern each, and the jurisdiction of the justice in such case is co-extensive with the limits of his county, and he may hold an examining court anywhere in his county. *Hart v. S.* 15 App. 202; *Kerry v. S.* 17 App. 178. But a justice cannot discharge a person accused of a capital offense. *Ante*, Art. 273.

[6—Tex. C. C. P.]

## CH. 4.—OF BAIL.

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**I. GENERAL RULES APPLICABLE TO ALL CASES OF BAIL.**

§1785—ART. 282.—Definition of "bail."—"Bail" is the security given by a person accused of an offense that he will appear and answer before the proper court the accusation brought against him. This security is given by means of a recognizance or a bail bond. [O. C. 257, 258.]

See, *ante*, §1412 *et seq.*

§1786—Meaning, etc., of bail—Decisions as to.—Bail is intended to secure the appearance and trial of the offender, not to mulct his sureties in a penalty. *Jackson v. S.* 13 Tex. 218. Surety differs from bail in that the latter has, or is presumed to have, the custody of his principal, while the former has no control over him. *Gay v. S.* 20 Tex. 504.



**§1787—ART. 283.—Definition of “recognizance.”**—A “recognizance” is an undertaking entered into before a court of record in session, by the defendant in a criminal action and his sureties, by which they bind themselves respectively, in a sum fixed by the court, that the defendant will appear for trial before such court upon the accusation preferred against him. The undertaking of the parties in such case is not signed, but is made a matter of record in the court where the same is entered into. [O. C. 259.]

A recognizance is an obligation of record. *Grant v. S. S. App. 432.* For requisites of, see, *post*, Art. 287. For recognizance on appeal, see, *post*, Art. 852.

**§1788—ART. 284.—Definition of “bail bond.”**—A “bail bond” is an undertaking entered into by the defendant and his sureties for the appearance of the principal therein before some court or magistrate to answer a criminal accusation; it is written out and signed by the defendant and his sureties. [O. C. 260.]

A bail bond, when it has been returned into court, is an obligation of record. *Jawton v. S. S. Tex. 270.* For requisites of, see, *post*, Art. 288.

**§1789—ART. 285.—When a bail bond is given.**—A bail bond is entered into either before a magistrate upon an examination of a criminal accusation against a defendant, or before a judge upon an application under *habeas corpus*; or it is taken from the defendant by a peace officer who has a warrant of arrest or commitment, as hereafter provided. [O. C. 261.]

**§1790—Peace officer—Authority of to take bail.**—When a sheriff or other peace officer arrests a person under a warrant issued by a magistrate, upon a charge of *felony*, it is the duty of such sheriff or peace officer to take such person forthwith before the magistrate who issued the warrant, or before the magistrate before whom the warrant is made returnable. No authority is given by law to the sheriff or peace officer in such cases to take bail—that authority is vested in the magistrate. *Short v. S. S. 16 App. 44; ante*, §1746; *Kiser v. S. S. 13 App. 201; S. v. Miller, 31 Tex. 564.* But the arresting officer may take bail where the charge is a misdemeanor. *Post*, Arts. 303, 908. And he may take bail in a felony case, after indictment found, when he makes the arrest by virtue of a *capias*, and when the court is not in session; ~~but when the court is in session, he cannot take bail in a felony case.~~ *Post*, Arts. 304, 305, §1804; *Kiser v. S. S. 13 App. 201; Patillo v. S. S. 9 App. 456.*

**§1791—ART. 286.—What the word “bail” includes.**—Wherever the word “bail” is used with reference to the security given by the defendant, it is intended to apply as well to recognizances as to bail bonds. When a defendant is said to be “on bail,” or to have “given bail,” it is intended to apply as well to recognizances as to bail bonds. [O. C. 262.]

## II. RECOGNIZANCE AND BAIL BOND.

**§1792—ART. 287.—Requisites of a recognizance.**—A recognizance shall be sufficient to bind the principal and sureties, if it contain the following requisites:

1. If it be acknowledged that the defendant is indebted to the State of Texas in such sum as is fixed by the court, and the sureties are in like manner indebted in such sum as is fixed by the court.

2. That it state the name of the offense with which the defendant is charged.

3. That it appear by the recognizance that the defendant is accused of an offense against the laws of this state.

4. That the time and place when and where the defendant is bound to appear be stated, and the court before which he is bound to appear. [O. C. 263.]

See Willson's Cr. Forms, 590; Recognizance on Appeal, *post*, Art. 852.

**§1793—Requisite 1.**—It must state the sum in which the principal and the sureties also are bound. *Townsend v. S. S. 7 App. 74.* The sum may be stated in figures, with a dollar mark affixed. *Roberts v. S. S. 11 App. 26.* It will be presumed that the sum named in the recognizance in which the principal is bound, is the amount of bail fixed by the court, whether such statement is explicitly made in the recognizance or not. *Thrash v. S. S. 16 App. 271.* It must

bind the *surety*, not alone "his heirs and legal representatives." *Grier v. S.* 29 Tex. 95. It must bind the *principal* to appear, as well as bind the sureties that he will appear. *Wright v. S.* 22 App. 670.

**§1794—Requisites 2 and 3.**—If the offense is specifically defined by the statute, the general name is sufficiently descriptive of it, as murder, theft, rape, robbery, burglary, and the like. *Lowrie v. S.* 43 Tex. 602; *McLaren v. S.* 3 App. 680; *Morris v. S.* 4 App. 554; *Massey v. S. Id.* 580; *O'Bannon v. S.* 9 App. 465; *Robinson v. S.* 11 App. 309; *McGee v. S. Id.* 520; *Arrington v. S.* 13 App. 551; *Keppler v. S.* 14 App. 173; *Jones v. S.* 15 App. 82; *Vivian v. S.* 16 App. 262; *Watkins v. S. Id.* 646; *Thrash v. S. Id.* 271. If the offense is not so defined, then it must be described by stating its essential elements, so that it will appear that a particular offense against the law is charged against the principal. In such case a generic or general term, will not be sufficient. *Lowrie v. S.* 43 Tex. 602; *Morris v. S.* 4 App. 554; *Massey v. S. Id.* 580; *O'Bannon v. S.* 9 App. 465; *Kramer v. S.* 18 App. 13. The following descriptions of the offense have been held insufficient: "Having in his possession stolen goods." *Dailey v. S.* 4 Tex. 417. "Gaming." *S. v. Cotton,* 6 Tex. 425. "Playing at a game of cards." *Cotton v. S.* 7 Tex. 547. "Betting money upon a certain game with cards." *McDonough v. S.* 19 Tex. 293. "Stands charged with the crime of making threats." *Sively v. S.* 44 Tex. 274. "Charged with the offense of passing a forged writ of error bond." *Morris v. S.* 4 App. 554. "Passing a forged instrument as true." *Stancil v. S.* 6 App. 460. "Malicious mischief." *McLaren v. S.* 3 App. 680; *Waterman v. S.* 8 App. 671. "Gift enterprise." *Foard v. S.* 3 App. 556. "Carrying a pistol." *Morgan v. S.* 8 App. 672; *Massey v. S.* 4 App. 580. "Skinning a calf or yearling, unmarked or unbranded." *Littlefield v. S.* 1 App. 722. "Unlawfully using an estray horse without complying with the laws regulating estrays." *Davis v. S.* 30 Tex. 352. "Using a stray horse." *Gonzales v. S.* 31 Tex. 205. "Unlawfully taking up and using an estray." *Riviere v. S.* 7 App. 55. "Violation of the estray laws, as set forth in the bill of indictment against him." *Stewart v. S.* 37 Tex. 576; *Etchison v. S.* 8 App. 671. "Larceny of a filly." *Montgomery v. S.* 33 Tex. 179. "Shooting with intent to kill and murder." *Moore v. S.* 34 Tex. 138. "Illegal marking." *Webb v. S.* 32 Tex. 652. "Not publishing quarterly report." *Vanway v. S.* 44 Tex. 112. "Threats to kill and murder." *Buile v. S.* 1 App. 58. "Permitted monte to be exhibited in a house under his control," or "did unlawfully permit the banking game of monte to be dealt and exhibited in a certain house under his control." *Coney v. S.* 1 App. 62. "Carrying a gun on election day." *Harris v. S.* 1 App. 614. "Destroying a fence." *Wraybourn v. S.* 2 App. 7. "Retailing liquor without license." *Murch v. S.* 3 App. 552. "Disturbing a congregation assembled for religious worship." *Magee v. S.* 7 App. 99. "Cruelty to dumb animals." *Kelley v. S.* 8 App. 671. "Disturbing a congregation." *McKay v. S.* 8 App. 672. "Unlawfully working at his trade on Sunday." *O'Brien v. S.* 8 App. 671. "Violating the bell-runch law in failing to register alcoholic drinks." *Moore v. S.* 8 App. 672. "Disposing of mortgaged property." *O'Bannon v. S.* 9 App. 465. "Exhibiting a faro bank." *Kramer v. S.* 18 App. 13. "Willful burning." *Keppler v. S.* 14 App. 173.

The following descriptions have been held sufficient: "Did cut and stab L. H. with intent to kill and murder him." *Turner v. S.* 41 Tex. 549. "Unlawful card playing." *Lowrie v. S.* 43 Tex. 602. "Stealing two bushels of corn the property of one Archibald Cone." *Gay v. S.* 20 Tex. 504. "Assault with intent to kill." *Hodges v. S.* 20 Tex. 493. *Wilson v. S.* 25 Tex. 169; *S. v. Hotchkiss,* 30 Tex. 162; *Goldthwaite v. S.* 32 Tex. 599; *Barrera v. S. Id.* 644. "An assault to murder." *Wills v. S.* 4 App. 613. "Murder," without stating the degree. *Thompson v. S.* 31 Tex. 166; *S. v. Brown,* 34 Tex. 146. "Willfully and wantonly killing a certain dog." *Smith v. S.* 36 Tex. 317. "Forgery," or "forgery of a writ of error bond in a civil suit." *Morris v. S.* 4 App. 557. "Assault with intent to rob." *Robinson v. S.* 11 App. 309. "Swindling." *Mathena v. S.* 15 App. 460. "Offering to bribe a witness to evade criminal process as a witness." *Hill v. S.* 15 App. 530. "Theft" includes theft of animals, and the kind of animals need not be stated. *Vivian v. S.* 16 App. 262. "Theft of bacon of the value of \$27." *Thrash v. S.* 16 App. 271. A failure to specify the offense of which the principal is accused is not cured by reference to the indictment against him. *Stewart v. S.* 37 Tex. 576.

**§1795—Offense must be same as that charged in the indictment.**—The offense named or described must be the offense charged in the indictment or information. *McAdams v. S.* 10 App. 317; *Keppler v. S.* 14 App. 173; *Addison v. S. Id.* 568; *Foster v. S.* 27 Tex. 236; *Duke v. S.* 35 Tex. 424; *S. v. Gordon,* 41 Tex. 510; *Turner v. S. Id.* 549; *Smalley v. S.* 3 App. 202. The latter case overruling *McCoy v. S.* 37 Tex. 219, and *Angell v. S. Id.* 357, in so far as said cases hold a contrary doctrine.

**§1796—Disjunctive statement of offense, etc.**—A disjunctive statement of the offense, as "selling or giving away whiskey on election day," is insufficient. *Hart v. S.* 2 App. 39. A recognizance which recites that the defendant is accused of two or more distinct offenses is bad for duplicity. *Killingsworth v. S.* 7 App. 28; *Hutchinson v. S.* 4 App. 435; *Patton v. S.* 35 Tex. 92.

**§1797—Requisite 4.**—It should bind the accused to appear at a certain time and at a certain place, and name the court before which he is to appear. *Littlefield v. S.* 1 App. 723; *Teel v. S.* 3 App. 326; *Crowder v. S.* 7 App. 484; *Ward v. S.* 38 Tex. 302; *S. v. Phelps, Id.* 555; *Maxwell v. S. Id.* 171; *Barnes v. S.* 36 Tex. 322; *S. v. Angell,* 37 Tex. 357. In stating the time it is sufficient to state the term of the Court, and in stating the place it is sufficient to specify the name of the court and the county. *Teel v. S.* 3 App. 326; *Fentress v. S.* 16 App. 79; *Vivian v. S. Id.* 262. If the time stated be a time when there can be no term of the court legally held, it is a fatal defect. *Burnett v. S.* 18 App. 283; *Thomas v. S.* 12 App. 417; *Brite*

v. S. 24 Tex. 219; Thomas v. S. 14 App. 496. For statements of the time and place held to be sufficient, see Williford v. S. 17 Tex. 653; Ray v. S. *Id.* 268; O'Neal v. S. 35 Tex. 130; Turner v. S. 14 App. 168; Fentress v. S. 16 App. 79; Hodges v. S. 20 Tex. 493; Moore v. S. 37 Tex. 133. It must bind the accused to appear before the *proper* court. Wallen v. S. 18 App. 414. But the venue of the offense need not be stated. Cundiff v. S. 38 Tex. 641. It must bind him to appear before the court. Carroll v. S. 6 App. 463. But is not impaired if it omits to stipulate that he shall answer the accusation against him. Gary v. S. 11 App. 527; S. v. Becknall, 41 Tex. 319; Goldthwaite v. S. 32 Tex. 599. A recognizance which bound the principal to appear "at the next term of this court" was held insufficient. Williamson v. S. 12 App. 169. See, also, Teel v. S. 3 App. 326; Barnes v. S. 36 Tex. 332, for instances of statements of time and place held to be insufficient. For insufficient designations of the court, see S. v. Phelps, 38 Tex. 555; Crowder v. S. 7 App. 484; Smith v. S. *Id.* 160; Downs v. S. *Id.* 483; Littlefield v. S. 1 App. 722.

§1798—Defects in, cannot be supplied by parol proof.—If a recognizance be defective, its defects cannot be supplied by parol, but only by such intendments as the court can reasonably make by the help of its judicial knowledge of facts. Brite v. S. 24 Tex. 219. Being an obligation of record, the court can make no material alteration in it without the consent of all the cognizors. Grant v. S. 8 App. 432; Gragg v. S. 18 App. 295. But where the recognizance omitted the word "dollars," which appeared in the original entry on the docket, it was held that such defect might be amended upon notice to the cognizors. Blalack v. S. 8 App. 376. But the appellate court will not supply by intentment a necessary word, though its omission be obviously a mere clerical oversight. Carroll v. S. 6 App. 463.

§1799—ART. 288.—Requisites of a bail bond.—A bail bond shall be sufficient if it contain the following requisites:

1. That it be made payable to the State of Texas.
2. That the obligors thereto bind themselves that the defendant will appear before the proper court or magistrate to answer the accusation against him.
3. That the offense of which the defendant is accused be distinctly named in the bond, and that it appear therefrom that he is accused of some offense against the laws of the state.
4. That the bond be signed by the principal and sureties, or in case all or either of them cannot write, then that they affix thereto their marks.
5. That the bond state the time and place when and where the accused binds himself to appear, and the court or magistrate before whom he is to appear. In stating the time it is sufficient to specify the term of the court; and in stating the place it is sufficient to specify the name of the court or magistrate and of the county. [O. C. 264.]

See Willson's Cr. Forms, 593, 594, 595, 596, 838, 839.

§1800—Decisions as to requisites of bail bond.—The decisions collated in the preceding notes relating to the requisites of a recognizance are applicable alike to bail bonds, and need not be repeated here. A bail bond when filed in court has the force and effect of a recognizance, and is an obligation of record. Lawton v. S. 5 Tex. 270; Goldthwaite v. S. 32 Tex. 599. It must be made payable to the State of Texas. Warren v. S. 21 Tex. 510; Lawton v. S. 5 Tex. 270. It is essential to the validity of a bail bond that it be signed by the principal, or in his name by some one authorized by him. Price v. S. 12 App. 235; Tierney v. S. 31 Tex. 40; Holt v. S. 20 App. 271. A bail bond is strictly a statutory bond, and to entitle the state to a forfeiture thereon, it must contain all the requisites prescribed by the statute. The principles of equity as applied to private contracts cannot be invoked in the construction of a bail bond. Wallen v. S. 18 App. 414; Turner v. S. 14 App. 168. A bail bond is not invalidated by the omission of a word essential to its validity if the omitted word be clearly indicated by the context. Roberts v. S. 11 App. 26. Where the bond, after naming the principal, required the "above bounden —" to appear, etc., the omission of the principal's name after the word "bounden" was held to not vitiate the bond. Gorman v. S. 38 Tex. 112. A bail bond should be dated, but the date of the approval thereof by the officer taking it is a sufficient dating. Carroll v. S. 6 App. 463; Ake v. S. 4 App. 126. The execution of the bond dates from the signature thereof, and not from the time of its approval. Holt v. S. 20 App. 271.

§1801—Bail bond before indictment found.—The law does not require as great particularity in a bail bond which is taken *before*, as *after* indictment found. In such case, if the bond shows that the principal stands charged with an offense, and binds him to appear before the proper court, at a proper place and time, and otherwise substantially complies with the statute, it is sufficient. It is only required that it describe in plain language some offense known to the law. Barrera v. S. 32 Tex. 644; Moore v. S. *Id.* 133; Goldthwaite v. S. 32 Tex. 599; S. v. Becknall, 41 Tex. 319; Keppler v. S. 14 App. 173; Vivian v. S. 16 App. 262. When a bail bond is taken by order of a magistrate it must conform to said order as to the amount thereof. Barranger v. S. 27 Tex. 533; Neblett v. S. 6 App. 316. See, also, Peters v. S. 10 App. 303.

**§1802—Onerous conditions of.**—A condition in a bail bond which is more onerous than is required by the law, vitiates the bond, and such bond will not support a judgment of forfeiture. *Turner v. S.* 14 App. 168; *Johnson v. Erskine*, 9 Tex. 10; *Barringer v. S.* 27 Tex. 553; *Wooters v. Smith*, 56 Tex. 198. A bond which obligates the obligors "jointly and severally" is not more onerous than the law requires. *Fulton v. S.* 14 App. 32; *Mathena v. S.* 15 App. 460. A bail bond which obligates the principal to appear "from day to day and term to term of the court until discharged," is not a condition more onerous than that imposed by law. *Pickett v. S.* 16 App. 648; *Anderson v. S.* 19 App. 299. See one instance of a recognizance more onerous than the law required. *Wright v. S.* 22 App. 670.

**§1803—Need not disclose the mode of accusation.**—When the offense of which the principal obligor is accused is named or described in the bond, and it appears therefrom that he is accused of an offense against the laws of this state, it is not necessary that the bond shall disclose the mode of the accusation, that is, whether such accusation is made by indictment, information, etc. *McGee v. S.* 11 App. 520. But when the bond obligated the principal to answer an information filed by a justice of the peace, charging said principal with an aggravated assault and battery, reciting in conclusion that said accusation was preferred in an indictment, it was held void, as it did not show that the principal was legally accused of an offense. *Murphy v. S.* 17 App. 100. All process and proceedings, including a bail bond, based upon a void indictment, are themselves void. *Harrell v. S.* 22 App. 602.

**§1804—Who may take a bail bond.**—An examining court is authorized to take a bail bond. *Thomas v. S.* 12 App. 416. A bail bond taken by a deputy sheriff under the order of an examining court, while said court was in session, and upon which, by order of said court, the accused was released from custody, was held to be valid. *Arrington v. S.* 13 App. 551. A district clerk has no official power to take a bail bond. *Doughty v. S.* 33 Tex. 1. After the taking of a bail bond by a magistrate, and the adjournment of his court, he has no power to take another. *S. v. Russell*, 24 Tex. 505. Nor has he power to take a bail bond after the adjournment of his court. *Moore v. S.* 37 Tex. 133. When an examining court, in default of bail, has committed an accused to jail, the sheriff is then authorized to take bail in the sum fixed by the order of the magistrate. *Shrader v. S.* 30 Tex. 386. The sheriff has no authority to take bail of one who, before indictment or accusation, voluntarily surrenders himself. He must take such person before a magistrate. *S. v. Miller*, 31 Tex. 564. A peace officer having a *capias* for the arrest of a person indicted for a bailable felony, when the court in which the indictment is pending is not in session, may take a bail bond of such person, and may fix the amount of such bond, where the court has not fixed the amount. *Patillo v. S.* 9 App. 456; *Gragg v. S.* 18 App. 295; *post*, Art. 305. When the arrest is made under a *capias* for a misdemeanor, the officer making the arrest may take bail, although the court be in session. *Ellis v. S.* 10 App. 324; *post*, Art. 303. A peace officer who makes an arrest for a felony under a warrant of arrest issued by a magistrate, cannot in such case take bail. *Short v. S.* 16 App. 44. Where the county court has criminal jurisdiction, indictments for misdemeanor, except for official misconduct, must be transferred to said courts, or to justices' courts, and process thereon must be issued from those courts, and a bail bond taken by authority of a *capias* issued from the district court in such case is without authority of law and void. *Cassady v. S.* 4 App. 96. But a sheriff cannot take a bail bond in a felony case when the court in which the case is pending is in session. *Kiser v. S.* 13 App. 201; see, *ante*, §1790.

**§1805—Approval and filing of a bail bond.**—The statutory provisions respecting the approval of bail bonds are merely directory, and a bail bond is not void by reason of non-compliance therewith. *Dyches v. S.* 24 Tex. 266; *Doughty v. S.* 33 Tex. 1; *Holt v. S.* 20 App. 271; *Taylor v. S.* 16 App. 514. The taking and returning the bond into court is a substantial approval of it, no formal approval being required. *Brown v. S.* 40 Tex. 49; *Evans v. S.* 25 Tex. 80; *Dyches v. S.* 24 Tex. 266. The omission of the clerk to indorse the file mark upon the bond, does not vitiate the bond. It is sufficient if the bond be in court and on file. *Turner v. S.* 41 Tex. 549; *Cundiff v. S.* 38 Tex. 641. It may be filed *nunc pro tunc* even after judgment *non* has been entered upon it. *Haverty v. S.* 32 Tex. 602; *Slocumb v. S.* 11 Tex. 15.

**§1806—Delivery of a bond as an escrow.**—A bail bond cannot be delivered as an escrow to the obligee, though it may be delivered as such by the surety to the principal obligor. When delivered to the obligee it is absolute and binding. *Brown v. S.* 18 App. 326. Where a surety signed a bail bond in blank as to amount, but with the understanding, with the principal, that the blank was to be filled with \$300, and delivered said bond to the principal, and the principal took it and delivered it to the magistrate, who filled the blank by inserting therein \$1000, it was held that the surety was bound for said sum of \$1000. *Gary v. S.* 11 App. 527.

**§1807—Alteration of bond—What is, and effect of.**—Any alteration of an instrument which causes it to speak a language different in legal effect from that which it originally spoke is a material alteration. Thus, the alteration of a bail bond as to the term of the court at which the principal was bound to appear, when such alteration was made without the consent of the sureties, was held to be a material alteration, the effect of which was to release the sureties from liability upon such bond. *Heath v. S.* 14 App. 213. And the erasure of the signature of one of the sureties, without the consent of the others, was held to operate as a release of the others. *Davis v. S.* 5 App. 48; *Kiser v. S.* 13 App. 201. But an immaterial alteration will not vitiate, as where the bond recited that the indictment was presented in the year "180," and the court permitted it to be altered so as to read "1880." *Gragg v. S.* 13 App. 295. If the bond appears upon its face to have been materially altered, the burden is

upon the state, when attempting to enforce it, to explain such appearance. For practice in case of alteration, see *Heath v. S.* 14 App. 213. A bond changed so as to release one surety and substitute another, is not binding, even upon those who consented to the change. *Kiser v. S.* 13 App. 201; *Collins v. S.* 16 App. 274.

**§1808—ART. 289.—Rules laid down in this chapter applicable to all cases where bail is taken.**—The rules laid down in this chapter respecting recognizances and bail bonds are applicable to all such undertakings when entered into in the course of a criminal action, whether before or after an indictment or information, in every case where authority is given to any court, judge, magistrate or other officer, to require bail of a person accused of an offense, or of a witness in a criminal action. [O. C. 265.]

**§1809 — ART. 290.—Bail bond and recognizance—How construed.**—A recognizance or bail bond entered into by a defendant, and which binds him to appear at a particular term of the district court, shall be construed to bind him and his sureties for his attendance upon the court from term to term, and from day to day, until discharged from further liability thereon according to law. [O. C. 267.]

**§1810—Decisions construing bail bonds, etc.**—The legal effect of a recognizance or bail bond is to bind the obligors that the principal will appear from day to day, and term to term of the court, until discharged by the court. *Pickett v. S.* 16 App. 648; *Ex parte Guffee*, 8 App. 409. When the liability of each surety is for the full penalty, the fact that they are bound "jointly and severally," does not make the condition of the bond more onerous than the law. *Fulton v. S.* 14 App. 32. When construed together, the various provisions of the Code require that the sureties shall be severally bound for the payment of the entire amount for which the principal is bound. The liability of the sureties is several as well as joint, and a surety cannot now, as he formerly could, limit his liability to a portion of the entire amount, and the validity of a recognizance or bail bond is not affected by a failure to bind the sureties, in terms, *severally*. *Mathena v. S.* 15 App. 460; but see *Thomas v. S.* 13 App. 496; *Fulton v. S.* 14 App. 32; *Barringer v. S.* 27 Tex. 554; *Ishmael v. S.* 41 Tex. 244.

**§1811—ART. 291.—Minor or married woman cannot be security.**—A minor or married woman cannot be surety on a recognizance or bail bond, but if either of these classes of persons be the accused party, the undertaking shall be binding both upon principal and surety. [O. C. 268.]

See *Pickett v. S.* 16 App. 648.

**§1812—ART. 292.—In what manner bail shall be taken.**—It is the duty of every court, judge, magistrate, or other officer taking bail, to require evidence of the sufficiency of the security offered; but in every case one surety shall be sufficient, if it be made to appear that such surety is worth at least double the amount of the sum for which he is bound, exclusive of all property exempted by law from execution, and of debts or other incumbrances; that he is a resident of this state, and has property therein liable to execution worth the sum for which he is bound. [O. C. 269.]

**§1813—ART. 293.—Property exempt from sale shall not be liable for, etc.**—The property secured by the constitution and laws from forced sale shall not in any case be held liable for the satisfaction of a recognizance or bail bond, either as to the principal or sureties. [O. C. 270.]

**§1814—ART. 294.—How sufficiency of sureties shall be ascertained.**—In order to test the sufficiency of the security offered to any recognizance or bail-bond, unless the court or officer taking the same is fully satisfied as to the sufficiency of the security, the following oath shall be made in writing, and subscribed by the surety: "I, A B, do swear (or affirm as the case may be), that I am worth in my own right at least the sum of [*here insert the amount in which the surety is bound,*] after deducting from my property all that which is exempt by the constitution and laws of the state from forced sale, and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all incumbrances upon my property which are known to me; that I reside in.....county,

and have property in this state liable to execution, worth [amount for which he offers to be bound] or more.

Dated.....and attest by the }  
judge of the court, clerk, }  
magistrate or sheriff. }

[Signed by the surety.]

Which affidavit shall be filed with the papers of the cause, or criminal proceedings. [O. C. 27.]

See Willson's Cr. Forms, 599.

**§1815—ART. 295.—Affidavit not conclusive, but further evidence required, when.**—The affidavit provided for in the preceding article shall not be deemed conclusive, as to the sufficiency of the security, and if the court or officer taking the recognizance or bail bond is not fully satisfied as to the sufficiency of the security offered, further evidence shall be required before approving the same. [Added in revising.]

**§1816—ART. 296.—Rules for fixing amount of bail.**—The amount of bail to be required in any case is to be regulated by the court, judge, magistrate, or officer taking the bail; they are to be governed in the exercise of this discretion by the constitution of this state, and by the following rules:

1. The bail shall be sufficiently high to give reasonable assurance that the undertaking will be complied with.

2. The power to require bail is not to be used in such manner as to make it an instrument of oppression.

3. The nature of the offense and the circumstances under which it was committed are to be considered.

4. The pecuniary circumstances of the accused are to be regarded, and proof may be taken upon this point. [O. C. 272.]

**§1817—Decisions as to amount of bail.**—The assessment of the amount of bail is a matter within the discretion of the court, judge, magistrate or officer taking the same, and will not be revised on appeal, unless it clearly appears that the discretion has been abused and the constitution violated. The constitution declares that excessive bail shall not be required. Bill of Rights, Sec. 13. *McConnell v. S. 13 App. 390.* See an instance of bail held to be excessive. *Ex parte Wilson, 20 App. 498.* *Prima facie*, the sum of \$500 is not excessive where the accused is charged with the commission of a felony. Whether excessive in fact depends largely upon the pecuniary condition of the accused. A sum which might be trivial to a wealthy man might be oppressive to a poor one. *Hutchings v. S. 11 App. 28.* The record, in *habeas corpus* cases on appeal, should always disclose the pecuniary circumstances of the accused, as a guide to fix the amount of bail, should the case be adjudged to be a bailable one, and should the record fail to make such disclosure, the court of appeals cannot consider that question. *McConnell v. S. 13 App. 390; Ruston v. S. 15 App. 324; Ex parte Coldiron, id. 464; Ex parte Walker & Black, 3 App. 668; Miller v. S. 42 Tex. 309.*

## II. SURRENDER OF THE PRINCIPAL BY HIS BAIL.

**§1818—ART. 297.—Surety may surrender his principal.**—Those who have become bail for the accused, or either of them, may at any time relieve themselves of their undertaking by surrendering the accused into the custody of the sheriff of the county where he is prosecuted. [O. C. 273.]

**§1819—Decisions as to surrender.**—When a surety desires to release himself from further liability as such upon a bail bond, the law provides the manner in which he may accomplish it, and one of the modes provided must be strictly complied with, and the sheriff of the proper county is the only officer authorized to receive the surrender. *Roberts v. S. 4 App. 129; Kaiser v. S. 13 App. 201.* Surrender of the principal relegates him to the custody of the sheriff under the original *capias*, and another *capias* is not essential to the legal detention of the prisoner. *Patillo v. S. 9 App. 456.*

**§1820—ART. 298.—When surrender is made during term of court.**—Should a surrender of the accused be made during a term of the court to which he has bound himself to appear, the sheriff shall take him before the court; and if he is willing to give other bail, the court shall forthwith require him to do so, as in other cases. [O. C. 274.]

§1821—ART. 299.—**When court is not in session.**—If the surrender be made while the court is not in session, the sheriff may take himself the necessary bail bond. [O. C. 275.]

Prior to this provision the sheriff did not have such authority. *S. v. Wren*, 21 Tex. 379.

§1822—ART. 300.—**Surety may obtain a warrant of arrest for principal, when.**—Any surety desiring to surrender his principal may, upon making a written affidavit of such intention before the court or magistrate before which the prosecution is pending, obtain from such court or magistrate a warrant of arrest for such principal, which shall be executed as in other cases. [O. C. 274.]

§1823—ART. 301.—**Proceedings when surrender is in term time, and accused fails to give bond.**—If the accused fail or refuse to give bail, in case of a surrender, during a term of the court, the court shall make an order that he be committed to jail until the bail be given; and this shall be a sufficient commitment without any written order or warrant to the sheriff. [O. C. 275.]

§1824—ART. 302.—**When surrender is made in vacation, and accused fails, etc.**—When the surrender is made at any other time than during the session of the court, and the defendant fails or refuses to give other bail, the sheriff shall take him before the nearest magistrate, and such magistrate shall issue a warrant of commitment, reciting the fact that the accused has been once admitted to bail, has been surrendered and now fails or refuses to give other bail. [O. C. 276.]

§1825—**Rules as to subsequent bail.**—In taking subsequent bail-bonds, the officer is to be governed by the same rules as are applicable in taking bail in the first instance, but is in no manner bound by the amount of a previous bond taken on his own authority. *Patillo v. S.* 9 App. 456; *Neblett v. S.* 6 App. 316; *Barringer v. S.* 27 Tex. 553.

§1826—ART. 303.—**Sheriff, etc., may take bail bond, when.**—The sheriff or other peace officer, in cases of misdemeanor, has authority at all times, whether during the term of the court or in vacation, where he has a defendant in custody under a warrant of commitment, warrant of arrest, or *capias*, or where the accused has been surrendered by his bail, to take of the defendant a bail-bond. [O. C. 279.]

See, *ante*, §§1804, 1790.

§1827—ART. 304.—**Sheriff, etc., not authorized to take bail in felony case when court is in session.**—In cases of felony, when the accused is in custody of the sheriff or other peace officer, and the court before which the prosecution is pending is in session in the county where the accused is in custody, such sheriff or peace officer is not authorized to take a bail-bond of the accused, but must take the accused forthwith before such court, that he may there enter into recognizance or be committed, as the case may be. [O. C. 280.]

See *Peters v. S.* 10 App. 302; *Kiser v. S.* 13 App. 201; *Arrington v. S.* *Id.* 554.

§1828—ART. 305.—**May take bail in felony cases, when.**—In a felony case, if the court before which the same is pending is not in session in the county where the defendant is in custody, the sheriff or other peace officer having him in custody may take his bail-bond in such amount as may have been fixed by the court or magistrate, or if no amount has been fixed, then in such amount as such sheriff or other peace officer may consider reasonable. [O. C. 281.]

See, *ante*, §§1790-1804. *Gragg v. S.* 18 App. 295.

§1829—ART. 306.—**Sureties are severally bound, etc.**—In all recognizances, bail-bonds, or other bonds, taken under the provisions of this

Code, the sureties shall be severally bound, and where a surrender of the principal is made by one or more of them, all the sureties shall be considered discharged, and the principal shall be required to give new bail, as in the first instance. [O. C. 281-283.]

§1830—**Decisions under preceding article.**—When construed together, Articles 283, 287 and 306 of this Code require that the sureties in a recognizance or bail-bond shall each be severally bound for the payment of the entire amount for which their principal is bound. The liability of such sureties is several as well as joint, and no surety can now limit his liability to a fraction of the entire amount. *Mathena v. S.* 15 App. 460; *Fulton v. S.* 14 App. 32; *Rainbolt v. S.* 34 Tex. 286. A judgment *nisi* is properly rendered against the defendants severally for the amount of the bond. *Kliser v. S.* 13 App. 201. A recognizance is not only a joint but a several undertaking, and, if good as to the principal and one of the sureties, such surety is liable, though another surety may not be. *Ray v. S.* 16 App. 268. See further, *post*, §§2015, 2016.

### III. BAIL BEFORE THE EXAMINING COURT.

§1831—**ART. 307.—Rules in relation to bail, and of a general nature, applicable in this court.**—The rules laid down in the preceding articles of this chapter, relating to the amount of the bail, the number of sureties, the person who may be surety, the property which is exempt from liability, the form of bail-bonds, the responsibility of parties to the same, and all other rules in this chapter of a general nature, are applicable to bail taken before an examining court. [O. C. 284.]

§1832—**ART. 308.—Proceedings when bail is granted.**—After a full examination of the testimony the magistrate shall, if the case be one where bail may properly be granted and ought to be required, proceed to make an order that the accused execute a bail-bond with sufficient security, conditioned for his appearance before the proper court. [O. C. 285.]

See, *ante*, §1776.

§1833—**ART. 309.—When bail cannot be allowed, and when it shall be allowed.**—In capital cases, where the proof of the guilt of the accused is *evident*, bail cannot be allowed. In all other cases the accused is entitled to bail as a matter of right. [O. C. 286, 287.]

See, *ante*, §§1442, 1443, 1444, 1445.

§1834—**ART. 310.—Reasonable time given to procure bail.**—Reasonable time shall be given the accused to procure security. [O. C. 289.]

§1835—**ART. 311.—When bail is not given magistrate shall commit accused, etc.**—If, after the allowance of a reasonable time, the security be not given, the magistrate shall make an order committing the accused to jail, to be there kept safely until legally discharged, and he shall issue a warrant of commitment accordingly. [O. C. 290.]

See, *ante*, §1776.

§1836—**ART. 312.—When accused is ready to give bail a bond shall be prepared, etc.**—If the party be ready to give bail, the magistrate shall prepare, or cause to be prepared, a bail-bond, which shall be signed by the accused and his surety or sureties, the magistrate first being satisfied as to the sufficiency of the security. [O. C. 291.]

*Willson's Cr. Forms*, 839; *Arrington v. S.* 13 App. 554.

§1837—**ART. 313.—Accused shall be liberated upon giving bond.**—In all cases when the accused has given the required bond, either to the magistrate or the officer having him in custody, he shall at once be set at liberty. [O. C. 293, 294.]

§1838—**ART. 314.—Magistrate shall certify proceedings to proper court.**—The magistrate before whom an examination has taken place upon a criminal accusation, shall certify to all the proceedings had before him, and transmit them, sealed up, to the court before which the defendant is subject



to be tried upon indictment or information, writing his name across the seals of the envelope containing the proceedings. The voluntary statement of the defendant, the testimony of the witnesses, bail-bonds of the defendant and of witnesses, and all and every other proceeding in the case, shall be thus delivered to the clerk of the proper court without delay. [O. C. 295.]

Willson's Cr. Forms, 833; *ante*, §1768.

§1839—ART. 315.—**Duty of clerks who receive such proceedings.**—If the proceedings be delivered to a clerk of the district court, he shall keep the same safely, and deliver the same to the foreman of the next grand jury as soon as said grand jury is organized. If the proceedings are delivered to a clerk of the county court, he shall keep the same safely, and without delay deliver them to the district or county attorney of his county. [Added in revising.]

See *Kerry v. S.* 17 App. 178; *ante*, §1768.

§1840—ART. 316.—**Duty of magistrate in all cases to certify and deliver proceedings.**—It is the duty of a magistrate, as well where a party has been discharged as where he has been held to bail or committed, to certify and deliver the proceedings in the case, as provided in article 314, and he shall likewise, when a complaint has been made to him of the commission of an offense and there has been a failure from any cause to arrest the accused, file with the proper clerk the complaint and warrant of arrest, together with a list of the witnesses and their residence, if known. [O. C. 296.]

§1841—ART. 317.—**Accused may waive an examination. Proceedings in such case.**—In all bailable cases before an examining court, the accused may waive a trial of the accusation and consent for the magistrate to require bail of him, but in such case the prosecutor or magistrate may cause the witnesses for the state to be examined as in other cases, and the magistrate shall transmit, with the other proceedings in the case, to the clerk of the proper court, a list of the witnesses for the state, whether examined or not, and their residence, if known. [Added in revising.]

#### IV. BAIL BY WITNESSES.

§1842—ART. 318.—**Witnesses required to give bond, when.**—Witnesses on behalf of the state or defendant may be required by the magistrate, upon the examination of any criminal accusation before him, to give bail for their appearance to testify before the proper court; and if a witness make oath that he is unable to give security or deposit a sufficient amount of money in lieu thereof, then his individual bond shall be taken. [O. C. 297.]

Willson's Cr. Forms. 592, 597, 598, 840, 841.

§1843—ART. 319.—**Of amount of security required of a witness.**—The amount of security to be required of a witness is to be regulated by his pecuniary condition, and the nature of the offense with respect to which he is a witness. [O. C. 298.]

§1844—ART. 320.—**Force and effect of witnesses' bonds.**—The bonds given by witnesses for their appearance shall have the same force and effect of bail-bonds, and may be forfeited and recovered upon in the same manner. [O. C. 299.]

§1845—ART. 321.—**Witness who fails, etc., to give bond when required may be committed.**—When a witness, who has been required to give bail, fails or refuses to do so, and fails or refuses to make the affidavit provided for in article 318, he shall be committed to jail as in other cases of a failure or refusal to give bail when required; but he shall be released from custody upon giving such bail, or upon making the affidavit provided for in article 318, and giving his individual bond. [Added in revising.]

## TITLE 6.—OF SEARCH WARRANTS.

## CH. 1. GENERAL RULES.

## 2. WHEN AND HOW A SEARCH WARRANT MAY BE ISSUED.

## CH. 3. THE EXECUTION OF A SEARCH WARRANT.

## 4. PROCEEDINGS ON THE RETURN OF A SEARCH WARRANT.

## CH. 1.—GENERAL RULES.

ART.	SEC.	ART.	SEC.
322. Definition of "search warrant."	1846	326. When asked for in reference to property not stolen.	1850
323. For what purposes it may be issued.	1847	327. These rules applicable to all cases.	1851
324. Its object.	1848		
325. Definition of word "stolen."	1849		

§1846—ART. 322.—Definition of "search warrant."—A "search warrant" is a written order, issued by a magistrate and directed to a peace officer, commanding him to search for personal property, and to seize the same and bring it before such magistrate; or it is a like written order commanding a peace officer to search a suspected place where it is alleged stolen property is commonly concealed, or implements kept for the purpose of being used in the commission of any designated offense. [O. C. 300.]

§1847—ART. 323.—For what purposes it may be issued.—A search warrant may be issued for the following purposes and no others:

1. To discover property acquired by theft, or in any other manner which makes its acquisition a penal offense.

2. To search suspected places where it is alleged property so illegally acquired is commonly kept or concealed.

3. To search places where it is alleged implements are kept for the purpose of being used in forging or counterfeiting.

4. To search places where it is alleged arms or munitions are kept or prepared for the purpose of insurrection or riot.

5. To seize and bring before a magistrate any such property, implements, arms or munitions. [O. C. 301.]

For another purpose of a search warrant, see, *ante*, §622, which authorizes a search warrant for "blind tiger."

§1848—ART. 324.—Its object.—A warrant to search for and seize stolen property is designed as a means of obtaining possession of the property for the purpose of restoring it to the true owner, and detecting any person guilty of the theft or concealment of the same. [O. C. 302.]

\* §1849—ART. 325.—Definition of word "stolen."—The word "stolen," as used in this title, is intended to embrace also the acquisition of property by any means forbidden and made penal by the law of the state. [Added in revising.]

§1850—ART. 326.—When asked for in reference to property not stolen.—When it is alleged that the property, to search for which a warrant is asked, was acquired in any other manner than by theft, the particular manner of its acquisition must be set forth in the complaint and in the warrant. [O. C. 304.]

§1851—ART. 327.—These rules applicable to all cases.—The mode of proceeding, directed to be pursued in applying for a warrant to search for and seize *stolen* property, and the rules prescribed for officers in issuing such warrants, and executing the same, the disposition of the property seized, and

all other rules herein prescribed on the subject shall apply and be pursued when the property to be searched for was acquired in any manner in violation of the provisions of the Penal Code. [Added in revising.]

## CH 2.—WHEN AND HOW A SEARCH WARRANT MAY BE ISSUED.

ART.	SEC.	ART.	SEC.
328. Contents of application for a search warrant.	1852	332. Search warrant may command officer to bring party accused before the magistrate.	1856
329. Contents of application for warrant to discover and seize.	1853	333. Requisites of a search warrant.	1857
330. Contents of application for warrant to search suspected place.	1854	334. Requisites of a warrant to search suspected place.	1858
331. Warrant to arrest may issue with the search warrant in certain cases.	1855		

§1852—ART. 328.—**Contents of application for a search warrant.**—A warrant to search for and seize property alleged to be stolen and concealed at a particular place, may be issued by a magistrate, whenever complaint in writing and on oath is made to such magistrate, setting forth—

1. The name of the person accused of having stolen or concealed the property, or, if his name be unknown, giving a description of the accused; or stating that the person who stole or concealed the property is unknown.

2. The kind of property, and its probable value, alleged to be stolen or concealed.

3. The place where the property is alleged to be concealed.

4. The time, as near as may be, when the property is alleged to have been stolen. [O. C. 307.]

See Willson's Cr. Forms, 892.

§1853—ART. 329.—**Contents of application for warrant to discover and seize.**—A warrant to discover and seize property alleged to have been stolen, or otherwise acquired in violation of the penal law, but not alleged to be concealed at any particular place, may be issued whenever complaint is made in writing and on oath, setting forth—

1. The name of the person suspected of being the thief, or an accurate description of him if his name be unknown, or that the thief is unknown.

2. An accurate description of the property, and its probable value.

3. The time, as near as may be, when the property is supposed to have been stolen.

4. That the person complaining has good ground to believe that the property was stolen by the person alleged to be the thief. [O. C. 306.]

See Willson's Cr. Forms, 893.

§1854—ART. 330.—**Contents of application for warrant to search suspected place.**—A warrant to search any place suspected to be one where stolen goods are commonly concealed, or where implements are kept, for the purpose of aiding in the commission of offenses, may be issued by a magistrate when complaint is made in writing and on oath, setting forth—

1. A description of the place suspected.

2. A description of the kind of property alleged to be commonly concealed at such place, or the kind of implements kept.

3. The name, if known, of the person supposed to have charge of such place, when it is alleged that it is under the charge of any one.

4. When it is alleged that implements are kept at a place for the purpose of aiding in the commission of offenses, the particular offense for which such implements are designed must be set forth. [O. C. 308.]

See Willson's Cr. Forms, 894, 895.

§1855—ART. 331.—**Warrant to arrest may issue with the search warrant in certain cases.**—The magistrate at the time of issuing a search warrant, may also issue a warrant for the arrest of the person accused of having stolen the property, or of having concealed the same, or of having in his possession or charge property concealed at a suspected place, or of having possession of implements designed for use in the commission of the offense of forgery, counterfeiting or burglary, or of having the charge of arms or munitions prepared for the purpose of insurrection, or of having prepared such arms or munitions, or who may be in any legal manner accused of being accomplice or accessory to any of the offenses above enumerated. [O. C. 309.]

§1856—ART. 332.—**Search warrant may command officer to bring party accused before the magistrate.**—The search warrant may, in addition to commanding the peace officer to seize property, also require him to bring before the magistrate the person accused of having stolen or concealed the property. [Added in revising.]

See Willson's Cr. Forms, 896, 897, 898.

§1857—ART. 333.—**Requisites of a search warrant.**—A search warrant to seize property stolen and concealed shall be deemed sufficient if it contain the following requisites:

1. That it run in the name of "The State of Texas."

2. That it be directed to the sheriff or other peace officer of the proper county.

3. That it describe the property alleged to be stolen or concealed, and the place where it is alleged to be concealed, and order the same to be brought before the magistrate.

4. That it name the person accused of having stolen or concealed the property; or, if his name be unknown, that it describe him with accuracy, and direct the officer to bring such person before the magistrate, or state that the person who stole or concealed the property is unknown.

5. That it be dated and signed by the magistrate. [O. C. 311.]

See Willson's Cr. Forms, 896.

§1858—ART. 334.—**Requisites of a warrant to search suspected place.**—A warrant to search a suspected place shall be deemed sufficient if it contain the following requisites:

1. That it run in the name of "The State of Texas."

2. That it describe with accuracy the place suspected.

3. That it describe, as near as may be, the property supposed to be commonly concealed in such suspected place, or the implements alleged to be there kept for the purpose of aiding in the commission of offenses, and state the particular offense for which such implements are designed.

4. That it name the person accused of having charge of the suspected place, if there be any such person, or if his name is unknown, that it describe him with accuracy and direct him to be brought before the magistrate.

5. That it be dated and signed by the magistrate and directed to the sheriff or other peace officer of the proper county. [O. C. 312.]

See Willson's Cr. Forms, 897, 898.

## CH. 3.—OF THE EXECUTION OF A SEARCH WARRANT.

ART.	SEC.	ART.	SEC.
335. Warrant shall be executed without delay, etc.	1859	340. Shall seize person accused and property, and take them before magistrate.	1864
336. Three whole days allowed for warrant to run.	1860	341. Officer shall receipt for property.	1865
337. Officer shall give notice of purpose to execute warrant.	1861	342. How return made.	1866
338. Power of officer executing the warrant.	1862	343. All persons have the right to prevent the consequences of theft, etc.	1867
339. When officer may enter house by force.	1863		

§1859—ART. 335.—**Warrant shall be executed without delay, etc.**—Any peace officer to whom a search warrant is delivered shall execute the same without delay, and forthwith return the same to the proper magistrate. It must be executed within three days from the time of its issuance, and shall be executed within a shorter period, if so directed in the warrant by the magistrate. [O. C. 313, 319.]

§1860—ART. 336.—**Three whole days allowed for warrant to run.**—The three days' time allowed for the execution of a search warrant shall be three whole days, exclusive of the day of its issuance and of the day of its execution. [Added in revising.]

§1861—ART. 337.—**Officer shall give notice of purpose to execute warrant.**—The officer shall, upon going to the place ordered to be searched, or before seizing any property for which he is ordered to make search, give notice of his purpose to the person who has charge of, or is an inmate of the place, or who has possession of the property described in the warrant. [O. C. 315.]

§1862—ART. 338.—**Power of officer executing the warrant.**—In the execution of a search warrant the officer may call to his aid any number of citizens in his county, who shall be bound to aid in the execution of the same. If he is resisted in the execution of the warrant, he may use such force as is necessary to overcome the resistance, but no greater. [O. C. 314, 316.]

§1863—ART. 339.—**When officer may enter house by force.**—In the execution of a search warrant, the officer may break down a door or a window of any house which he is ordered to search, if he cannot effect an entrance by other less violent means; but when the warrant issues only for the purpose of discovering property stolen, or otherwise obtained in violation of the penal law, without designating any particular place where it is supposed to be concealed, no such authority is given to the officer executing the same. [O. C. 317.]

See, also, *ante*, §662.

§1864—ART. 340.—**Shall seize person accused and property, and take them before magistrate.**—When the property, implements, arms or munitions which the officer is directed to search for and seize are found, he shall take possession of the same and carry them before the magistrate. He shall also arrest any person whom he is directed to arrest by the warrant, and forthwith take such person before the magistrate. [O. C. 318.]

§1865—ART. 341.—**Officer shall receipt for property.**—An officer taking any property, implements, arms or munitions, shall receipt therefor to the person from whose possession the same may have been taken. [O. C. 320.]

§1866—ART. 342.—**How return made.**—Upon returning the search warrant the officer shall state on the back of the same, or on some paper

attached to it, the manner in which it has been executed, and shall likewise deliver to the magistrate an inventory of the property, implements, arms or munitions taken in his possession under the warrant. [O. C. 321.]

See Willson's Cr. Forms, 899, 900.

§1867—**ART. 343.—All persons have the right to prevent the consequences of theft, etc.**—All persons have a right to prevent the consequences of theft by seizing any personal property which has been stolen, and bringing it with the supposed offender, if he can be taken, before a magistrate for examination, or delivering the same to a peace officer for that purpose. To justify such seizure there must, however, be reasonable grounds to suppose the property to be stolen, and the seizure must be openly made and the proceedings had without delay. [O. C. 94.]

*Luera v. S.* 12 App. 257; *Smith v. S.* 13 App. 507.

#### CH. 4.—PROCEEDINGS ON THE RETURN OF A SEARCH WARRANT.

ART.	SEC.	ART.	SEC.
344. Disposition of stolen property, etc.	1863	349. Arms, etc., forfeited, when.	1873
345. Officer seizing implements, etc., shall keep same subject, etc.	1869	350. Proceedings when magistrate is satisfied that warrant was issued upon good ground.	1874
346. Magistrate shall proceed to investigate, etc.	1870	351. Magistrate shall certify record, etc., of proceedings to proper court.	1875
347. Shall discharge defendant, when.	1871		
348. Sheriff, etc., shall furnish magistrate schedule of property seized.	1872		

§1868—**ART. 344.—Disposition of stolen property, etc.**—When property is taken under the provisions of this title and delivered to a magistrate, he shall, if it appear that the same was stolen or otherwise acquired in violation of the penal law, dispose of it according to the rules prescribed in this Code with reference to the disposition of stolen property. [O. C. 322.]

See, *post*, Title 11, Chap. 2.

§1869—**ART. 345.—Officer seizing implements, etc., shall keep same subject, etc.**—When a warrant has been issued for the purpose of searching a suspected place, and there be found any such implements, arms or munitions, as are alleged to have been there kept or concealed, the same shall be safely kept by the officer seizing the same, subject to the further order of the magistrate. [O. C. 323.]

§1870—**ART. 346.—Magistrate shall proceed to investigate, etc.**—The magistrate, upon the return of a search warrant, shall proceed to try the questions arising upon the same, and shall take testimony as in other examinations before him, and be governed by like rules. [O. C. 330.]

§1871—**ART. 347.—Shall discharge defendant, when.**—If the magistrate be not satisfied upon investigation that there was good ground for the issuance of the warrant, he shall discharge the defendant and order restitution of the property or articles taken from him, except implements which appear to be designed for forging, counterfeiting or burglary; and in such case the

implements shall be kept by the sheriff or officer who seized the same, subject to the order of the proper court. [O. C. 332.]

See Willson's Cr. Forms, 902.

§1872—ART. 348.—**Sheriff, etc., shall furnish magistrate schedule of property seized.**—The sheriff or other officer who seizes any property under a search warrant, shall furnish the magistrate to whom he returns the warrant with a certified schedule of the articles of property so seized. [O. C. 324.]

See, *ante*, §1866; Willson's Cr. Forms, 900.

§1873—ART. 349.—**Arms, etc., forfeited, when.**—Arms or munitions taken under a warrant in accordance with the provisions of this title shall become forfeited to the state, and shall be so adjudged by the proper court upon the conviction or escape of any person accused of having had possession of or of having concealed them. [O. C. 324.]

As to forfeiture, see, *ante*, §§126, 127.

§1874—ART. 350.—**Proceedings when magistrate is satisfied that warrant was issued upon good ground.**—If the magistrate be satisfied there was good ground for issuing the warrant, he shall proceed to deal with the accused in accordance with the rules prescribed in this Code for other criminal cases before an examining court. [O. C. 331.]

§1875—ART. 351.—**Magistrate shall certify record, etc., of proceedings to proper court.**—The magistrate shall keep a record of all the proceedings had before him in cases of search warrants, and shall certify the same and deliver them to the clerk of the court having jurisdiction of the case before the next term of said court, and accompany the same with all the original papers relating thereto, including the certified schedule of the property seized required by article 348. [O. C. 334.]

[7—Tex. C. C. P.]

## TITLE 7.—OF THE PROCEEDINGS SUBSEQUENT TO COMMITMENT OR BAIL, AND PRIOR TO THE TRIAL.

### CH. 1. THE ORGANIZATION OF THE GRAND JURY.

#### 2. OF THE DUTIES, PRIVILEGES AND POWERS OF THE GRAND JURY.

### CH. 3. OF INDICTMENTS AND INFORMATION.

#### 4. OF PROCEEDINGS PRELIMINARY TO TRIAL.

### CH. 1.—THE ORGANIZATION OF THE GRAND JURY.

ART.	SEC.	ART.	SEC.
352. Jury commissioners shall be appointed, and their qualifications.	1876	372. Shall be interrogated touching qualifications.	1896
353. Commissioners shall be notified of appointment, etc.	1877	373. Mode of testing juror's qualifications.	1897
354. Oath of jury commissioners.	1878	374. When juror is qualified, shall be accepted.	1898
355. Shall be instructed in their duties, furnished with room, stationery, etc.	1879	375. When not qualified shall be excused from serving.	1899
356. Shall be kept free from intrusion and shall not separate, etc.	1880	376. Jury shall be empannelled, when, unless, etc.	1900
357. Shall select grand jurors.	1881	377. Any person may challenge, when. Decisions as to challenges.	1901
358. Qualifications of grand jurors.	1882	378. Definition of "array."	1903
359. Names of grand jurors shall be returned, how.	1883	379. Meaning of "empannelled," etc.	1904
360. Judge shall deliver list to clerk.	1884	380. Causes of challenge to the array.	1905
361. Oath shall be administered to clerk, etc., by judge.	1885	381. Causes of challenge to a particular juror.	1906
362. Deputy clerk subsequently appointed, shall take same oath.	1886	382. Court shall decide challenge summarily.	1907
363. When clerk shall open lists, etc.	1887	383. When challenge is sustained, court shall order other jurors summoned, etc.	1909
364. Mode of summoning grand jurors.	1888	384. Oath of grand jurors. Decisions as to oath.	1910
365. Return of officer.	1889	385. Court shall instruct grand jury.	1911
366. Juror may be fined for not attending.	1890	386. Bailiffs may be appointed, and the oath they take.	1912
367. Where there has been a failure to select, etc., grand jury, court shall direct grand jury to be summoned.	1891	387. Bailiffs' duties.	1913
368. When less than twelve attend, court shall order others summoned.	1892	388. Bailiffs shall take no part in discussions of grand jury, and may be punished for violation of duty.	1914
369. When jurors shall be required to attend forthwith.	1893	389. Another foreman shall be appointed, when.	1915
370. Sheriff shall be directed by the court not to summon disqualified persons.	1894	390. Nine members constitute a quorum.	1916
371. Court shall proceed to test qualifications of jurors, when.	1895	391. May be re-assembled after having been discharged for the term.	1917

§1876—ART. 352.—Jury commissioners shall be appointed, and their qualifications.—The district judge shall, at each term of the district court, appoint three persons to perform the duties of jury commissioners, who shall possess the following qualifications:

1. They shall be intelligent citizens of the county and able to read and write.

2. They shall be freeholders in the county and qualified jurors in the county.

3. They shall be residents of different portions of the county.

4. They shall have no suit in the district court of such county which requires the intervention of a jury. [Act Aug. 1, 1876, p. 79, §4.]

See McDonald v. S. 15 App. 493; Sayles' Civ. Stat. Title 57, Ch. 2.



§1877—ART. 353.—**Commissioners shall be notified of appointment, etc.**—The judge shall cause the persons appointed as jury commissioners to be notified by the sheriff or other proper officer of such appointment, and of the time and place when and where they are to appear before the judge. [Act Aug. 1, 1876, p. 79, §4.]

§1878—ART. 354.—**Oath of jury commissioners.**—When the persons appointed appear before the judge, he shall administer to them the following oath: "You do swear faithfully to discharge the duties required of you as jury commissioners; that you will not knowingly elect any man as jurymen whom you believe to be unfit and not qualified; that you will not make known to any one the name of any jurymen selected by you and reported to the court; that you will not, directly or indirectly, converse with any one selected by you as a jurymen concerning the merit of any case to be tried at the next term of this court until after said cause may be tried or continued or the jury discharged." [Act Aug. 1, 1876, p. 79, §4.]

§1879—ART. 355.—**Shall be instructed in their duties, furnished with room, stationery, etc.**—The jury commissioners, after they have been organized and sworn, shall be instructed by the judge in their duties and shall then retire in charge of the sheriff or a deputy sheriff to a suitable room or apartment to be secured by the sheriff for that purpose. They shall be furnished by the clerk with the necessary stationery, and with the names of the persons appearing from the records of the court to be exempt or disqualified from serving on the jury at each term, and they shall also be furnished with the last assessment roll of the county. [Act Aug. 1, 1876, p. 79, §6.]

§1880—ART. 356.—**Shall be kept free from intrusion; shall not separate, etc.**—The jury commissioners shall be kept free from the intrusion of any person during their session, and shall not separate without leave of the court until they shall have completed the duties required of them. [Act Aug. 1, 1876, p. 79, §6.]

§1881—ART. 357.—**Shall select grand jurors.**—The jury commissioners shall select from the citizens of the different portions of the county sixteen persons, to be summoned as grand jurors for the next term of the district court. [Act Aug. 1, 1876, p. 83, §28.]

See *Smith v. S.* 19 App. 95; *Rainey v. S.* *Id.* 479.

§1882—ART. 358.—**Qualifications of grand jurors.**—No person shall be selected or serve as a grand juror who does not possess the following qualifications:

1. He must be a citizen of the state and of the county in which he is to serve, and qualified under the constitution and laws to vote in said county.
2. He must be a freeholder within the state, or a householder within the county.
3. He must be of sound mind and good moral character.
4. He must be able to read and write.
5. He must not have been convicted of any felony.
6. He must not be under indictment or other legal accusation of theft, or of any felony. [Act Aug. 1. 1876, p. 78, §§1-3; O. C. 389; Const. art. 16, sec. 19.]

§1883—ART. 359.—**Names of grand jurors shall be returned, how.**—The names of the persons selected as grand jurors by the commissioners shall be written upon a paper, and the fact that they were so selected shall be certified and signed by the jury commissioners, who shall place said paper so certified and signed in an envelope and seal the same and indorse thereon the words: "The list of grand jurors selected at——term of the

district court," the blank to be filled by stating the month and year in which the term of the court began its session. The commissioners shall write their names across the seal of said envelope, and direct the same to the district judge and deliver it to him in open court. [Act Aug. 1, 1876, p. 78, §28.]

§1884—ART. 360.—**Judge shall deliver list to clerk.**—The judge shall deliver the envelope containing the list of grand jurors, as provided for in the preceding article, to the clerk or one of his deputies, in open court, and without opening the same. [Act Aug. 1, 1876, p. 78, §8.]

§1885—ART. 361.—**Oath shall be administered to clerk, etc., by judge.**—Before the list of grand jurors is delivered to the clerk as provided in the preceding article, the judge shall administer to the clerk and each of his deputies, in open court, the following oath: "You do swear that you will not open the jury lists now delivered to you, nor permit them to be opened until the time prescribed by law; that you will not directly or indirectly converse with any one selected as a juror concerning any case or proceeding which may come before such juror for trial in this court at its next term." [Act Aug. 1, 1876, p. 78, §8.]

§1886—ART. 362.—**Deputy clerk shall take same oath.**—Should the clerk subsequently appoint a deputy, such clerk shall administer to him the same oath at the time of such appointment. [Act Aug. 1, 1876, p. 78, §8.]

§1887—ART. 363.—**When clerk shall open lists, etc.**—Within thirty days of the next term of the district court, and not before, the clerk or one of his deputies shall open the envelope containing the list of grand jurors, and make out a fair copy of the names of the persons selected as grand jurors, and certify to the same under his official seal and deliver it to the sheriff or his deputy. [Act Aug. 1, 1876, p. 78, §9.]

See Willson's Cr. Forms, 558.

§1888—ART. 364.—**Mode of summoning grand jurors.**—It shall be the duty of the sheriff or his deputy to summon the persons named in the list at least three days, exclusive of the day of service, prior to the first day of the term of the court at which they are to serve, by giving personal notice to each juror of the time and place when and where he is to attend as a grand juror, or by leaving at his place of residence, with a member of his family over sixteen years old, a written notice to such juror that he has been selected as a grand juror, and the time and place when and where he is to attend. [Act Aug. 1, 1876, p. 78, §9.]

§1889—ART. 365.—**Return of officer.**—The sheriff or officer executing such summons shall return the list on the first day of the term of the court at which such jurors are to serve, with a certificate thereon of the date and manner of service upon each juror, and if any of said jurors have not been summoned he shall also state in his certificate the reason why they have not been summoned. [Act Aug. 1, 1875, p. 78, §9.]

See Willson's Cr. Forms, 559.

§1890—ART. 366.—**Juror may be fined for not attending.**—A jury legally summoned, failing to attend without a reasonable excuse, may, by order of the court entered on the record, be fined not less than ten nor more than one hundred dollars. [Act Aug. 1, 1876, p. 78, §10.]

§1891—ART. 367.—**Failure to select, etc., grand jury; duty of court.**—If for any cause there should be a failure to select and summon a grand jury as herein directed, or when none of those summoned shall attend, the district court shall, on the first day of the organization thereof, direct a writ to be issued to the sheriff commanding him to summon any number of

persons not less than twelve nor more than sixteen persons to serve as grand jurors. [O. C. 347.]

See Willson's Cr. Forms, 560. The original article read "any number of persons not exceeding twenty."

§1892—ART. 368.—**When less than twelve attend, court shall order others summoned.**—When a number less than twelve of those summoned to serve as grand jurors are found to be in attendance and qualified to serve as grand jurors, the court shall order the sheriff to summon such additional number of persons as may be deemed necessary to constitute a grand jury of twelve men. [O. C. 354.]

The original article limited the number to not less than fifteen.

§1893—ART. 369.—**When jurors shall be required to attend forthwith.**—The jurors provided for in the two preceding articles shall be summoned to attend before the court forthwith, and shall be summoned in person, but shall not be entitled to service three days before the time they are to attend, as provided in the case of jurors selected by jury commissioners. [Added in revising.]

§1894—ART. 370.—**Sheriff not to summon disqualified persons.**—The court, upon directing the sheriff to summon grand jurors not selected by the jury commissioners, shall instruct him that he must summon no person to serve as a grand juror who does not possess the qualifications prescribed in article 358. [Added in revising.]

§1895—ART. 371.—**Court shall test qualifications of jurors, when.**—When as many as twelve persons summoned to serve as grand jurors are in attendance upon the court, it shall proceed to test their qualifications as such. [O. C. 348.]

The original article fixed the number at fifteen. Under the constitution and law, as at present existing, a grand jury must be composed of *twelve* men, no more, and no less. Const. Art. 5, Sec. 13; Lott v. S. 18 App. 627; McNeese v. S. 19 App. 48; Smith v. S. *Id.* 95; Rainey v. S. *Id.* 479; Williams v. S. *Id.* 265; *post*, §1900.

§1896—ART. 372.—**Shall be interrogated touching qualifications.**—Each person who is presented to serve as a grand juror shall, before being impannelled, be interrogated on oath by the district judge, or under his direction, touching his qualifications. [O. C. 349.]

See Willson's Cr. Forms, 563.

§1897—ART. 373.—**Mode of testing jurors' qualifications.**—In trying the qualifications of any person to serve as a grand juror, he shall be asked these questions:

1. Are you a citizen of this state and county, and qualified to vote in this county under the constitution and laws of this state?
2. Are you a freeholder in this state or a householder in this county?
3. Are you able to read and write? [O. C. 350.]

See, *ante*, §1882.

§1898—ART. 374.—**When juror is qualified, shall be accepted, etc.**—When by the answers of the person it appears to the court that he is a qualified juror, he shall be accepted as such, unless it be shown that he is not of sound mind or of good moral character, or unless it be shown that he is in fact not a qualified voter. [O. C. 351.]

§1899—ART. 375.—**When not qualified, shall be excused.**—Any person summoned who does not possess the requisite qualifications shall be excused by the court from serving. [O. C. 352.]

§1900—ART. 376.—**Jury shall be impannelled when, unless, etc.**—When twelve qualified jurors are found to be present the court shall proceed

to impanel them as a grand jury, unless a challenge is made, which may be to the array or to any particular individual presented to serve as a grand juror. [O. C. 353.]

See, *ante*, §1895.

**§1901—ART. 377.—Any person may challenge, when.**—Any person, before the grand jury have been impanelled, may challenge the array of jurors or any person presented as a grand juror, and in no other way shall objections to the qualifications and legality of the grand jury be heard. Any person confined in jail in the county shall, upon his request, be brought into court to make such challenge. [O. C. 362.]

**§1902—Decisions as to challenges.**—Objections to a grand jury, or to individual grand jurors, can only be made by challenge. *S. v. Vahe*, 20 Tex. 779; *Johnson v. S.* 33 Tex. 570; *Hudson v. S.* 40 Tex. 12; *Newman v. S.* 43 Tex. 525; *Reed v. S.* 1 App. 1; *Thomason v. S.* 2 App. 550. A challenge to the array is the only mode by which objections are available against the grand jury as a body, and such challenge can be made for no other causes than those specified in article 380, *post*. *Reed v. S.* 1 App. 1; *Green v. S.* *Id.* 83; *Smith v. S.* *Id.* 134; *Kemp v. S.* 11 App. 174; *Hart v. S.* 15 App. 202. The proper time to make such a challenge is before the jurors have been interrogated as to their qualifications. But a challenge to a particular juror may be made after the qualifications of the jurors have been tested. *Reed v. S.* 1 App. 1; *Grant v. S.* 2 App. 164. A prisoner in jail, as well as every other person, should have the opportunity of challenging, but unless such opportunity is requested by a prisoner, he cannot be heard to complain. With a view to the prevention of improper prosecutions, the practice of affording prisoners an opportunity to challenge the grand jury is commended. *Kemp v. S.* 11 App. 174; *Reed v. S.* 1 App. 1; *Smith v. S.* *Id.* 134; *Thomason v. S.* 2 App. 550; *Cordova v. S.* 6 App. 207; *Hart v. S.* 15 App. 202. Before the adoption of the Code, the practice was different. See *Tompkins v. R. Dallam*, 488; *S. v. Jacobs*, 6 Tex. 99; *S. v. Foster*, 9 Tex. 65; *Jackson v. S.* 11 Tex. 261; *Vanhook v. S.* 12 Tex. 252; *Barker v. S.* *Id.* 273; *Stanley v. S.* 16 Tex. 557; *S. v. White*, 17 Tex. 242; *Martin v. S.* 22 Tex. 214.

**§1903—ART. 378.—Definition of "array."**—By the array of grand jurors is meant the whole body of persons summoned to serve as such before they have been impanelled. [O. C. 368.]

See *Rainey v. S.* 19 App. 479.

**§1904—ART. 379.—Meaning of "impanelled," etc.**—A grand juror is said to be impanelled after his qualifications have been tried and he has been sworn. By the word "panel" is meant the whole body of grand jurors. [O. C. 360.]

**§1905—ART. 380.—Causes for challenge to the array.**—A challenge to the array shall be made in writing, and for these causes only:

1. That the persons summoned as grand jurors are not, in fact, the persons selected by the jury commissioners.

2. In case of grand jurors summoned by order of the court, that the officer who summoned them has acted corruptly in summoning any one or more of them. [O. C. 363.]

See *Wilson's Cr. Forms*, 564; *ante*, §1902.

**§1906—ART. 381.—Causes for challenge to a particular juror.**—A challenge to a particular grand juror may be made orally, and for the following causes only:

1. That he is not a qualified grand juror.

2. That he is the prosecutor upon an accusation against the person making the challenge.

3. That he is related by consanguinity or affinity to some person who has been held to bail, or who is in confinement upon a criminal accusation. [O. C. 364.]

See, *ante*, §1902.

**§1907—ART. 382.—Court shall decide challenge summarily.**—When a challenge to the array or to any individual has been made, the court shall hear proof and decide in a summary manner whether the challenge be well founded or not. [O. C. 365.]

§1908—ART. 383.—**Court shall order other jurors summoned, when.**—If the challenge to the array be sustained, or if by challenge to any particular individual the number of grand jurors be reduced below twelve, the court shall order another grand jury to be summoned, or shall order the panel to be completed, as the case may be, as provided in previous articles of this chapter. [O. C. 366, 367.]

See Willson's Cr. Forms, 565, 566.

§1909—ART. 384.—**Oath of grand jurors.**—When the grand jury is completed the court shall appoint one of the number foreman, and the following oath shall be administered by the court, or under its direction, to each of the jurors:

"You solemnly swear (or affirm, as the case may be) that you will diligently inquire into, and true presentment make of all such matters and things as shall be given you in charge; the state's counsel, your fellows and your own you shall keep secret, unless required to disclose the same in the course of a judicial proceeding in which the truth or falsity of evidence given in the grand jury room, in a criminal case, shall be under investigation. You shall present no person from envy, hatred or malice, neither shall you leave any person unrepresented for love, fear, favor, affection or hope of reward, but you shall present things truly as they come to your knowledge, according to the best of your understanding, so help you God." [O. C. 356; Amended Act, March 13, 1875, p. 166.]

See Willson's Cr. Forms, 568. A violation of this oath is a misdemeanor. *Ante*, §319a P. C.

§1910—**Declations as to oath.**—See recitals held sufficient to show that the grand jurors were sworn according to law. *Pierce v. S.* 12 Tex. 210; *Loving v. S.* 16 Tex. 558; *Thomason v. S.* 2 App. 550; *Ferguson v. S.* 6 App. 504. A defendant cannot question the form of the oath, or the process upon which the grand jury were summoned. *West v. S.* 6 App. 485. See the oath construed with respect to requiring a grand juror to testify to the secrets of the grand jury. *Clanton v. S.* 13 App. 139, which overrules upon this subject *Ruby v. S.* 9 App. 353. See, also, *ante*, §319a.

§1911—ART. 385.—**Court shall instruct grand jury.**—After the grand jury has been sworn, the court shall give them instruction as to their duty. [O. C. 357.]

§1912—ART. 386.—**Bailiffs may be appointed; their oath.**—One or more bailiffs may be appointed by the court to attend upon the grand jury, and at the time of appointment the following oath shall be administered to each of them by the court, or under its direction:

"You solemnly swear (or affirm, as the case may be) that you will faithfully and impartially perform all the duties of bailiff of the grand jury, and that you will keep secret the proceedings of the grand jury, so help you God." [O. C. 358.]

See Willson's Cr. Forms, 569, 570.

§1913—ART. 387.—**Bailiff's duties.**—A bailiff is to obey the instructions of the foreman, to summon all witnesses, and generally to perform all such duties as are required of him by the foreman. Where two bailiffs are appointed one of them shall be always with the grand jury. [O. C. 359.]

§1914—ART. 388.—**Bailiff shall take no part in discussions of grand jury; punishment.**—A bailiff shall take no part in the discussions or deliberations of the grand jury, and shall not be present when the grand jury is either discussing or voting upon a question, and any violation of duty upon the part of a bailiff shall be reported by the grand jury to the court, and for such violation of duty he may be punished by the court as for contempt. [Added in revising.]

§1915—ART. 389.—**Another foreman appointed, when.**—In case of the absence of the foreman of the grand jury from any cause, or of his

inability or disqualification to act, the court shall appoint in his place some other member of the body. [O. C. 361.]

§1916—ART. 390.—**Nine members constitute a quorum.**—Nine members shall be a quorum for the purpose of discharging any duty, or exercising any right properly belonging to the grand jury. [Const. art. V, §13; O. C. 370.]

See *McNeese v. S.* 19 App. 48; *Smith v. S.* *Id.* 95.

§1917—ART. 391.—**May be re-assembled after having been discharged for the term.**—When a grand jury has been discharged by the court for the term, it may be re-assembled by the court at any time during the term, and in case of failure of one or more of the members to re-assemble the court may complete the panel by impanelling other qualified persons in their stead, in accordance with the rules prescribed in this chapter for completing the grand jury in the first instance. [Added in revising.]

Such was the practice before the adoption of this article. *Willson v. S.* 32 Tex. 112; *Newmar v. S.* 43 Tex. 525; *Mitchell v. S.* *Id.* 512; *Willson's Cr. Forms*, 578.

## CH 2.—OF THE DUTIES, PRIVILEGES AND POWERS OF THE GRAND JURY.

ART.	SEC.	ART.	SEC.
392. Suitable place to be prepared for grand jury.	1918	405. Evasion of service by witness may be punished by fine.	1931
393. Deliberations shall be secret.	1919	406. When witness refuses to testify, shall be dealt with, how.	1932
394. Attorney representing the state may go before.	1920	407. Oath to witnesses.	1933
395. Attorney may examine witness, etc.	1921	408. How witnesses shall be questioned.	1934
396. Grand jury may send for attorney representing the state, etc.	1922	409. When a felony has been committed by unknown person.	1935
397. Grand jury may seek advice from the court.	1923	410. (Was stricken out by the legislature.)	1935a
398. Foreman shall preside over grand jury.	1924	411. After the testimony, grand jury shall vote.	1936
399. Grand jury shall meet and adjourn.	1925	Decisions under preceding article.	1937
400. Duties of grand jury.	1926	412. Memorandum shall state what.	1938
401. Foreman may issue process for witnesses.	1927	413. Indictment shall be prepared by attorney, and signed, etc., by foreman.	1939
402. Attachment for witnesses in another county may be obtained, how.	1928	Decisions under preceding article.	1940
403. Attachment may be obtained in vacation, etc.	1929	414. Indictment shall be presented in open court, etc.	1941
404. Bailiff, etc., shall execute and return process from grand jury, etc.	1930	415. Presentment to be entered of record, etc.	1942
		Decisions under preceding article.	1943

§1918—ART. 392.—**Suitable place to be prepared for grand jury.**—The grand jury, after being organized, shall proceed to the discharge of their duties, and some suitable place shall be prepared by the sheriff for their sessions. [O. C. 371.]

§1919—ART. 393.—**Deliberations shall be secret.**—The deliberations of the grand jury shall be secret, and any member of the body or bailiff who divulges anything transpiring before them, in the course of their official duties, shall be liable to a fine, as for contempt of the court, not exceeding

one hundred dollars, and to imprisonment not exceeding five days. [O. C. 372.] See also Acts 1887, Chap. 136, p. 131.

§1920—ART. 394.—**Attorney representing the state may go before, etc.**—The attorney representing the state may go before the grand jury at any time, except when they are discussing the propriety of finding a bill of indictment or voting upon the same. [O. C. 373.]

See *Rothschild v. S.* 7 App. 519.

§1921—ART. 395.—**Attorney may examine witnesses, etc.**—The attorney representing the state may examine the witnesses before the grand jury, and may advise as to the proper mode of interrogating them, if desired, or if he thinks it necessary. [O. C. 375.]

§1922—ART. 396.—**Grand jury may send for attorney representing the state, etc.**—When any question arises before a grand jury respecting the proper discharge of their duties, or any matter of law about which they may require advice, it is their right to send for the attorney representing the state and take his advice thereon. [O. C. 374.]

§1923—ART. 397.—**Grand jury may seek advice from the court.**—The grand jury may also seek and receive advice from the court touching any matter before them, and for this purpose shall go into court in a body; but they shall so guard the manner of propounding their questions as not to divulge the particular accusation that is pending before them; or they may propound their questions in writing, upon which the court may give them the desired information in writing. [O. C. 376.]

§1924—ART. 398.—**Foreman shall preside over grand jury, etc.**—The foreman shall preside over the sessions of the grand jury and conduct its business and proceedings in an orderly manner. He may appoint one or more of the members of the body to act as clerks for the grand jury. [Added in revising.]

§1925—ART. 399.—**Grand jury shall meet and adjourn.**—The grand jury shall meet and adjourn at times agreed upon by a majority of the body, but they shall not adjourn at any one time for more than three days unless by the consent of the court; but with the consent of the court they may adjourn for a longer time, and shall, as near as may be, conform their adjournments to those of the court. [O. C. 377.]

§1926—ART. 400.—**Duties of grand jury.**—It is the duty of the grand jury to inquire into all offenses liable to indictment, of which any of the members may have knowledge, or of which they shall be informed by the attorney representing the state, or any other credible person. [O. C. 378.]

§1927—ART. 401.—**Foreman may issue process for witnesses.**—The foreman of the grand jury may issue a summons or attachment for any witness in the county where they are sitting, which summons or attachment may require the witness to appear before them at a time fixed or forthwith, without stating the matter in respect to which the witness will be called upon to testify. [O. C. 379; Act Aug. 15, 1870.]

See *Willson's Cr. Forms*, 573, 574.

§1928—ART. 402.—**Attachment for witnesses in another county, obtained how.**—The foreman of the grand jury or the attorney representing the state may, upon application in writing to the district court, stating the name and residence of the witness, and that his testimony is believed to be material, cause an attachment to be issued to any county in the state for such witness, returnable to the grand jury then in session, or to the next grand jury for the county from whence the same issued, as such foreman or attorney

may desire, which attachment shall command the sheriff or any constable of the county where such witness resides, to arrest such witness and have him before the grand jury at the time and place specified in the writ. [Act Aug. 15, 1870.]

See Willson's Cr. Forms, 575, 576.

§1929—ART. 403.—**Attachment may be obtained in vacation, etc.**—The district or county attorney may cause an attachment for a witness to be issued, as provided in the preceding article, either in term time or in vacation. [Act Aug. 15, 1870.]

§1930—ART. 404.—**Bailiff, etc., shall execute and return process from grand jury, etc.**—The bailiff or other officer who receives process to be served from a grand jury, shall forthwith execute the same and return it to the foreman, if the grand jury be in session; and if the grand jury be not in session, the process shall be returned to the clerk of the district court. If the process is returned not executed, the return shall state the reason why it was not executed. [Added in revising.]

§1931—ART. 405.—**Evasion of service by witness may be punished by fine.**—If it be made to appear satisfactorily to the court that a witness for whom a summons or attachment has been issued, to go before the grand jury, is in any manner willfully evading the service of such summons or attachment, the court may fine such witness as for a contempt not exceeding one hundred dollars. [Added in revising.]

§1932—ART. 406.—**When witness refuses to testify, dealt with how.**—When a witness, brought in any manner before a grand jury, refuses to testify, such fact shall be made known to the attorney representing the state or to the court, and the court may compel the witness to answer the question, if it appear to be a proper one, by imposing a fine not exceeding one hundred dollars, and by committing the party to jail until he is willing to testify. [O. C. 381.]

§1933—ART. 407.—**Oath to witnesses.**—The following oath shall be administered by the foreman, or under his direction, to all witnesses before being interrogated:

"You solemnly swear (or affirm, as the case may be) that you will not divulge, either by words or signs, any matter about which you may be interrogated, and that you will keep secret all proceedings of the grand jury which may be had in your presence, and that you will true answers make to such questions as may be propounded to you by the grand jury, or under its direction, so help you God." [O. C. 382; Amended by Act March 15, 1875, p. 108.]

See Willson's Cr. Forms, 571; ante, §319a, which makes a violation of this oath a misdemeanor, etc.

§1934—ART. 408.—**How witnesses shall be questioned.**—The grand jury in propounding questions to a witness shall direct the examination to the person accused or suspected, shall state the offense with which he is charged, the county where the offense is said to have been committed, and, as nearly as may be, the time of the commission of the offense; but should the jury think it necessary, they may ask the witness in general terms whether he has knowledge of the violation of any particular law by any person, and if so by what person. [O. C. 383.]

§1935—ART. 409.—**When a felony has been committed by unknown person.**—When a felony has been committed in any county within the jurisdiction of the grand jury, and the name of the person guilty thereof is unknown, or where it is uncertain by whom the same was committed, the



grand jury may ask any pertinent question relative to the transaction in such manner as to ascertain who is the guilty party. [O. C. 383a.]

§1935a—ART. 410, submitted by the revisers, was stricken out by the legislature in adopting this Code.

§1936—ART. 411.—**After the testimony grand jury shall vote.**—After all the testimony which is accessible to the grand jury shall have been given in respect to any criminal accusation, the vote shall be taken as to the presentment of a bill of indictment, and if nine members concur in finding the bill the foreman shall make a memorandum of the same for the purpose of enabling the attorney who represents the state to write the indictment. [O. C. 385.]

§1937—**Decision under preceding article.**—There is no law which authorizes the courts to go behind an indictment properly returned into court, and inquire into the evidence, or the sufficiency of the evidence, upon which the grand jury found and presented it. The presumption of law is that the indictment returned was found by the grand jury after all the testimony which was accessible to them had been heard by them. *Terry v. S.* 15 App. 66.

§1938—ART. 412.—**Memorandum shall state what.**—The memorandum furnished the attorney shall state the name of the defendant if known, and if unknown shall describe him; the name of the party injured or attempted to be injured, if any one; the nature of the offense; the time and place of its commission, and the names of the witnesses on whose testimony the accusation is sustained. [O. C. 386.]

See Willson's Cr. Forms, 572.

§1939—ART. 413.—**Indictment shall be prepared by attorney and signed, etc., by foreman.**—The attorney representing the state shall prepare all indictments which have been found by a grand jury with as little delay as possible, and when so prepared shall deliver them to the foreman, who shall sign the same officially, and the attorney representing the state indorse thereon the names of the witnesses upon whose testimony the same was found. [O. C. 387.]

§1940—**Decisions under preceding article.**—The court may appoint a district or county attorney *pro tem.*, who will thereby be authorized to prepare indictments. *Ante*, §§1492, 1493. The requirement that the witnesses' names shall be indorsed on the indictment is merely directory. *Steele v. S.* 1 Tex. 142; *Walker v. S.* 19 App. 176. No exception lies because the statute has not been complied with in this respect, nor is it ground for new trial; but upon motion, the court may cause the omission to be supplied. *Skipworth v. S.* 8 App. 135. That the names of the state's witnesses, as they appeared on the indictment, were not indorsed on the copy served on the accused, is no ground for a postponement of the trial. *Hart v. S.* 15 App. 202; *Walker v. S.* 19 App. 176. When the offense is proved as charged, the defendant cannot complain that the witnesses upon whose testimony the indictment was found, knew nothing of the offense charged. *Cotton v. S.* 43 Tex. 169.

§1941—ART. 414.—**Indictment shall be presented in open court.**—When the indictment is ready to be presented the grand jury shall go in a body into open court, and through their foreman deliver the indictment to the judge of the court, and at least nine members of the grand jury must be present on such occasions. [O. C. 388.]

An objection that nine of the grand jury did not concur in presenting the indictment will not be entertained on appeal *dehors* the record. *Hasley v. S.* 14 App. 217. An indictment presented by more than twelve men is a nullity. *Lott v. S.* 18 App. 627; *McNeese v. S.* 19 App. 48; *Williams v. S.* *Id.* 265; *Ex parte Swain, Id.* 323.

§1942—ART. 415.—**Presentment to be entered of record, etc.**—The fact of a presentment of an indictment in open court by a grand jury shall be entered upon the minutes of the proceedings of the court, noting briefly the style of the criminal action and the file number of the indictment, but omitting the name of the defendant, unless he is in custody or under bond. [Act May 25, p. 8.]

See Willson's Cr. Forms 9.

§1943—Decisions under preceding article.—It is not essential that the entry should state the offense charged. *Hasley v. S.* 14 App. 217; *Bohannon v. S.* *Id.* 271; *Tyson v. S.* *Id.* 388; *Spear v. S.* 16 App. 98; *Steele v. S.* 19 App. 425; *DeOlles v. S.* 20 App. 145; *Rowlett v. S.* 23 App. 191. That an indictment is not indorsed "filed" by the clerk, will not avail after verdict, if the record shows it was presented in court by the grand jury. *Reynolds v. S.* 11 Tex. 120. A palpable mistake of the clerk in the date of a file mark is immaterial after verdict. *Terrill v. S.* 41 Tex. 463. The fact of the presentment must be noted in the minutes and appear on appeal. *Hardy v. S.* 1 App. 556. But the omission of such entry can only be availed of when the objection is made *in limine*. *Anderson v. S.* 2 App. 10; *Coats v. S.* *Id.* 16; *Houillon v. S.* 3 App. 537; *Hill v. S.* 4 App. 559; *Jinks v. S.* 5 App. 68; *Templeton v. S.* *Id.* 398; *Johnson v. S.* 7 App. 210; *Bailey v. S.* 11 App. 140; *Rowlett v. S.* 23 App. 191. The entry of the presentment should not be omitted. *Walker v. S.* 7 App. 52. Upon proper showing, even at a subsequent term, the record may be amended so as to show presentment. *Burnett v. S.* 14 Tex. 456; *Rhodes v. S.* 29 Tex. 188; *Townsend v. S.* 5 App. 574; *Cox v. S.* 7 App. 495; *DeOlles v. S.* 20 App. 145. But such amendment cannot be made after notice of appeal. *Knight v. S.* 7 App. 206. It is not error to permit the entry to be amended so as to show that the presentment was made in open court. *Tyson v. S.* 14 App. 388. Where the record of the presentment has been destroyed it cannot be supplied by proof that such record was made. It must be substituted in the manner prescribed for the substitution of records. *Strong v. S.* 18 App. 19. For entries held sufficient, see *Anderson v. S.* 2 App. 288; *Houillon v. S.* 3 App. 537; *Spear v. S.* 16 App. 98. It is not a good objection in arrest of judgment that the indictment is not marked "filed." *Reynolds v. S.* 11 Tex. 120. And such omission may be supplied after the trial has commenced. *Caldwell v. S.* 5 Tex. 18. Nor can a mistake in the file mark be objected to on motion in arrest of judgment. *Terrill v. S.* 41 Tex. 464.

## CH. 3.—OF INDICTMENTS AND INFORMATIONS.

ART.	SEC.	ART.	SEC.	
416.	Felonies presented by indictment only.	1944	428k. Certain forms of indictments prescribed.	1980
417.	Misdemeanors presented by indictment, or, etc.	1945	428l. Proof not dispensed with.	1981
418.	All offenses must be presented by indictment or information.	1946	428m. Libel—Indictment for.	1982
419.	An "indictment" is what.	1947	428n. Disjunctive allegations.	1983
	Meaning of indictment—Decisions as to.	1948	428o. Statutory words need not be strictly followed.	1984
420.	Requisites of an indictment.	1949	428p. Matters of judicial notice, etc., need not be stated.	1985
	Requisite 1.	1950	428q. Defects of form do not affect trial, etc.	1986
	Requisites 2 and 3.	1951	428r. Repealing clause.	1987
	Requisite 4.	1952	Surplusage—Decisions as to.	1988
	Requisite 5.	1953	Duplicity—Decisions as to.	1989
	Requisite 6.	1954	Repugnancy.	1990
	Requisite 7.	1955	Incorrect spelling, grammar, etc.	1991
	Requisite 8.	1956	Erasures and interlineations.	1992
	Requisite 9.	1957	Negating exceptions.	1993
421.	What should be stated in an indictment, etc.	1958	Joinder of defendants.	1994
422.	The certainty required.	1959	Written instruments—When and how to be set forth.	1995
	Decisions as to certainty.	1960	429. Definition of an "information."	1996
423.	Particular intent—Intent to defraud.	1961	Decisions under preceding article.	1997
	Decisions as to intent.	1962	430. Requisites of an information.	1998
424.	Allegation of venue, etc.	1963	Decisions as to informations.	1999
425.	Allegation of name.	1964	431. Shall not be presented until oath has been made, etc.	2000
	Decisions as to name.	1965	432. Rules as to indictments applicable to informations.	2001
426.	Allegation of ownership.	1966	433. Indictment, etc., may contain several counts.	2002
427.	Description of property.	1967	Decisions as to counts.	2003
428.	"Felonious" and "feloniously" not necessary.	1968	Election between counts—Decisions as to.	2004
	"COMMON SENSE INDICTMENT ACT."	1969	434. When indictment or information has been lost, mislaid, etc.	2005
428a.	Certainty—What sufficient.	1970	Substitution—Decisions as to.	2006
428b.	Special and general terms in statute.	1971	435. Order transferring cases.	2007
428c.	"Public place"—Allegation of.	1972	436. What causes shall be transferred to justice of the peace at county seat.	2008
428d.	Act, with intent to commit an offense.	1973	437. Duty of clerk of district court when case is transferred.	2009
428e.	Selling intoxicating liquor—Sufficient allegations as to.	1974	438. Proceedings of court to which cases have been transferred.	2010
428f.	Perjury—Sufficient allegations for.	1975	439. Cause improvidently transferred shall be retransferred.	2011
428g.	Bribery—Sufficient allegations for.	1976	Transfer of indictments—Decisions as to.	2012
428h.	Misapplication of public money—Sufficient charge of.	1977		
428i.	Description of money, etc., in theft, etc.	1978		
428j.	Carrying weapons—Indictment for.	1979		

§1944—ART. 416.—Felonies presented by indictment only.—All felonies shall be presented by indictment only, except in cases specially provided for. [O. C. 390; Const. art. 1, sec. 10.]

See, *ante*, §§1431-1439.

§1945—ART. 417.—Misdemeanors presented by indictment, or, etc.—All misdemeanors may be presented by either information or indictment. [O. C. 391.]

See *Garza v. S.* 11 App 410; *Reddish v. S.* 4 App. 32; *Haines v. S.* 7 App. 30; *S. v. Corbit*, 42 Tex. 88.

§1946—ART. 418.—All offenses must be presented by indictment or information.—All offenses known to the penal law of this state must be prosecuted either by indictment or information. This provision does not include fines and penalties for contempt of court, nor special cases in which inferior courts exercise jurisdiction. [O. C. 392.]

See *Garza v. S.* 11 App. 410. For jurisdiction of inferior courts see, *ante*, Title 2, Ch. 5.

§1947—ART. 419.—An “indictment” is what.—An indictment is the written statement of a grand jury, accusing a person therein named of some act or omission, which, by law, is declared to be an offense. [O. C. 394.]

§1948—Meaning of “indictment”—Decisions as to.—At the adoption of our constitution, and for a century previously, both in England and America, the preceding article expressed what was understood as constituting an indictment. The meaning of the word “indictment” requires a statement of the essential acts or omissions which constitute the offense with which the party is accused. All that is essential to constitute the offense must be explicitly charged, and cannot be aided by intendment. A statement of a legal result, a conclusion of law, will not be sufficient. The facts constituting the crime must be set forth, that the conclusion of law may be arrived at from the facts so stated. *Hewitt v. S.* 25 Tex. 722; *S. v. Duke*, 42 Tex. 455; *Williams v. S.* 12 App. 395; *Brinster v. S. Id.* 612; *Huntsman v. S. Id.* 619; *Insall v. S.* 14 App. 145; *Reed v. S. Id.* 662; *Allen v. S.* 13 App. 28; *Gabrielski v. S. Id.* 428; *Stringer v. S. Id.* 520; *Parker v. S.* 9 App. 351; *Pierce v. S.* 17 App. 232; *VanVickle v. S.* 22 App. 625. A printed form, with the blanks properly filled in writing, is a “written statement.” *Winn v. S.* 5 App. 621. A “grand jury” is composed of twelve men, no more and no less. An indictment presented by a body of more than twelve men is a nullity, and all proceedings had under it are void. *Ante*, §§1895-1941.

§1949—ART. 420.—Requisites of an indictment.—An indictment shall be deemed sufficient if it has the following requisites:

1. It shall commence “In the name and by the authority of the State of Texas.”

2. It must appear therefrom that the same was presented in the district court of the county where the grand jury is in session.

3. It must appear to be the act of a grand jury of the proper county.

4. It must contain the name of the accused, or state that his name is unknown, and in case his name is unknown give a reasonably accurate description of him.

5. It must show that the place where the offense was committed is within the jurisdiction of the court in which the indictment is presented.

6. The time mentioned must be some date anterior to the presentment of the indictment, and not so remote that the prosecution of the offense is barred by limitation.

7. The offense must be set forth in plain and intelligible words.

8. The indictment must conclude “Against the peace and dignity of the state.”

9. It shall be signed officially by the foreman of the grand jury. [O. C. 395.]

§1950—*Requisite 1.*—The indictment must commence “In the name and by the authority of the State of Texas.” These words are indispensable. *Const. Art. V, Sec. 12.* “By and with the authority of the state” was held insufficient. *Saine v. S.* 14 App. 144. A printed card at the head of a blank form of indictment is no part of the indictment, and does not vitiate such indictment. *Winn v. S.* 5 App. 621; *West v. S.* 6 App. 485. A caption forms no part of and does not vitiate an indictment. *English v. S.* 4 Tex. 125; *Winn v. S.* 5 App. 621; *Jefferson v. S.* 24 App. 535.

§1951—*Requisites 2 and 3.*—An indictment which sets out the state and county in the caption, and then recites that “the grand jurors in and for the county and state aforesaid,” etc., is sufficient. *English v. S.* 4 Tex. 125. So, also, is the recital, “the grand jurors for the State of Texas, duly sworn, etc., to inquire, etc., of all offenses committed within the county of C.,” etc. *Williams v. S.* 30 Tex. 404; *Davis v. S.* 6 App. 133; *Coker v. S.* 7 App. 83; *Scales v. S. Id.* 361. But the following recital was held insufficient: “The grand jurors in and for the County of Freestone and State of Texas, duly elected, etc., in the district court of said Freestone county, Texas, etc., upon their oaths present, etc.” because it did not show by direct affirmative allegation that they presented the indictment in the district court of Freestone, or any other county. *Thomas v. S.* 18 App. 213. When the indictment upon its face shows that it was presented by a grand jury duly organized, and that such presentment was made in the proper court, it must be presumed that the presentment was made by a legal grand jury of the proper county, and this presumption must prevail until it is shown that in fact the indictment was not presented by a legal grand jury. *DeOlles v. S.* 20 App. 145. The requirement that the indictment must state the court in which it is presented, relates to form and not substance, and is amendable. *Bosshard v. S.* 25 Tex. Sup. 207. A disregard of the requirement is not available except upon exception to the indictment. It is not an objection which can be entertained on a motion in arrest of judgment. *Niland v. S.* 19 App. 166; *Thomas v. S.* 18 App. 213; *Walker v. S.* 7 App. 52; *Houck v. S.* 1 App. 357; *Long v. S. Id.* 466; *Mathews v.*

S. 41 Tex. 376; State v. Hilton, 41 Tex. 565; Bosshard v. S. 25 Tex. Sup. 207; VanVickle v. S. 22 App. 625. But if exception be made to the indictment because of such defect, the exception should be entertained. Mathews v. S. 44 Tex. 376; Thomas v. S. 18 App. 213. For instances of a sufficient compliance with requisites 2 and 3, see Garling v. S. 2 App. 44; Harris v. S. *Id.* 102; West v. S. 6 App. 485; DeOlles v. S. 20 App. 145. It is not essential that the indictment should state that the grand jurors were sworn, or that the presentment was made upon their oaths or affirmations. It is sufficient if it appears from the indictment that it was the act of a grand jury of the proper county. Chevarrio v. S. 17 App. 390. And that the charge is made by such grand jury. VanVickle v. S. 22 App. 625. Matters of form in an indictment are amendable *before* both parties announce ready upon the merits, but not thereafter. Allegations as to the court and term at which the indictment was presented are matters of form. Osborne v. S. 23 App. 431. See Willson's Cr. Forms, 1.

§1952—*Requisite 4.*—See, *post*, §§1964, 1965; Willson's Cr. Forms, 3 and 4. Middle initial letters are immaterial, and may be transposed or omitted, without affecting the validity of the indictment. S. v. Manning 14 Tex. 402; Delphino v. S. 11 App. 30; Sullivan v. S. 6 App. 319; Dodd v. S. 2 App. 58; Dixon v. S. *Id.* 531. It is sufficient to state one of the initials of the christian name and the surname. McAfee v. S. 14 App. 668; Victor v. S. 15 App. 90. When a person is known by two or more names it is sufficient to state either name, and proof of the name stated in the indictment is all that is required. Williams v. S. 13 App. 235. If the christian name is first correctly stated, a mistake in repeating it will not vitiate the indictment. Musquez v. S. 41 Tex. 226; Cotton v. S. 4 Tex. 265; Mayo v. S. 7 App. 342. Misspelling the name is immaterial if the name be *idem sonans*. Foster v. S. 1 App. 351; Williams v. S. 5 App. 226. Where the person is as well known by the name stated in the indictment as by his true name, the variance between the allegation and the proof will not be material. Bird v. S. 16 App. 528; Rye v. S. 8 App. 163; Wells v. S. 4 App. 20; Bell v. S. 25 Tex. 574; Hart v. S. 38 Tex. 382; Cotton v. S. 4 Tex. 260. When the name of the accused is unknown to the grand jury that fact must be stated, and a reasonably accurate description of him must be given in the indictment. Where the defendant was described as "one Victor, a Mexican, whose other name is to the grand jurors unknown," it was held to be not a compliance with the statute. Victor v. S. 15 App. 90, explaining Harris v. S. 2 App. 102, and Vandever v. S. 21 Tex. 335. Where the indictment described the defendant as "one Ben, whose name other than Ben is to the grand jurors unknown, and who is known and described as negro Ben, and who is a colored man" it was held sufficient. Negro Ben v. S. 9 App. 107. If the defendant be not indicted by his true name, he may upon suggesting that fact, and his true name, have the error corrected, but if he does not make such suggestion, it will be taken that his name is truly set forth in the indictment, and he will not thereafter be allowed to deny the same by way of defense. *Post*, Art. 512; Negro Ben v. S. 9 App. 107.

§1953—*Requisite 5.*—See, *post*, Art. 424. It must appear from the indictment that the place where the offense was committed is within the jurisdiction of the Court in which it is presented. Robins v. S. 9 App. 666; Collins v. S. 6 App. 647. An omission to lay a venue to the offense is a fatal defect, which may be taken advantage of by motion to quash, or in arrest of judgment. It is a defect of substance which is not amendable. Robins v. S. 9 App. 666; Collins v. S. 6 App. 647; Searcy v. S. 4 Tex. 450; S. v. Warren, 14 Tex. 406. Venue is sufficiently alleged by naming the county in which the offense was committed. S. v. Odum, 11 Tex. 12. Without adding "in the State of Texas," etc. S. v. Jordan, 12 Tex. 205; Satterwhite v. S. 6 App. 609. It is sufficient to allege that the offense was committed "at" instead of "in" the named county. Augustine v. S. 20 Tex. 451. See further, *ante*, §1715. See, also, Pierce v. S. 12 Tex. 210; Corley v. S. 3 App. 412; Cain v. S. 18 Tex. 391.

§1954—*Requisite 6.*—See, *ante*, Ch. 1, Title 4. The date of the commission of the offense must be distinctly alleged, and it must be a day certain. S. v. Slack, 30 Tex. 354; S. v. Johnson, 32 Tex. 96; S. v. Eubanks, 41 Tex. 291. "On or about" a specific date is a sufficient allegation of the time. S. v. McMickle, 34 Tex. 676; S. v. Elliott, *Id.* 148; S. v. Hill, 35 Tex. 348; Johnson v. S. 1 App. 118. Where the name of the month was so written as to read either "February" or "Tebruary" it was held sufficient. Witten v. S. 4 App. 70. The time alleged must be a date *anterior* to the presentment of the indictment. Williams v. S. 12 App. 226; Collins v. S. 5 App. 37; Nelson v. S. 1 App. 118; Goddard v. S. 14 App. 566; Clement v. S. 22 App. 23. If the time alleged be the same day on which the indictment is presented, it must be expressly averred that the offense was committed *before* the presentment. Joel v. S. 28 Tex. 642; Williams v. S. 12 App. 226. But an information filed August 31, 1883, which alleged the offense to have been committed "heretefore on the 31st day of August, 1883" was held sufficient, the word "heretefore" showing that the offense was committed anterior to the presentment. Wilson v. S. 15 App. 150. If the date of the commission of the offense as alleged, be a date subsequent to the presentment of the indictment, it is a fatal defect, although it be apparent that the error is a clerical one. Robles v. S. 5 App. 346; Goddard v. S. 14 App. 266; Donaldson v. S. 15 App. 25; Lee v. S. 22 App. 547. Where it is an offense to do an act between two specified dates, it is sufficient to allege any date between said specified dates. S. v. White, 41 Tex. 64. The time alleged must not be so remote as to show that the offense is barred by limitation. Collins v. S. 5 App. 37; Brewer v. S. *Id.* 248; Shoefercater v. S. *Id.* 207; Blake v. S. 3 App. 399; O'Connell v. S. 18 Tex. 343. It is not necessary to reiterate "then and there" to every allegation of time and place. Harris v. S. 2 App. 102. The allegation of the time of the commission of the offense is matter of substance and is not amendable. Drummond v. S. 4 App. 150, overruling S. v. Elliott, 34 Tex. 148. See, also, Sanders v. S. 26 Tex. 119; S. v. Davidson, 36 Tex. 325. The time when the offense was committed must be

proved, but the date proved need not be the exact date alleged in the indictment. All that is required is, that the time of the commission of the offense be proved, and that the time proved be some date anterior to the presentment of the indictment, and not so remote as to show that a prosecution for the offense was barred by limitation. *Temple v. S.* 15 App. 304. If the proof shows that the offense was committed at a date subsequent to the presentment of the indictment, it is fatal to a conviction. *Kincaid v. S.* 8 App. 465; *McCoy v. S.* 3 App. 399; *Fields v. S.* 43 Tex. 214; *Dovalina v. S.* 14 App. 324. See, also, *Willson's Cr. Forms*, 6.

§1955—*Requisite 7.*—It must be alleged in plain and intelligible words that the accused did the things which constitute the offense. *Moore v. S.* 7 App. 42; *S. v. Meschac*, 30 Tex. 518; *Blair v. S.* 32 Tex. 474; *Johnson v. S.* 1 App. 146; *Greenlee v. S.* 4 App. 345. That "the offense must be set forth in plain and intelligible words" means more than that the defendant must be charged in general terms with the commission of some crime. The indictment must particularize the act or omission complained of, so that its identity cannot be mistaken. *Alexander v. S.* 29 Tex. 495; see, also, as to this requisite, *Dawson v. S.* 33 Tex. 491; *post*, §1960.

It will generally be sufficient if the indictment in describing the offense follows the precise language of the statute, or uses words of equivalent or more comprehensive meaning. *Post*, §1983; *Smith v. R. Dallam*, 473; *Bush v. R.* 1 Tex. 455; *Burch v. R. Id.* 608; *Drummond v. S.* 2 Tex. 156; *Estes v. S.* 10 Tex. 300; *S. v. West, Id.* 555; *S. v. Ake*, 9 Tex. 322; *Welsh v. S.* 11 Tex. 368; *S. v. Warren*, 13 Tex. 45; *Francis v. S.* 21 Tex. 280; *Rhodes v. S.* 29 Tex. 186; *S. v. Campbell, Id.* 44; *Portwood v. S. Id.* 47; *Phillips v. S. Id.* 226; *Smith v. S.* 34 Tex. 612; *Mathews v. S.* 36 Tex. 675; *Fowler v. S.* 38 Tex. 559; *McFain v. S.* 41 Tex. 385; *Caldwell v. S.* 2 App. 53; *White v. S.* 3 App. 605; *Bigby v. S.* 5 App. 101; *Brewer v. S. Id.* 248; *Antle v. S.* 6 App. 202; *Lagrone v. S.* 12 App. 426; *Jones v. S. Id.* 424; *Tynes v. S.* 17 App. 123; *Kerry v. S. Id.* 185; *Lantzneester v. S.* 19 App. 320; *Thompson v. S.* 16 App. 74; *Shubert v. S.* 20 App. 320.

But if the statutory words be words of technical meaning, they cannot be substituted by other words, as "malice aforethought" in murder, or "fraudulently" in theft. *Drummond v. S.* 2 Tex. 156; *McElroy v. S.* 14 App. 235; *ante*, §§1035, 1254. And, where the statute in describing the offense uses a generic term, it will not be enough to employ that term only, but the species must be stated according to the facts in the case. *Burch v. R.* 1 Tex. 608; *S. v. West*, 10 Tex. 553; *Brewer v. S.* 5 App. 248. But if the statute, in defining the offense, sets out the specific acts constituting it, and not by the use of generic terms, the indictment may follow it literally. *McFain v. S.* 41 Tex. 385.

It is always safer, in describing the offense, to use the words of the statute, instead of undertaking to substitute them with other words of equivalent or more comprehensive meaning. *Burch v. R.* 1 Tex. 608; *Henderson v. S.* 14 Tex. 503; *Francis v. S.* 21 Tex. 280; *Bartholow v. S.* 26 Tex. 175; *S. v. Moreland*, 27 Tex. 726; *Juarqui v. S.* 28 Tex. 625; *Hart v. S.* 2 App. 40; *White v. S.* 3 App. 605.

Notwithstanding the general rule is, that in describing the offense in the indictment it is sufficient to follow the language of the statute, there are instances which form exceptions to this general rule, and in which more certainty is required either from the obvious intention of the legislature, or from the application of known principles of law. *S. v. West*, 10 Tex. 553; *Portwood v. S.* 29 Tex. 47; *White v. S.* 3 App. 605; *Hoskey v. S.* 9 App. 202; *Kerry v. S.* 17 App. 179; *Dixon v. S.* 21 App. 517. If extrinsic facts be necessary to bring the act within the statute, they must be averred. *Brewer v. S.* 5 App. 248; *Gray v. S.* 7 App. 10; *Vaughan v. S.* 9 App. 563; *Kerry v. S.* 17 App. 179; *Longenotti v. S.* 22 App. 61. But it is sufficient to pursue the words of the statute, if by so doing the act which constitutes the offense is fully, directly and expressly alleged, without any uncertainty or ambiguity. *Bigby v. S.* 5 App. 101; *Phillips v. S.* 29 Tex. 226; *McFain v. S.* 41 Tex. 385. But every fact which is a constituent element of the offense must be alleged distinctly and affirmatively, and must not be left to be deduced by argument or inference. *Parker v. S.* 9 App. 351; *Hoskey v. S. Id.* 202; *Proffit v. S.* 12 App. 233; *Huntsman v. S. Id.* 619; *Pierce v. S.* 17 App. 232; *Long v. S.* 36 Tex. 6; *Gaddy v. S.* 8 App. 127; *Kerry v. S.* 17 App. 179; *Strickland v. S.* 19 App. 518.

An omission of a material word will render the indictment invalid—as the omission of the word "did" in charging the defendant with the commission of the offense. *S. v. Hutchinson*, 26 Tex. 111; *S. v. Dougherty*, 30 Tex. 360; *Ewing v. S.* 1 App. 362; *Sparks v. S.* 35 Tex. 349; *Edmondson v. S.* 41 Tex. 496; *Moore v. S.* 7 App. 42. The word "at" is sometimes material. *S. v. Huston*, 12 Tex. 245. Also the word "and" in a joint indictment. *S. v. Toney*, 13 Tex. 74. The character "&" may be used for the word "and" without vitiating the indictment, but it is better practice to use the word. *Brown v. S.* 16 App. 245. So the word "to" in one instance was held to be essential. *Jones v. S.* 21 App. 349.

§1956—*Requisite 8.*—It is indispensable that the indictment conclude "against the peace and dignity of the state." *Const. Art. V. Sec. 12.* *S. v. Durst*, 7 Tex. 74; *S. v. Sims*, 43 Tex. 521; *Holden v. S.* 1 App. 225; *Cox v. S.* 8 App. 254; *Haun v. S.* 13 App. 383; *Saine v. S.* 14 App. 144; *Thompson v. S.* 15 App. 39-168. If the indictment concludes "against the peace and dignity of the state," no words following such conclusion, and which do not form a part of it, will vitiate the indictment. *Rowlett v. S.* 23 App. 191. The addition of the word "Texas" after the word "state," in the conclusion, was held not to vitiate the indictment. *S. v. Pratt*, 44 Tex. 93. So the words "a true bill" indorsed on the margin of the indictment did not vitiate it. *Thomas v. S.* 8 App. 344. So the words "a true bill" following the conclusion, but forming no part of it, were held to not vitiate the indictment. *Rowlett v. S.* 23 App. 191. But an omission of the word "the" before the word "state" was held to be a

substantial defect and fatal to the sufficiency of the indictment. *Thompson v. S.* 15 App. 39-167. But mere misspelling of a word, as "aganist" for "against," will not vitiate. *Hudson v. S.* 10 App. 215; *post*, §1992; *Willson's Cr. Forms*, 7.

§1957—*Requisite 9.*—This requisite should be complied with, but a failure to do so will not render the indictment invalid. *Post*, Art. 529; *Jones v. S.* 10 Tex. 552; *Weaver v. S.* 19 App. 547; *Pinson v. S.* 23 Tex. 579; *S. v. Powell*, 24 Tex. 153; *Hannah v. S.* 1 App. 578; *Campbell v. S.* 8 App. 84; *Flores v. S.* 33 Tex. 444; *Basham v. S.* 38 Tex. 622; *Robinson v. S.* 1 App. 4.

§1958—ART. 421.—**What should be stated in an indictment, etc.**—Everything should be stated in an indictment which it is necessary to prove, but that which it is not necessary to prove need not be stated. [O. C. 396.]

The preceding article is cited and applied in the following cases: *McMahan v. S.* 13 App. 220; *Costley v. S.* 14 App. 156; *Reed v. S.* *Id.* 662; *Kerry v. S.* 17 App. 178; *Black v. S.* 18 App. 124; *Bosshard v. S.* 25 Tex. Sup. 207; *Evans v. S.* *Id.* 303; *Blair v. S.* 32 Tex. 474; *Johnson v. S.* 1 App. 146.

§1959—ART. 422.—**The certainty required.**—The certainty required in an indictment is such as will enable the accused to plead the judgment that may be given upon it, in bar of any prosecution for the same offense. [O. C. 398.]

See, *post*, §1969.

§1960—**Decisions as to certainty.**—The certainty required in an indictment or information is such as will enable the accused to plead the judgment that may be rendered upon it in bar of any prosecution for the same offense. *Williams v. S.* 1 App. 90; *Johnson v. S.* *Id.* 146; *Rose v. S.* *Id.* 401; *Cornell v. S.* 2 App. 422; *Coleman v. S.* *Id.* 512; *Ware v. S.* *Id.* 547; *Frasher v. S.* 3 App. 283; *Wells v. S.* 4 App. 20; *Greenlee v. S.* *Id.* 345; *Curry v. S.* *Id.* 574; *Mayo v. S.* 7 App. 342; *Alexander v. S.* 29 Tex. 495; *Phillips v. S.* *Id.* 226; *S. v. Hanson*, 23 Tex. 232.

It is well settled that if, eliminating surplusage, the constituents of the offense are so averred as to apprise the defendant of the charge against him, and enable him to plead the judgment in bar of another prosecution for the same offense, it is good in substance, under our Code. *McConnell v. S.* 22 App. 354; *Moore v. S.* 20 App. 275; *Holden v. S.* 18 App. 91; *Mayo v. S.* 7 App. 342; *Burke v. S.* 5 App. 74; *Coleman v. S.* 2 App. 512.

The rule as to certainty does not require that the offense shall be set out with such minuteness of detail as to entirely supersede proof of identity on another prosecution for the same offense. *Horan v. S.* 24 Tex. 161; *Phillips v. S.* 29 Tex. 226; *Albrecht v. S.* 8 App. 313; *Cochran v. S.* 26 Tex. 678.

Every indictment or information should be drawn with reference to the idea that an innocent man should know the facts charged against him that he may prepare to meet them, and the averments should be direct, positive and certain, not argumentative or inferential. *S. v. Baggerly*, 21 Tex. 757; *Lewellen v. S.* 18 Tex. 538; *Odum v. S.* 11 Tex. 12; *Estes v. S.* 10 Tex. 300; *Bush v. R.* 1 Tex. 455; *Moore v. S.* 7 App. 608; *Kerry v. S.* 17 App. 179; *Pierce v. S.* *Id.* 232; *Parker v. S.* 9 App. 351; *Prophit v. S.* 12 App. 233.

If the offense be composed of different constituents, each constituent being itself an offense, the particular constituents relied on must be specifically and accurately averred. *S. v. Williams*, 14 Tex. 98; *S. v. Wupperman*, 13 Tex. 33; *Kerry v. S.* 17 App. 179; *S. v. Meshac*, 30 Tex. 518; *Alexander v. S.* 29 Tex. 495; *Huntsman v. S.* 12 App. 619.

An indictment is sufficiently certain if all the ingredients of the offense be as amply set out as it is necessary to prove them. Facts and incidents which do not constitute a necessary part of the offense need not be stated for the purpose of distinguishing it, but they may be proved by the defendant, so as to fix its identity, and thereby protect himself from a second prosecution. *Horan v. S.* 24 Tex. 161.

The common law rule, which requires in indictments "certainty to a certain intent in every particular," does not obtain under our Code. *S. v. Miller*, 34 Tex. 535. And it is not material that an indictment does not conform to precedents, if it is otherwise sufficient. *Williams v. S.* 2 App. 271; *Harris v. S.* *Id.* 102. The accused cannot complain that the offense is described with unnecessary minuteness. *Lockhart v. S.* 10 Tex. 275. But descriptive allegations, although unnecessary to the validity of the indictment, must be proved. *Benson v. S.* 1 App. 6; *Ranjel v. S.* *Id.* 461; *Warrington v. S.* *Id.* 168; *Soria v. S.* 2 App. 297; *Courtney v. S.* 3 App. 257; *Sweat v. S.* 4 App. 617; *McGee v. S.* *Id.* 625; *Hampton v. S.* 5 App. 463; *Massie v. S.* *Id.* 81; *Simpson v. S.* 10 App. 681; *Wallace v. S.* *Id.* 255; *Jones v. S.* 12 App. 424; *Allen v. S.* 8 App. 360; *Cameron v. S.* 9 App. 336; *Davis v. S.* 13 App. 215; *Moore v. S.* 20 App. 275; *Withers v. S.* 21 App. 210; *Loyd v. S.* 22 App. 646. In charging an assault with intent to commit some other offense, the same particularity is not required as is required in charging the offense itself. *Morris v. S.* 13 App. 65; *S. v. Wall*, 35 Tex. 484; *S. v. Croft*, 15 Tex. 576.

§1961—ART. 423.—**Particular intent—Intent to defraud.**—Where a particular intent is a material fact in the description of the offense, it must be stated in the indictment. But in any case where an intent to defraud is required to constitute an offense, it shall be sufficient to allege an intent to

defraud, without naming therein the particular person intended to be defrauded. [O. C. 399.]

§1962—**Decisions as to intent.**—Where, to constitute an act a crime, it is essential that an evil intent should accompany it, the intent must be alleged. *S. v. West*, 10 Tex. 553; *S. v. Johnson*, 11 Tex. 22; *Cain v. S.* 18 Tex. 387; *Johnson v. S.* 1 App. 146; *Reeves v. S.* 7 App. 276. It is not necessary, however, in charging a common assault, or assault and battery, to allege an intent to injure. *Ante*, §810. Nor is an allegation of intent necessary where the act alleged to have been done is in violation of law. *S. v. Allen*, 30 Tex. 59; *Milstead v. S.* 19 App. 490. But where a *particular* intent is a material fact in the description of the offense, such particular intent must be specifically alleged. *Morris v. S.* 13 App. 65; *Woolsey v. S.* 14 App. 57; *Marshall v. S.* 31 Tex. 471; *Reeves v. S.* 7 App. 276; *Johnson v. S.* 1 App. 146; *Bartlett v. S.* 21 App. 500; *Beach v. S.* 18 App. 124.

Statutory terms denoting intent cannot be dispensed with in alleging the offense as "knowingly," "wilfully," "wantonly," "fraudulently," etc. *S. v. West*, 10 Tex. 553; *Hunter v. S.* 18 App. 444; *Pressler v. S.* 13 App. 95; *Woolsey v. S.* 14 App. 57; *Uecker v. S.* 4 App. 234; *Wallace v. S.* 30 Tex. 750; *Branch v. S.* 41 Tex. 622; *Bartholow v. S.* 26 Tex. 175; *Muldrew v. S.* 12 App. 617; *Ware v. S.* 19 App. 462; *Spain v. S.* *Id.* 469. As to intent to defraud, see *Westbrook v. S.* 23 App. 401.

§1963—**ART. 424.—Allegation of venue, etc.**—When by law the offense may be prosecuted in either of two or more counties, the indictment may allege the offense to have been committed in the county where the same is prosecuted, or in any county or place where the offense was actually committed. [O. C. 400.]

See, *ante*, §1953.

§1964—**ART. 425.—Allegation of name.**—In alleging the name of the defendant, or of any other person necessary to be stated in an indictment, it shall be sufficient to state one or more of the initials of the christian name and the surname. When a person is known by two or more names, it shall be sufficient to state either name. When the name of the person is unknown to the grand jury that fact shall be stated, and if it be the person accused of the offense, a reasonably accurate description of him shall be given in the indictment. [Added in revising.]

See, *ante*, §1952.

§1965—**Decisions as to name.**—In addition to the decisions collated in §1952, *ante*, the following others are noted. In an indictment for murder the deceased was named as "one Chino, whose other name is to the grand jurors unknown." Held sufficient. *DeOlles v. S.* 20 App. 145. That the alleged name of the deceased is an unprecedented one, as "Smutty my darling" is immaterial. *Wade v. S.* 23 App. 308. The injured party's given name may be stated by initial letters, and a middle letter is immaterial. *S. v. Black* 31 Tex. 560; *Stockton v. S.* 25 Tex. 772. Certainty to a common intent, as to the party injured, is all that is required. If he is known by one name as well as another, he may be described by either. *Cotton v. S.* 4 Tex. 260; *Bell v. S.* 25 Tex. 574; *Hart v. S.* 38 Tex. 382; *Wells v. S.* 4 App. 20; *Bird v. S.* 6 App. 528; *Rye v. S.* 8 App. 163. The following have been held to be not the same names, "Glenn" and "McGlenn," *Martin v. S.* 16 Tex. 240. "Mary Gorman" and "Martha Gorman." *Gorman v. S.* 42 Tex. 221. "Carter Gabriel" and "Gabriel Carter." *Collins v. S.* 43 Tex. 577, overruling *Brown v. S.* 32 Tex. 125. "Abie" and "Avie" *Burgamy v. S.* 4 App. 572. "Lindley" and "Lindsay." *Roberts v. S.* 2 App. 4. "J. F. R." and "N. B. R." *Mayes v. S.* 33 Tex. 340. "E. J. C." and "J. D. C." *Johnson v. S.* 41 Tex. 608. "Conrod Furnash" and "Conrad Furinash." *Shields v. Hunt*, 45 Tex. 425. "Franz Masoh" and "Frank Mozach," *Schindler v. S.* 17 App. 408. "J. W. Flanagan" and "Major Flanagan." *Perry v. S.* 4 App. 566. "Franks" and "Frank." *Parchman v. S.* 2 App. 228; "Clements Turner" and "Turner Clements." *Clements v. S.* 21 App. 258; "Wood" and "Woods." *Neiderluck v. S.* 21 App. 320. "McDevro" and "McDero." *McDero v. S.* 23 App. 429. "Leitz" and "Seitz." *Nance v. S.* 17 App. 385.

The following names have been held to be the same: "Knittel" and "Knittel." the mere misplacement of the dot over the letter "i" in the first not being material, the letters composing the name being plainly and distinctly written. *Hennessey v. S.* 23 App. 340. "Ichman" and "Eichman." *Eichman v. S.* 22 App. 137. "J. W. Watts" and "J. H. Watts." *Dixon v. S.* 2 App. 530. "Mary Etta" and "Marietta." *Goode v. S.* 2 App. 520. "Whiteman" and "Whitman." *Henry v. S.* 7 App. 388. "Sofia" and "Sofira." *Owens v. S.* 7 App. 329. "Woodlin" and "Woodline" and "Woodlan." *Dawson v. S.* 33 Tex. 491. "Redur" and "Redus." *Hunter v. S.* 8 App. 75. "William" and "Williams." *Williams v. S.* 5 App. 226. "Abraham Barnes" and "A. Barnes." *Ham v. S.* 4 App. 645. "John Smith" and "John A. Smith." *Dodd v. S.* 2 App. 58. "J. H. Smith" and "J. W. Smith." *Dixon v. S.* 2 App. 531. "F. A. Fater" and "F. R. Fater." *Delphino v. S.* 11 App. 30. "Chatam National Bank" and "Chatham National Bank." *Roth v. S.* 10 App. 27. "Wm. Hunt" and "William Hunt."



Roberson v. S. 15 App. 317. "J. W. Dixon" and "Jack Dixon." Anderson v. S. 19 App. 299. "H. Haley" and "H. K. Haley." McAfee v. S. 14 App. 668.

Where two names have the same derivation, or where one is an abbreviation or corruption of the other, but both are commonly used as the same, they will be considered the same. Goode v. S. 2 App. 520. The true rule is, if the names can be sounded alike, without doing violence to the power of the letters found in the variant orthography, the variance is immaterial. Foster v. S. 1 App. 531; Goode v. S. 2 App. 520; Henry v. S. 7 App. 388; Walker v. S. 13 App. 618.

When the name of the injured person is unknown, it is sufficient to aver that fact. S. v. Snow, 41 Tex. 596; Ranch v. S. 5 App. 363; S. v. Elmore, 44 Tex. 102; Willson's Cr. Forms, 5.

If the name be alleged as unknown it devolves upon the state to prove the fact, and that the grand jury by the use of reasonable diligence could not have ascertained the name. Brewer v. S. 18 App. 456; Williamson v. S. 13 App. 514; Jorasco v. S. 6 App. 238; Cock v. S. 8 App. 659; Rothschild v. S. 7 App. 519; Prestey v. S. 24 App. 494.

The name alleged should be the name which the injured party was known by at the time of the injury. Rutherford v. S. 13 App. 92; Williams v. S. *Id.* 285.

When the injured party is a corporation, it must be described by its corporate name, and alleged to be a corporation. White v. S. 24 App. 231.

**§1966—ART. 426.—Allegation of ownership.**—Where one person owns the property, and another person has the possession, charge or control of the same, the ownership thereof may be alleged to be in either. Where property is owned in common, or jointly, by two or more persons, the ownership may be alleged to be in all or either of them. When the property belongs to the estate of a deceased person, the ownership may be alleged to be in the executor, administrator or heirs of such deceased person, or in any one of such heirs. Where it is the separate property of a married woman the ownership may be alleged to be in her, or in her husband. Where the ownership of the property is unknown to the grand jury it shall be sufficient to allege that fact. [Added in revising.]

For decisions as to allegation of ownership in prosecution for theft, see, *ante*, §1258. As to proof of such allegation, see, *ante*, §1297.

**§1967—ART. 427.—Description of property.**—When it becomes necessary to describe property of any kind in an indictment, a general description of the same by name, kind, quantity, number and ownership, if known, shall be sufficient. If the property be real estate its general locality in the county, and the name of the owner, occupant or claimant thereof, shall be a sufficient description of the same. [Added in revising.]

For decisions as to description of property in prosecutions for theft, see §§1256-1296.

**§1968—ART. 428.—"Felonious" and "feloniously" not necessary.**—In an indictment for a felony it is not necessary to use the words "felonious" or "feloniously." [Added in revising.]

The preceding article is only declaratory of the established doctrine at the time of its adoption. Calvin v. S. 25 Tex. 789; Posey v. S. 32 Tex. 476; Prim v. S. *Id.* 157; Robinson v. S. 33 Tex. 341; Jorasco v. S. 6 App. 238; Sullivan v. S. 13 App. 462; Reed v. S. 14 App. 662. Prior to the adoption of the Codes, however, the word "feloniously" was essential in every indictment for a felony. Cain v. S. 18 Tex. 387. And after the adoption of the Code it was held in one case essential in charging the offense of swindling to allege that the offense was "feloniously" committed. S. v. Small, 31 Tex. 184. But a contrary doctrine was subsequently held in Robinson v. S. 33 Tex. 341.

#### "COMMON SENSE INDICTMENT ACT."

§1969—This is thought to be a proper place to insert the act of March 26, 1881, Genl. Laws, 17 Leg. Ch. 57, p. 60, commonly known as the "Common sense indictment act." In Mansfield v. S. 17 App. 468, it is stated that said act has been repealed, but I find no statute repealing it, and such statement was doubtless, owing to the fact that at the time the opinion was delivered, there was pending before the legislature a bill to repeal said act, and the court had information that said bill had become a law. The act is in force, in as far as it has not been held unconstitutional. Some of the forms prescribed therein have been held to be unconstitutional, and other forms and provisions thereof seem to the writer to be obnoxious to the same objections.

Its several sections, with such notes and references as may be useful are as follows:—

**§1970—ART. 428a.—Certainty—What sufficient.**—That an indictment for any offense against the penal laws of this state shall be deemed sufficient which charges the commission of the offense in ordinary and concise

language in such a manner as to enable a person of common understanding to know what is meant, and with that degree of certainty that will give the defendant notice of the particular offense with which he is charged, and enable the court on conviction to pronounce the proper judgment; and in no case are the words "force and arms," or "contrary to the form of the statute" necessary. [Act June 26, 1881, Ch. 57, p. 60, §1.]

See, *ante*, §§1959, 1960.

§1971—ART. 428*b*.—**Special and general terms in statute.**—When a statute creating or defining any offense uses special or particular terms, an indictment on it may use the general term which in common language embraces the special term. [*Id.* §2.]

But see, *ante*. §1955.

§1972—ART. 428*c*.—"Public place"—**Allegation of.**—When to constitute the offense an act must be done in a public place, it is sufficient to allege that the act was done in a "public place." [*Id.* §3.]

But see, *ante*, §574.

§1973—ART. 428*d*.—**Act, with intent to commit an offense.**—An indictment for an act done with intent to commit some other offense, may charge in general terms the commission of such act with intent to commit such other offense, without stating the facts constituting such other offense. [*Id.* §4.]

But see, *ante*, §1220.

§1974—ART. 428*e*.—**Selling intoxicating liquor—Sufficient allegations as to.**—In an indictment for selling intoxicating liquors in violation of any law of this state, it shall be sufficient to charge that the defendant sold intoxicating liquors contrary to law, naming the person to whom sold, without stating the quantity sold; and under such indictment any act of selling in violation of the law may be proved. [*Id.* §5.]

But see, *ante*, §§614-632; *White v. S.* 11 App. 476; *Eppstein v. S.* *Id.* 476.

§1975—ART. 428*f*.—**Perjury—Sufficient allegation for.**—An indictment for perjury or false swearing need not charge the precise language of the false statement, but may state the substance of the same, and no such indictment shall be held insufficient on account of any variance which does not affect the subject matter or general import of such false statement; and it is not necessary in such indictment to set forth the pleadings, records or proceedings with which the false statement is connected, nor the commission or the authority of the court, or person before whom the perjury was committed; but it is sufficient to state the name of the court, or officer by whom the oath was administered, with the allegation of the falsity of the matter on which the perjury is assigned. [*Id.* §6.]

See, *ante*, §308; *post*, §1980, Form 13.

§1976—ART. 428*g*.—**Bribery—Sufficient allegations for.**—An indictment under the laws relating to bribery shall be sufficient, if it charges that the defendant bribed or attempted to bribe any officer or other person named in the Penal Code who may be subject to bribery, with intent to influence the action of such person; or that any such officer or other person accepted, or agreed to accept, a bribe given or promised, to influence his action, stating the particular thing or advantage given, promised, accepted, or agreed to be accepted, and the particular act to be influenced thereby. [*Id.* §7.]

See, *ante*, §§210-234.

§1977—ART. 428*h*.—**Misapplication of public money—Sufficient charge of.**—Under the laws relating to misapplication of public money, an

indictment may charge that the defendant misapplied certain public moneys in his hands by virtue of his trust, stating the amount of such public moneys and the manner in which the same was misapplied. [*Id.* §8.]

See, *ante*, Title 4, Ch. 3, Penal Code; *post*, §1980, Form 28.

§1978—ART. 428i.—**Description of money, etc., in theft, etc.**—In indictments for theft or embezzlement of any coin or paper current as money, or of any checks, bills of exchange, or other such security, it shall be sufficient to describe the property in general terms, as “money,” “checks,” “bills of exchange,” or other evidence of debt, of or about a certain amount. [*Id.* §9.]

See, *ante*, §§1256, 1967.

§1979—ART. 428j.—**Carrying weapons—Indictment for.**—An indictment under the laws regulating the carrying of deadly weapons may charge that the defendant carried about his person a pistol, or other deadly weapon, without authority of law, without a further averment of a want of legal excuse or authority on his part. [*Id.* §10.]

See, *ante*, §463.

§1980—ART. 428k.—**Certain forms of indictments prescribed.**—The following forms of indictments in cases in which they are applicable are sufficient, and analogous forms may be used in other cases:

*Form No. 1: General form.*—In the name and by the authority of the State of Texas, the grand jury of ..... county, present in the district court of said county that about the ..... day of ....., A. D. ...., in ..... county, Texas, (name or description of defendant) did (description of offense), against the peace and dignity of the state, ....., Foreman of the grand jury.

The preceding form would seem to be sufficient under decisions rendered without reference to it. See, *ante*, §§1950, 1951, 1952, 1953, 1954, 1956; also Willson's Cr. Forms 1.

*Form No. 2: Murder.*—A. B. did with malice aforethought kill C. D. by shooting him with a gun, or, by striking him with an iron wedge, or, by poisoning him, etc.

See, *ante*, §1035; Willson's Cr. Forms, 388, 389, *et seq.*

*Form No. 3: Assault to commit felony.*—A. B. did assault C. D., with intent to murder, rob, maim, disfigure or castrate him; or, did assault C. D. in attempting to commit burglary; or, did assault E. F., a female, with intent to rape her, etc.

See, *ante*, §§850, 853, 866, 871; Willson's Cr. Forms, 356, 357, 358, 359.

*Form No. 4: Aggravated assault.*—A. B. did make an aggravated assault on C. D.

See, *ante*, §836; Willson's Cr. Forms, 346 *et seq.* The preceding form has been held unconstitutional and therefore bad. *Allen v. S.* 13 App. 28.

*Form No. 5: Simple assault.*—A. B. did assault C. D.

See, *ante*, §810; Willson's Cr. Forms, 345.

*Form No. 6: Bribery.*—A. B. did bribe C. D., a sheriff, by paying him ten dollars in money, with intent that said C. D. should permit E. F., a prisoner in his custody, to escape.

See, *ante*, §§210, 1975; Willson's Cr. Forms, 63.

*Form No. 7: Gaming.*—A. B. and C. D. did play at a game with cards in a public place (or in a store-house, etc.), or A. B. and C. D. did bet at a game with dice; or A. B. and C. D. did bet at a game with dominoes, crack-loo, and crack-or-loo; or A. B. and C. D. did bet at crack-loo or crack-or-loo. A. B. did keep a table, (bank or alley,) for gaming; or A. B. did bet at a ten-pin alley; or did permit gaming in his house (or house under his con-

trol); or did rent to C. D. a room to be used as a place for gaming; or did bet on the result of an election.

See, *ante*, §§574, 588, 593, 597, 608; Willson's Cr. Forms, 237 to 249.

*Form No. 8: Rape.*—A. B., an adult male, did rape C. D., a female.

See, *ante*, §905; Willson's Cr. Forms, 374, 375.

*Form No. 9: Affray.* A. B. and C. D. did fight together in a public place.

See, *ante*, §453; Willson's Cr. Forms, 198.

*Form No. 10: Adultery and fornication.*—A. B., a man, and C. D., a woman, did have habitual carnal intercourse with each other, the said A. B. being lawfully married to E. F.

See, *ante*, §§514-526; Willson's Cr. Forms, 213, 214, 215, 216, 217.

*Form No. 11: Unlawful marriage.*—A. B., having a wife then living, did unlawfully marry C. D.; or A. B., a white person, and C. D., a negro, did knowingly intermarry with each other; or, having intermarried did continue to live together as man and wife.

See, *ante*, §§485-488; Willson's Cr. Forms, 207, 208, 209.

*Form No. 12: Escape.*—A. B., a sheriff, having the legal custody of C. D. then accused of a murder in the first degree, did willfully permit him to escape.

See, *ante*, §323; Willson's Cr. Forms, 333 *et seq.*

*Form No. 13: Perjury.*—A. B. did deliberately and willfully state under an oath required by law, and legally administered by C. D., a justice of the peace, that (giving the substance of the false statement), which statement was false, as the said A. B. well knew.

See, *ante*, §§308, 1974; Willson's Cr. Forms, 121, 122, 123, 124. The preceding form has been held unconstitutional and therefore bad. *Gabrielkski v. S.* 13 App. 428.

*Form No. 14: Keeping disorderly house.*—A. B. did keep a disorderly house.

See, *ante*, §533; Willson's Cr. Forms, 218.

*Form No. 15: Lotteries.*—A. B. did establish a lottery, or did dispose of certain property by lottery.

See, *ante*, §559; Willson's Cr. Forms, 233.

*Form No. 16: Unlawful practice of medicine.*—A. B. did practice medicine without authority of law.

See, *ante*, §665 *et seq.*; Willson's Cr. Forms, 270.

*Form No. 17: False imprisonment.*—A. B. did willfully and without lawful authority detain C. D. against his consent.

See, *ante*, §888; Willson's Cr. Forms, 365, 366, 367.

*Form No. 18: Kidnapping.*—A. B. did falsely imprison C. D. for the purpose of removing him from the state.

See, *ante*, §895; Willson's Cr. Forms, 369, 370.

*Form No. 19: Arson.*—A. B. did willfully burn a certain house, the property of C. D.

See, *ante*, §1128; Willson's Cr. Forms, 410-412.

*Form No. 20: Burglary.*—A. B. did break and enter the dwelling house of C. D. with intent to steal.

See, *ante*, §1220; Willson's Cr. Forms, 460-464.

*Form No. 21: Theft.*—A. B. did steal a horse from C. D., or did steal a watch of the value of fifty dollars from C. D.

See, *ante*, §1253 *et seq.*; Willson's Cr. Forms, 468 *et seq.* The preceding form has been held unconstitutional and therefore bad. *Williams v. S.* 12 App. 396; *Brown v. S.* *Id.* 347; *Hodges v. S.* *Id.* 554; *Young v. S.* *Id.* 614; *Muldrew v. S.* *Id.* 617; *Insall v. S.* 14 App. 145.

**Form No. 22: Swindling.**—A. B. did falsely represent to C. D. that he had ten bales of cotton packed and ready for delivery, and by means of such false representation did obtain from C. D. one hundred dollars in money, with intent to appropriate it to his own use.

See, *ante*, §1383; Willson's Cr. Forms, 514-517. The preceding form was held sufficient in *Arnold v. S.* 11 App. 472; but if subsequent analogous decisions should be adhered to, it would certainly be held insufficient. See, also, *Dwyer v. S.* 24 App. 132; *Wills v. S.* *Id.* 400.

**Form No. 23: Fraudulent disposition of mortgaged property.**—A. B. having given to C. D. a lien in writing, on his crop of cotton, did dispose of the same with intent to defraud said C. D.

See, *ante*, §1396; Willson's Cr. Forms, 519; *Glass v. S.* 23 App. 425; *Presley v. S.* 24 App. 494.

**Form No. 24: Counterfeiting coin.**—A. B. did counterfeit a silver coin of the Republic of Mexico, called a dollar, which was at the time current as money in the United States.

See, *ante*, §777 *et seq.*; Willson's Cr. Forms, 323-326.

**Form No. 25: Conspiracy.**—A. B. and C. D. did conspire together to murder E. F.

See, *ante*, §1409; Willson's Cr. Forms, 524.

**Form No. 26: Robbery.**—A. B. did rob C. D. of twenty dollars in money.

See, *ante*, §§1248, 1249.

**Form No. 27: Forgery.**—A. B. did forge a certain false instrument in writing, in substance as follows: (setting out the forged instrument.)

See, *ante*, §§740-742; Willson's Cr. Forms, 307, 308 *et seq.*

**Form No. 28: Misapplication of public money.**—A. B., a collector of taxes, did misapply one thousand dollars of public moneys in his hands, by virtue of his office, by converting said moneys to his own use. [*Id.* §11.]

See, *ante*, §1976; Willson's Cr. Forms, 13 *et seq.*

§1981—ART. 428l.—**Proof not dispensed with.**—Nothing contained in the 11th section of this act shall be construed to dispense with the necessity for proof of all the facts constituting the offense charged in an indictment, as the same is defined by law. [*Id.* §12.]

See *White v. S.* 11 App. 476.

§1982—ART. 428m.—**Libel—Indictment for.**—In an indictment for libel, it is not necessary to set forth any intrinsic facts for the purpose of showing the application to the libelled party of the defamatory matter on which the indictment is founded; it is sufficient to state generally that the same was published concerning him. [*Id.* §13.]

See, *ante*, §1086; Willson's Cr. Forms, 401.

§1983—ART. 428n.—**Disjunctive allegations.**—When the offense may be committed by different means, or with different intents, such means or intents may be alleged in the same count, in the alternative. [*Id.* §14.]

The following decisions conflict with the preceding article, and lay down the following rule: If a statute makes it a crime to do this, or that, mentioning several things disjunctively, the indictment may, as a general rule, embrace the whole in a single count; but in doing so it must use the conjunction "and" where "or" is found in the statute, else it will be defective as being uncertain. *Hart v. S.* 2 App. 40; *Tompkins v. S.* 4 App. 161; *Berliner v. S.* 6 App. 181; *Copping v. S.* 7 App. 61; *Slawson v. S.* *Id.* 63; *Randle v. S.* 41 Tex. 292; *Phillips v. S.* 29 Tex. 226; *Lancaster v. S.* 43 Tex. 519; *Davis v. S.* 23 App. 637. An alternative description of property as a "trunk or chest" was held bad. *Potter v. S.* 39 Tex. 388.

§1984—ART. 428o.—**Statutory words need not be strictly followed.**—Words used in a statute to define an offense, need not be strictly pursued in the indictment; it is sufficient to use other words conveying the

same meaning, or which include the sense of the statutory words. [*Id.* §15.]

See, *ante*, §1955.

§1985—ART. 428*p*.—**Matters of judicial notice, etc., need not be stated.**—Matters of which judicial notice is taken (among which are included the authority and duties of all officers elected or appointed under the general laws of this state), and presumptions of law need not be stated in an indictment. [*Id.* §16.]

§1986—ART. 428*q*.—**Defects of form do not affect trial, etc.**—An indictment shall not be held insufficient, nor shall the trial, judgment or other proceedings thereon be affected by reason of any defect or imperfection of form in such indictment, which does not prejudice the substantial rights of the defendant. [*Id.* §17.]

See, *post*, Arts. 529-549.

§1987—ART. 428*r*.—**Repealing clause.**—That all laws and parts of laws in conflict with the provisions of this act be and they are hereby repealed. [*Id.* §18.]

#### END OF COMMON SENSE INDICTMENT ACT.

§1988—**Surplusage—Decisions as to.**—Unnecessary words do not vitiate. *Sadler v. R. Dallam*, 610. And unnecessary averments may be rejected as surplusage. *S. v. Moreland*, 27 Tex. 726. Recitals which are not repugnant or contradictory to the body of the indictment, and which do not render unintelligible any of the material, traversable matters constituting the charge may be rejected as surplusage. *S. v. Elliott*, 14 Tex. 423. See further, as to surplusage, *Meredith v. S.* 40 Tex. 480; *Warrington v. S.* 1 App. 168; *Gordon v. S.* 2 App. 154; *Burke v. S.* 5 App. 74; *Hampton v. S.* *Id.* 463; *Mayo v. S.* 7 App. 342; *Smith v. S.* *Id.* 382; *Rivers v. S.* 10 App. 177; *Osborne v. S.* 24 App. 398; *McConnell v. S.* 23 App. 354; *Gibson v. S.* 17 App. 574. If one offense be fully charged, and another defectively, the latter may be treated as surplusage. *S. v. Coffee*, 41 Tex. 46; *Crow v. S.* 41 Tex. 468; *Henderson v. S.* 2 App. 88; *Holden v. S.* 18 App. 91. As to distinction between *variance* and *surplusage*, see *Warrington v. S.* 1 App. 168.

§1989—**Duplicity—Decisions as to.**—Duplicity in an indictment is the joinder of two or more distinct offenses in one count. If several offenses are embraced in the same general definition and are punishable in the same manner, they are not distinct offenses, and may be charged conjunctively in the same count. *Nicholas v. S.* 23 App. 317; *Lancaster v. S.* 43 Tex. 520; *S. v. Dorsett*, 21 Tex. 656; *S. v. Randle*, 41 Tex. 292; *S. v. Smith*, 24 Tex. 285; *Weathersby v. S.* 1 App. 643. For instances of duplicity, see *Heineman v. S.* 22 App. 44; *Hickman v. S.* *Id.* 441. When offenses are several in their nature, and yet of such a character that one of them, when complete, necessarily implies the other, they may be joined in the same count. *S. v. Edmondson*, 43 Tex. 162; *Nicholas v. S.* 23 App. 317. A charge for the murder of two persons by the same act is not duplicitous, and may be made in the same count. *Rucker v. S.* 7 App. 549. To render an indictment objectionable on the ground of duplicity, the duplicity must be such as to produce confusion and uncertainty as to the offense intended to be charged. *Beaumont v. S.* 1 App. 533. The offenses of burglary and theft are excepted from the rule of duplicity, and may be joined in the same count. *Ante*, §1220; *Williams v. S.* 24 App. 69. Duplicity, although not specified as a ground of exception, may be included in articles 450, §7, *ante*, and 529, §2, *post*; *S. v. Smith*, 24 Tex. 285. But such exception must be made *in limine*. *Coney v. S.* 2 App. 62; *Berliner v. S.* 6 App. 181. An indictment which charges in separate counts forgery, and uttering a forged instrument, is not duplicitous. *Chester v. S.* 23 App. 577; *Barnwell v. S.* 1 App. 745; *Waddell v. S.* *Id.* 720. An indictment is not bad for duplicity which contains a statement of the facts connected with and forming part of the offense, although such facts are complicated and various. Thus an indictment for murder may in the same count, charge the various means by which the death may have been produced. *Edmondson v. S.* 43 Tex. 162. As to COUNTS, see, *post*, §§2002, 2003.

§1990—**Repugnancy.**—Any repugnancy or uncertainty as to *time* or *place* is bad. *Cain v. S.* 18 Tex. 391. The misstatement of a written or printed instrument is immaterial, if the instrument be set out in full. *Luckey v. S.* 26 Tex. 362. But see *Westbrook v. S.* 23 App. 401, and *Roberts v. S.* 2 App. 4, which hold that in charging forgery it is not essential that the forged instrument should be set out both by its purport and its tenor, but that if it is so set out, any repugnancy between the two allegations will be fatal to the indictment. Repugnancy, in general, consists of two inconsistent allegations in one pleading; and since both cannot be true, and there is no means of ascertaining which is meant, the whole must be as though neither existed, leaving the indictment inadequate. This doctrine applies to *counts only*; that is to say, no *count* should contain repugnant matters, but it does not, in the very nature of things, apply to the repugnancy which of necessity must exist in *different counts*.

Counts may be joined containing matter repugnant one to the other. *Boren v. S.* 23 App. 23. See an instance of repugnancy in *Hardeman v. S.* 16 App. 1.

§1991—**Incorrect spelling, grammar, etc.**—Bad spelling will not vitiate, if the meaning is unmistakable. *S. v. Earp*, 41 Tex. 487; *Thomas v. S.* 2 App. 293; *Stinson v. S.* 5 App. 31; *Hudson v. S.* 10 App. 215; *Brumley v. S.* 11 App. 114. See this rule illustrated in the following other cases. *Witton v. S.* 4 App. 70; *Somerville v. S.* 6 App. 433; *Hutto v. S.* 7 App. 44; *S. v. Williamson*, 43 Tex. 500; *Hennessey v. S.* 23 App. 340.

Incorrect grammar will not vitiate unless the words employed are so inartistically arranged as to make the charge uncertain. *S. v. Nations*, 31 Tex. 561; *Gay v. S.* 2 App. 127; *S. v. Richardson*, *Id.* 322; *Hudson v. S.* 10 App. 215.

Bad handwriting, if legible, will not vitiate. *Irvin v. S.* 7 App. 109; *Hudson v. S.* 10 App. 215; *Dodd v. S.* *Id.* 370; *S. v. Morris*, 43 Tex. 372.

§1992—**Erasures and interlineations.**—Objections to an indictment because of erasures and interlineations can only be reached by exceptions to the form. The court, and not the jury, must decide what are the words of an indictment or other pleading. The burden is upon the defendant to show that the erasures or interlineations were not the act of the grand jury. *Dodd v. S.* 10 App. 370.

§1993—**Negating exceptions.**—If there be exceptions contained in the same act which creates the offense, the indictment must show, negatively, that the defendant, or the subject of the indictment, does not come within the exception. *Colchell v. S.* 23 App. 584; *Leatherwood v. S.* 6 App. 244; *McFain v. S.* 31 Tex. 385; *Duke v. S.* 42 Tex. 455; *Clayton v. S.* 43 Tex. 410.

But where the words of the statute defining the offense are so entirely separable from the exception that all the ingredients constituting the offense may be clearly and accurately alleged without any reference to the exception, it is not necessary that the exception should be negated. *Moseley v. S.* 18 App. 311; *Blasdel v. S.* 5 App. 263; *Owens v. S.* 3 App. 404; *Summerlin v. S.* *Id.* 444.

§1994—**Joinder of defendants.**—Where several defendants are charged as principals, it is not necessary to allege a conspiracy between them, or any particular part performed by either. *Williams v. S.* 42 Tex. 392; *Bell v. S.* 1 App. 598; *Tuller v. S.* 8 App. 501. It is not necessary to allege the facts relied upon to show the defendants to be principals, although the offense with which they are charged may not have actually been committed by them. But if they are principals by reason of the parts performed by them in the commission of the offense, they may be convicted under an indictment charging them directly with its commission. If, however, the pleader charges each of the defendants with the particular acts done, or part performed by them respectively, and the facts alleged as to some of them be insufficient, the indictment as to them must be held bad. *Williams v. S.* 42 Tex. 392; *Gladden v. S.* 2 App. 508.

Several offenders may sometimes be included in the same indictment, for different offenses of the same kind, the word "separately" being inserted, which would make it several as to each, but if any material inconvenience is apprehended by reason thereof, the court may quash on that ground. *Lewellen v. S.* 18 Tex. 538.

§1995—**Written instruments.**—When and how to be set forth.—In charging the offense of forgery, the indictment must purport to and must set out the alleged false instrument by its tenor; that is, in *hæc verba*—unless it be impracticable to do so, in which case it must specifically allege the reason for not so setting it out, and then allege its substance and so describe it as to identify it with reasonable certainty. *Ante*, §740. An indictment for libel must set out the alleged libel in *hæc verba*, and must show upon its face that it is so set out. *Ante*, §1086. So in swindling, where the alleged swindle was perpetrated by means of a written instrument, the written instrument should be set out, as in the case of forgery, or good reason should be alleged for not so setting it out. *Ante*, §1383. So for the offense of sending or delivering a threatening letter, the indictment must set out the letter in *hæc verba*. *Ante*, §1416. In charging perjury upon a false statement made in writing, it is not necessary to set out the writing in *hæc verba*. It will be sufficient to set it out substantially. *Ante*, §308. In setting out an alleged forged instrument it is not necessary to set out any writing put upon the instrument subsequent to the forgery. *Hennessey v. S.* 23 App. 340; *May v. S.* 15 App. 430; *Labbate v. S.* 6 App. 257. An allegation that the writing is "in substance and effect as follows, to-wit:" does not imply tenor, but implies merely that the writing is substantially set forth. *Thomas v. S.* 18 App. 213; *Coulson v. S.* 16 App. 189. "In words and figures following, to-wit," or "in tenor as follows, to-wit," indicate that the writing is set out in *hæc verba*, and not merely in substance. *Baker v. S.* 14 App. 332. As a general rule, whenever an instrument in writing enters into an offense as a part or basis thereof, or when its proper construction is material, the instrument should be set out in *hæc verba* in the indictment. *White v. S.* 3 App. 605; *Baker v. S.* 14 App. 332; *Coulson v. S.* 16 App. 189; *Thomas v. S.* 18 App. 213; *Dwyer v. S.* 24 App. 132. When, in charging the making, etc., of an indecent, etc., written composition, the composition being set out in *hæc verba*, it is unnecessary to charge the manner and means of the making of the same, or the circumstances attending its publication. *Smith v. S.* 24 App. 1.

§1996—**ART. 429.—Definition of an "information."**—An "information" is a written statement filed and presented in behalf of the state by the district or county attorney, accusing the defendant therein named of an

offense which is by law subject to be prosecuted in that manner. [O. C. 402.]

§1997—Decisions under preceding article.—An information is the official act of the state's attorney, and not the act of the person upon whose affidavit it is based; and it must clearly appear on the face of the information that the charge against the accused is preferred by the state's attorney. *Thomas v. S.* 15 App. 39; *Prophit v. S.* 12 App. 233; *Warren v. S.* 17 App. 207; distinguished from *Hunt v. S.* 9 App. 404, and *Allen v. S.* 13 App. 28; *Johnson v. S.* 17 App. 230; *Hilliard v. S. Id.* 210; *S. v. Corbitt*, 42 Tex. 88. All misdemeanors may be presented by information. *Ante*, §1945.

§1998—ART. 430.—Requisites of an information.—An information is sufficient if it has the following requisites:

1. It shall commence "In the name and by the authority of the State of Texas."

2. That it shall appear to have been presented in a court having jurisdiction of the offense set forth.

3. That it appear to have been presented by the proper officer.

4. That it contains the name of the person accused, or be stated that his name is unknown, and give a reasonably accurate description of him.

5. It must appear that the place where the offense is charged to have been committed is within the jurisdiction of the court where the information is filed.

6. That the time of the commission of the offense be some date anterior to the filing of the information, and that the offense does not appear to be barred by limitation.

7. That the offense be set forth in plain and intelligible words.

8. That the information conclude "Against the peace and dignity of the state."

9. It shall be signed by the district or county attorney, officially. [O. C. 403.]

See Willson's Cr. Forms, 543-544.

§1999—Decisions as to informations.—The rules with respect to the allegations in indictments and the certainty required, are applicable also to informations. *Post*, Art. 432; *S. v. Elliott*, 41 Tex. 224; *Calvert v. S.* 8 App. 538; *Rasberry v. S.* 1 App. 664. An information may be presented in vacation. *S. v. Corbitt*, 42 Tex. 88; *Rasberry v. S.* 1 App. 664. It must commence "in the name and by the authority of the State of Texas." *Ante*, §1950; *Saine v. S.* 14 App. 144; *Jefferson v. S.* 24 App. 535; *Calvert v. S.* 8 App. 538. It must show that it is presented in a court having jurisdiction of the offense charged. *Ante*, §1951; *Davis v. S.* 2 App. 184; *Thornberry v. S.* 3 App. 36.

It must appear to have been presented by the proper officer. *Ante* §1997.

It must contain the name of the person accused, etc. *Ante* §1952. The information may designate the defendant by name without following the complaint, which designates him also with an *alias*. *Harrison v. S.* 6 App. 256. If the name of the accused is stated wrong, it may be corrected on his suggestion, but not on that of the prosecuting officer. *Patillo v. S.* 3 App. 442; *Bassett v. S.* 4 App. 41; *Wilson v. S.* 6 App. 154. A variance between the name of the accused as stated in the complaint and that stated in the information, is fatal. *McDevro v. S.* 23 App. 429.

It must allege the *venue* of the offense. *Ante*, §§1953, 1963, 1715. And so also must the complaint upon which it is founded. *Smith v. S.* 3 App. 549. The want of an allegation of *venue* in the information cannot be supplied by such an allegation in the complaint. *Lawson v. S.* 14 App. 83.

It must allege the *time* of the commission of the offense, and the time must be a date anterior to the presentation of the information, and not so remote as to show that the offense is barred by limitation. *Ante*, §1954; *Blake v. S.* 3 App. 149; *York v. S. Id.* 15; *Swancoat v. S.* 4 App. 105; *Brewer v. S.* 5 App. 248; *S. v. Tandy*, 41 Tex. 291; *Williams v. S.* 12 App. 226. A variance between the information and the complaint as to the time of the commission of the offense is fatal. *Hoer v. S.* 4 App. 75; *Williamson v. S.* 5 App. 485; *Collins v. S. Id.* 37; *Hawthorne v. S.* 6 App. 562. The complaint cannot be resorted to, to supply the allegation of time in the information. *Kennedy v. S.* 22 App. 693. See a sufficient allegation of time. *Wilson v. S.* 15 App. 150.

The offense must be set forth in plain and intelligible words. *Ante*, §1955; *Lasindo v. S.* 2 App. 59; *Swancoat v. S.* 4 App. 105; *Walton v. S.* 12 App. 117. The averments charging the offense must be direct, positive and certain, and not by way of argument and inference. *Hunt v. S.* 9 App. 404; *Moore v. S.* 7 App. 608; *Thomas v. S.* 12 App. 227; *Prophit v. S. Id.* 233; *Brown v. S.* 11 App. 451. "It must conclude against the peace and dignity of the State.



*Ante*, §1957; *Saine v. S.* 14 App. 144; *Thompson v. S.* 15 App. 39; *Rasberry v. S.* 1 App. 664; *Wilson v. S.* 38 Tex. 548.

It does not invalidate the information that it is not signed officially by the district or county attorney, if it purports to have been presented by him. But the better practice is that the officer presenting it should sign it officially. *Ante*, §1957; *post*, Art. 529; *Rasberry v. S.* 1 App. 664. Bad spelling, or bad handwriting, will not vitiate an information where the meaning is plain, and the complaint may be consulted in aid of the information in these respects. *Irvin v. S.* 7 App. 109; *Stinson v. S.* 5 App. 31. See also, *ante*, §1991. The insufficiency of an information does not necessarily vitiate the complaint. *Goode v. S.* 2 App. 520. An information *must* be founded upon the sworn complaint of a credible person, and the record on appeal must show a complaint, or the conviction will be set aside. *Davis v. S.* 2 App. 184; *Daniels v. S.* *Id.* 353; *Thornberry v. S.* 3 App. 36; *Deon v. S.* *Id.* 435; *Turner v. S.* *Id.* 551; *Casey v. S.* 5 App. 462; *Perez v. S.* 10 App. 327; *Luckey v. S.* 14 App. 164; *Rose v. S.* 19 App. 470; *Wadgyman v. S.* 21 App. 459.

It is wholly unnecessary for an information to state that it is founded upon a complaint in writing under oath, or to make any mention whatever of the complaint. The law requires no more than that such complaint be filed with the information. *Johnson v. S.* 17 App. 230. It is not a valid objection to an information that it is founded upon a complaint upon which a previous information had been based, but which previous information had been dismissed. *Goode v. S.* 2 App. 520; *Boyd v. S.* 11 App. 80. The material allegations of the information must conform to those of the complaint upon which it is founded, and a want of such conformity will vitiate the information. *Davis v. S.* 2 App. 184; *Daniels v. S.* *Id.* 353; *Stinson v. S.* 5 App. 31; *Johnson v. S.* 4 App. 594; *Ferguson v. S.* *Id.* 156; *Hoer v. S.* *Id.* 75; *Swink v. S.* 7 App. 73; *Hawthorne v. S.* 6 App. 562; *Williamson v. S.* 5 App. 485; *Collins v. S.* *Id.* 37; *Cole v. S.* 11 App. 67. An information as to all material, substantial matters, must be complete within itself, without reference to the complaint upon which it is based. But, on appeal, where the information is bad, but the complaint is good, the conviction will be set aside, but the prosecution will not be dismissed, as another information may be brought upon the complaint in the trial court. *Pittman v. S.* 14 App. 576. An information will not be held invalid because the complaint upon which it is apparently based, and which is found among the papers in the case, does not have the file mark indorsed upon it. *S. v. Elliott*, 41 Tex. 224. And where a complaint and information are attached together, a file mark on the information will be considered as relating to both papers. *Stinson v. S.* 5 App. 31. If the complaint and information are written on the same sheet of paper, one file mark will answer for both. An objection that the complaint was not "filed" must be taken *in limine*. *Schott v. S.* 7 App. 616. A complaint without a *jurat* will not support an information, and after conviction the *jurat* cannot be added or amended. *Scott v. S.* 9 App. 434. A defective complaint upon which an information has been presented cannot be supplied by a new complaint so as to make good the information. A new information should be presented upon the new complaint. *Paschal v. S.* 9 App. 205. The particularity requisite in an information is not necessary in the complaint on which it is founded, nor are discrepancies between them of any consequence, provided there is accordance in substance. They should agree as to time and venue, and the names of the defendant and the injured party, and there should be substantial conformity in their allegations descriptive of the offense. *Cole v. S.* 11 App. 67.

An information may be filed at any time before the offense is barred by limitation, although the complaint may have been filed long before the time of presenting the information. *Roberson v. S.* 15 App. 317.

**§2000—ART. 431.—Shall not be presented until oath has been made, etc.**—An information shall not be presented by the district or county attorney until oath has been made by some credible person, charging the defendant with an offense. The oath shall be reduced to writing and filed with the information. It may be sworn to before the district or county attorney who, for that purpose, shall have power to administer the oath, or it may be made before any officer authorized by law to administer oaths. [O. C. 404.]

See also, as to complaints, *ante*, §§1487, 1488, 1489, 1490, 1733, 1734, 1735, 1739, 1740, 1741, 1742, 1999; *post*, Arts. 902, 903.

**§2001—ART. 432.—Rules as to indictments applicable to informations.**—The rules laid down in this chapter with respect to the allegations in indictments and the certainty required are applicable also to informations. [O. C. 406.]

*Ante*, §1999. See index under head of "Indictment" for the rules referred to.

**§2002—ART. 433.—Indictment, etc., may contain several counts.**—An indictment or information may contain as many counts, charging the same offense, as the attorney who prepares it may think necessary to

insert, and an indictment or information shall be sufficient if any one of its counts be sufficient. [Added in revising.]

See Willson's Cr. Forms, 2.

§2003—**Decisions as to Counts.**—Before the enactment of the preceding article it was permissible to charge two or more offenses in separate counts of the same indictment. *Boles v. S. 13 App. 650*; *Dill v. S. 1 App. 278*; *Weathersby v. S. Id. 643*; *Waddell v. S. Id. 720*; *Barnwell v. S. Id. 745*; *Dalton v. S. 4 App. 333*. The word "count" is used when, in one finding by the grand jury, the essential parts of two or more separate indictments, for causes apparently distinct, are combined, the allegations for each being termed *count*, and the whole an *indictment*. An indictment in several counts is, therefore, a collection of separate bills against the same defendant, under one caption, and found and indorsed collectively as true by the grand jury. The object is what it appears to be, namely, in fact to charge the defendant with distinct offenses, under the idea that the court may, as often as it will, allow them to be tried together, thus averting from both parties the burden of two or more trials; or, in another class of cases, to vary what is meant to be the one accusation, so as, at the trial, to avoid an acquittal by an unforeseen lack of harmony between allegations and proofs, or a legal doubt as to what form of charge the court will approve. *Boren v. S. 23 App. 28*. An indictment may and should comprise as many counts as are necessary to meet the contingencies of the evidence. *Dill v. S. 1 App. 278*; *Weathersby v. S. Id. 643*; *Waddell v. S. Id. 720*; *Barnwell v. S. Id. 745*; *Irving v. S. 8 App. 49*; *Mathews v. S. 10 App. 279*; *Gonzales v. S. 12 App. 637*; *Boles v. S. 13 App. 650*; *Dovalina v. S. 14 App. 312*; *Bean v. S. 17 App. 60*; *Shubert v. S. 20 App. 320*; *Masterson v. S. Id. 574*; *Green v. S. 21 Tex. 64*; *Keeler v. S. 15 App. 111*; *Chester v. S. 23 App. 577*. Each separate count should charge the defendant as if he had committed a distinct offense, because it is upon the principle of joinder of offenses that the joinder of counts is admitted. Therefore, we must look to the allegations of each count to determine its sufficiency, just as though it was the only count in the indictment; and when thus tested and found sufficient, we need look no farther. But if not sufficient on its face, we may then look to the preceding count, or counts, for auxiliary allegations to supply its defects. *Boren v. S. 23 App. 28*; *Boles v. S. 13 App. 650*. Counts are independent of each other, and the first or any other may be quashed without affecting the remainder; and a general verdict applies to those which are good, and on appeal the presumption is that the conviction was upon the good count. *King v. S. 10 Tex. 281*; *S. v. Rutherford, 13 Tex. 24*; *S. v. Yarborough, 19 Tex. 161*; *Henderson v. S. 2 App. 88*; *Boren v. S. 23 App. 28*.

§2004—**Election between counts.**—**Decisions as to.**—When several counts in the same indictment are substantially for the same offense, and are introduced for the purpose of meeting the evidence as it may transpire, the state will not be required to elect on which it will rely. *Green v. S. 21 App. 64*; *Masterson v. S. 20 App. 574*; *Keeler v. S. 15 App. 111*; *Gonzales v. S. 5 App. 584*; *Dalton v. S. 4 App. 333*; *Dill v. S. 1 App. 278*; *Weathersby v. S. Id. 643*; *Waddell v. S. Id. 720*; *Barnwell v. S. Id. 745*; *Irving v. S. 8 App. 46*. The rule seems to be that the court should interpose by quashing the indictment, or by compelling the state to elect, where an attempt is made as manifested by either the indictment or the evidence, to convict the accused of two or more offenses growing out of distinct and separate transactions; but should never interpose in either mode, where the joinder is simply designed and calculated to adapt the pleadings to the different aspects in which the evidence on the trial may present a single transaction. See this case for illustrations: *Keeler v. S. 15 App. 111*, and see, also, *Simms v. S. 10 App. 131*; *Fisher v. S. 33 Tex. 792*. If the duty to elect be incumbent on the state, the election should be made when the state has proceeded far enough with its testimony to identify the transaction, and before the defendant offers his evidence. *Dalton v. S. 4 App. 333*; *Lunn v. S. 44 Tex. 85*. As to election in misdemeanors, see *Street v. S. 7 App. 5*; *Waddell v. S. 1 App. 720*. Where the charge of the court limits the finding of the jury to a single count, it is tantamount to an election by the state to rely upon that count alone. *Dalton v. S. 4 App. 333*.

For other decisions as to the requisites of indictments in particular cases, examine under the heads of the different offenses in the Penal Code.

§2005—**ART. 434.—When indictment or information has been lost, mislaid, etc.**—When an indictment or information has been lost, mislaid, mutilated or obliterated, the district or county attorney may suggest the fact to the court, and the same shall be entered upon the minutes of the court, and in such case another indictment or information may be substituted upon the written statement of the district or county attorney that it is substantially the same as that which has been lost, mislaid, mutilated or obliterated. Or another indictment may be presented, as in the first instance, and in such case the period for the commencement of the prosecution shall be dated from the time of making such entry. [O. C. 406a.]

See Willson's Cr. Forms, 548, 549, 550.

§2006—**Substitution.**—**Decisions as to.**—The preceding article is constitutional. *Withers v. S. 21 App. 210*. But its constitutionality was questioned in *Shultz v. S. 15 App. 258*; *Gillespie v. S. 16 App. 641*. Under a former statute (Hart Dig. Art. 454), the fact of loss must have

been entered on the minutes and a new indictment be found as originally, or the prosecution might have proceeded under another statute (Hart Dig. Art. 2750), by establishing, by clear and conclusive evidence, the exact contents of the lost indictment. *S. v. Elliott*, 14 Tex. 423; *S. v. Adams*, 17 Tex. 232. The record must show: 1. The suggestion of loss, etc. 2. The leave of the court to substitute. 3. That the substitution was in fact made. *Turner v. S.* 7 App. 596; *Beardall v. S.* 4 App. 631; *Magee v. S.* 14 App. 366. The suggestion of loss should be in writing, should set out the facts, and be entered on the minutes of the court; and upon the presentation of the paper prepared as the substitute, accompanied by a written statement of the district or county attorney, that it is substantially the same as that lost, an order of the court should be entered, showing that the substitution was allowed and made. See this case for an insufficient record entry of substitution. *Clampitt v. S.* 3 App. 638; *Graham v. S.* 43 Tex. 550; *S. v. Adams*, 17 Tex. 232. The authenticity of a substitute indictment cannot be rested on presumption, nor on mere inference from a record recital that, the original indictment being lost, the court granted leave to substitute it with a copy inspected by the court. The record must affirmatively verify it as a fact that the substitution was actually made. *Rogers v. S.* 11 App. 608; *Turner v. S.* 7 App. 596; *Strong v. S.* 18 App. 19. Where an indictment has been lost or destroyed after trial and conviction, it may be supplied either by the presentment by the grand jury of a second indictment, or by substitution. *Harwood v. S.* 16 App. 416; *Turner v. S.* *Id.* 318; *Shultz v. S.* 15 App. 258. But the indictment or information cannot be supplied after an appeal has been perfected, so as to sustain the conviction. *Turner v. S.* 16 App. 318. But the record may be amended by making the substitution entries *nunc pro tunc*. *Turner v. S.* 7 App. 596. An indictment or information can only be substituted when it has been lost, mislaid, mutilated, or obliterated. Where the original indictment was on file in the clerk's office of the court of appeals, where it had been sent on appeal for inspection of said court, it was held that it could not be substituted. *Shehane v. S.* 13 App. 533. The fraudulent alteration of a date in a complaint is a mutilation not only of the complaint but of the information, and the proper practice in such case would be to substitute the complaint and information, as the complaint could not be amended with respect to the date of the commission of the offense. *Huff v. S.* 23 App. 291. Where an information has been torn, and so mutilated as to render illegible an entire line, it should be substituted. *Perez v. S.* 10 App. 327. An indictment which has become so mutilated as to become unintelligible, may be substituted. *S. v. Ivey*, 83 Tex. 646.

As to amending an indictment or information, see, *post*, Arts. 550, 551, and notes thereto.

**§2007—ART. 435.—Order transferring cases.**—Upon the filing of an indictment in the district court of each county in this state, which charges an offense over which such court has no jurisdiction, the judge of such court shall immediately, or as soon as convenient, make an order transferring the same to such inferior court as may have jurisdiction to try the offense therein charged, stating in such order the cause transferred, and to what court transferred. [Const. art. 5, sec. 17; Act August 12, 1876, p. 135; Acts 1879, ch. 65, p. 71; Act February 5, 1881, ch. 3, p. 2.]

See Willson's Cr. Forms, 551.

**§2008—ART. 436.—What causes shall be transferred to justice of the peace at county seat.**—Causes over which justices of the peace have jurisdiction may be transferred to a justice of the peace at the county seat; or, in the discretion of the judge, to a justice of the precinct in which the same can be most conveniently tried, as may appear by memorandum indorsed by the foreman of the grand jury, on the indictment or otherwise; but if it appear to the judge that the offense has been committed in any incorporated town or city, the cause shall be transferred to a justice in said town or city, if there be one therein; and any justice to whom any such cause may be transferred shall have jurisdiction to try the same. [Const. art. 5, sec. 16; Act April 3, 1879, ch. 65, p. 71; Original Act August 12, 1876, ch. 91, p. 135.]

**§2009—ART. 437.—Duty of clerk of district court when case is transferred.**—It shall be the duty of the clerk of the district court, without delay, to deliver the indictments in all cases transferred, together with all the papers relating to each case, to the proper court or justice of the peace, as directed in the order of transfer, and he shall accompany each case with a certified copy of all the proceedings taken therein in the district court, and also with a bill of the costs that have accrued therein in the district court, and the said costs shall be collected in the court in which said cause is tried in the

same manner as other costs are collected in criminal cases. [Act August 12, 1876, p. 135.]

See Willson's Cr. Forms, 552.

**§2010—ART. 438.—Proceedings of court to which cases have been transferred.**—All cases transferred from the district court shall be entered on the docket of the court to which they are transferred, and all process thereon shall be issued, and the defendants tried in the same manner as if the causes had originated in the court to which they have been transferred. [Act August 12, 1876, p. 135; amended slightly in revising.]

**§2011—ART. 439.—Cause improvidently transferred, shall be re-transferred.**—When a cause has been improvidently transferred to a court which has no jurisdiction of the same, the court to which it has been transferred shall order it to be re-transferred to the proper court, and the same proceedings shall be had as in the case of the original transfer. In such case the defendant and the witnesses shall be held bound to appear before the court to which the case has been re-transferred, the same as they were bound to appear before the court so transferring the same. [Added in revising.]

See Willson's Cr. Forms, 553.

**§2012—Transfer of indictments—Decisions as to.**—All indictments must be presented in the district court, and those for misdemeanor, over which said court has no jurisdiction, must be transferred to the proper tribunal for trial. *Davis v. S.* 6 App. 133; *Coker v. S.* 7 App. 83. As to the jurisdiction of the district courts, see, *ante*, §§1530, 1534. Of county courts, *ante*, §§1540, 1541, 1542. Of justices of the peace, §§1549, 1550. The district court has no authority to transfer a felony case to the county court, and an order of transfer in such case is a nullity, and does not divest the district court of jurisdiction, and no order to re-transfer the case is requisite. *Fossett v. S.* 11 App. 40. When an indictment is for an offense cognizable by a justice of the peace, and it is made to appear to the district court that the offense was committed in an incorporated town or city, the cause should be transferred to a justice of the peace in said town or city, if there be such officer therein. But the law does not charge a district judge with judicial knowledge that any designated locality is an incorporated town or city, and that there is a justice of the peace therein. If, therefore, those facts were not made to appear to the district judge when he transferred the cause to the county court, the latter court acquires jurisdiction by the order of transfer, and that jurisdiction cannot be impeached in the county court. *Patterson v. S.* 12 App. 222. In executing the order of transfer, the district clerk must accompany each case with a certified copy of all the proceedings taken therein in the district court. Non-compliance with this requirement is available to the defendant by plea to the jurisdiction of the court to which the transfer is made. *Brumley v. S.* 11 App. 114. See a certificate held to be in substantial compliance with the statute. *Gaston v. S.* 11 App. 143; *Coker v. S.* 7 App. 84. The record of the presentment of the indictment should be certified to the court to which the cause is transferred as a part of the proceedings taken in the district court. *Walker v. S.* 7 App. 52. An objection to the proceedings of transfer cannot be made by exception to the indictment. *Coker v. S.* 7 App. 84. Nor by motion in arrest of judgment. *Friedlander v. S.* 7 App. 204. Nor after mistrial. *Thompson v. S.* 2 App. 82. But may be made by plea to the jurisdiction. *Brumley v. S.* 11 App. 114. For insufficient certificates of transfer, see *Donaldson v. S.* 15 App. 25; *McDonald v. S.* 7 App. 113; *Walker v. S.* *Id.* 52. Substantial compliance with the statute regulating the transfer of indictments is all that is required in such proceedings. *Brannon v. S.* 23 App. 428. The law does not require that the certificate of transfer shall recite that the indictment was signed, or not signed, by the foreman of the grand jury. *Robinson v. S.* 24 App. 4. The certificate must be authenticated by the seal of the district court. *Walker v. S.* 7 App. 52. The certificate, when defective, may be amended, or a new certificate may be made by the clerk of the district court, and filed with the papers of the cause in the court to which the cause has been transferred. *McDonald v. S.* 7 App. 113; *Hasley v. S.* 14 App. 217. In cases transferable from the district court, no process therein can issue from that court, but the process therein must issue from the court to which the causes are transferred. *Cassady v. S.* 4 App. 96. Where the indictment charges a felony, the case is not transferable from the district court, because it may have been developed by the evidence on a trial that the defendant, if guilty, was guilty of a misdemeanor only. *Ingles v. S.* 4 App. 91. Where the district court is vested with jurisdiction over misdemeanors, and by statute such jurisdiction is divested, and vested in the county court, indictments and informations for misdemeanors then pending in said district court should be transferred to the county court. *Hildreth v. S.* 19 App. 195.

CH. 4.—OF PROCEEDINGS PRELIMINARY TO TRIAL.

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## I. OF ENFORCING THE ATTENDANCE OF DEFENDANT AND OF FORFEITURE OF BAIL.

§2013—ART. 440.—**Bail forfeited, when.**—Whenever a defendant is bound by recognizance or bail-bond to appear at any term of a court, and fails to appear on the day set apart for taking up the criminal docket, or any subsequent day when his case comes up for trial, a forfeiture of his recognizance or bail-bond shall be taken. [O. C. 407.]

See, *ante*, Ch. 4, Title 4.

§2014—**Decisions applicable to preceding article.**—The failure of a defendant to appear in compliance with the condition of a recognizance or bail-bond, is a forfeiture, and a judgment *nisi* is a recorded declaration of the fact. Taylor v. S. 21 Tex. 499. A forfeiture declared on a day previous to the day on which the defendant is bound to appear is void. Crowder v. S. 7 App. 484. But a forfeiture may be judicially declared at any time after it has occurred, and before the obligation is barred by the statute of limitation. Hill v. S. 15 App. 530; Barrera v. S. 32 Tex. 644. The undertaking of the bail is an original undertaking for the appearance of his principal to answer to the indictment; and hence, if he does not have his principal in court according to his undertaking, he forfeits his undertaking, and it becomes a debt of record, and he a principal judgment debtor, as between himself and the state. Gay v. S. 20 Tex. 504.

§2015—ART. 441.—**Manner of taking a forfeiture.**—Recognizances and bail-bonds are forfeited in the following manner: The name of the defendant shall be called distinctly at the door of the court-house, and if the defendant do not appear within a reasonable time after such call is made,

[9—Tex. C. O. P.]

judgment shall be entered that the State of Texas recover of the defendant the amount of money in which he is bound, and of his sureties the amount of money in which they are respectively bound, which judgment shall state that the same will be made final, unless good cause be shown at the next term of the court why the defendant did not appear. [O. C. 408; amended in revising.]

The article formerly required that the sureties as well as the principal should be called at the door of the court-house. See *Odiorne v. S.* 37 Tex. 122, decided under the article before the same was changed. For form of entry of forfeiture, see Willson's Cr. Forms, 600. See, also, *ante*, §1830.

**§2016—Judgment nisi—Decisions as to.**—Before the adoption of the Code a simple entry declaring the recognizance or bond “forfeited” and ordering *scire facias* to issue was sufficient. *Lawton v. S.* 5 Tex. 272. A judgment final in the first instance is not authorized. There must first be a judgment *nisi*, and notification to the sureties. *Waughop v. S.* 6 Tex. 337. And the judgment *nisi* must be entered against the principal as well as the sureties. *Ellis v. S.* 10 App. 324. It has been held that, on appeal, it will be presumed that the judgment *nisi* was taken in accordance with the statutory requirements, unless it affirmatively appear otherwise. *Thompson v. S.* 31 Tex. 166. But see subsequent cases which hold that the judgment *nisi* must show that the forfeiture was taken in accordance with the statutory requirements. *Lindley v. S.* 17 App. 120; *McWhorter v. S.* 14 App. 239; *Collins v. S.* 12 App. 356. A judgment *nisi* which does not contain the statutory provisions is void, and cannot be made the basis of a final judgment. Thus, it must state that “the same will be made final, unless good cause be shown at the next term of the court why the defendant did not appear.” *Ware v. S.* 21 App. 328; *McIntyre v. S.* 19 App. 443; *Burnett v. S.* 18 App. 283; *Lindley v. S.* 17 App. 120; *Thompson v. S.* *Id.* 318; *Pickett v. S.* 16 App. 648; *Watkins v. S.* *Id.* 646; *Collins v. S.* 12 App. 356; *Thomas v. S.* *Id.* 416; *Barton v. S.* *Id.* 613; *Fulton v. S.* 14 App. 32; *McWhorter v. S.* *Id.* 239; *Addison v. S.* *Id.* 568; *Hart v. S.* 13 App. 555; *Smith v. S.* *Id.* 31; *Cheatham v. S.* *Id.* 32. The judgment *nisi* need not order the issuance of citations nor direct when they shall be returnable. Error in these respects is not material and does not affect the validity of the judgment *nisi*. *Gragg v. S.* 18 App. 295. A judgment *nisi* is properly rendered against the principal and his sureties *severally* for the amount of the recognizance or bond. *Kiser v. S.* 13 App. 201; *ante*, §1830. But see *Carr v. S.* 9 App. 463; *Sass v. S.* 8 App. 426, and *Ishmael v. S.* 41 Tex. 244, which it would seem have been virtually, though not expressly, overruled by the *Kiser* case, *supra*, and other cases cited in §1830, *ante*. Where a judgment *nisi* recites a greater sum than the recognizance or bail-bond, such judgment is invalid. *Barringer v. S.* 27 Tex. 553. The judgment *nisi* must specify the amount of money for which it is rendered, both against the principal and the sureties. *Galindo v. S.* 15 App. 319; *S. v. Cox*, 25 Tex. 404. It should in all material respects conform to the recognizance or bail-bond. *Werbiski v. S.* 20 App. 331; *Barringer v. S.* 27 Tex. 553. Thus, where a bail-bond required the principal to appear in R. county, and was forfeited in A. county, and the judgment *nisi* described the bond as requiring the principal to appear in A. county, it was held to be a fatal misdescription of the bond. *Cushman v. S.* 38 Tex. 181. A. was held to bail for his appearance before the district court to answer a charge of swindling. He was indicted for theft, and failing to appear his bail-bond was forfeited. Held, that the indictment for theft did not authorize the forfeiture of the bail-bond for swindling. *Addison v. S.* 14 App. 568. It is not a valid objection to a judgment *nisi*, on a bond to answer a charge of murder, that the complaint on which the principal was brought before the magistrate by whom the bond was taken only charged the principal with an assault with intent to murder. *Dyches v. S.* 24 Tex. 266. It is proper to order an *alias copias* for the principal to issue at the time of rendering judgment *nisi*. *Post*, §2047; *Slocumb v. S.* 11 Tex. 15. The judgment *nisi* may be amended even after the expiration of the term at which it was rendered, so as to correct clerical errors or mistakes, or to add an omitted clause necessary to give it effect, when there is anything in the judgment by which to amend. In such case, however, the principal, as well as the sureties, must have notice of the motion to amend. *Collins v. S.* 16 App. 274. Where the judgment *nisi* is defective the state, by proper motion, etc., should have the same amended before taking judgment final upon it. *Robertson v. S.* 14 App. 210.

**§2017—ART. 442.—Citation to sureties.**—After the adjournment of the court at which the proceedings set forth in the last two articles have been had, a citation shall issue from the court notifying the sureties of the defendant that the recognizance or bond has been forfeited, and requiring them to appear at the next term of the court and show cause why the same should not be made final; but it shall not be necessary to give notice to the defendant. [O. C. 409.]

**§2018—Decisions under preceding article.**—It is no valid objection to a citation that it was issued during the term of the court at which the judgment *nisi* was rendered. *Jones v. S.* 15 App. 82. Citation for the principal need not be issued. *Branch v. S.* 25 Tex. 423; *Vaughn v. S.* 29 Tex. 273; *Hutchings v. S.* 24 App. 242.



§2019—ART. 443.—**Requisites of citation.**—A citation shall be sufficient if it contain the following requisites:

1. It shall run "In the name of the State of Texas."
2. It shall be directed to the sheriff or any constable of the county, where the surety resides or is to be found.
3. It shall state the name of the principal in such recognizance or bail-bond and the names of his sureties.
4. It shall state the date of such recognizance or bail-bond and the offense with which the principal is charged.
5. It shall state that such recognizance or bail-bond has been declared forfeited, naming the court before which the forfeiture was taken, the time when taken, and the amount for which it was taken against each party thereto.
6. It shall notify the surety to appear at the next term of the court and show cause why the forfeiture should not be made final.
7. It shall be signed and attested officially by the court or clerk issuing the same. [Added in revising.]

See Willson's Cr. Forms, 601.

§2020—**Citation—Decisions as to.**—The style of the writ should be "The State of Texas." Const. Art. 5, Sec. 12. The object of the citation is to bring the sureties into court to show cause why judgment final should not be entered against them, and it is not essential that it should be issued for, or served upon, the principal. *Hutchings v. S.* 24 App. 242; *ante*, §2018. It is not required that the citation to the sureties should show by what authority the bail-bond was taken, or that it should appear therefrom that such bond was taken and approved by competent legal authority. The requisites of the citation are prescribed by the preceding article, and a citation containing said requisites is sufficient. A contrary rule was laid down in *Pearson v. S.* 7 App. 280, decided before the enactment of the preceding article, which decision was inadvertently approved in *Lindley v. S.* 17 App. 121. But said decisions in this particular are expressly overruled in *Werbeski v. S.* 20 App. 131, following the decision in *Brown v. S.* 18 App. 326. It must state the date of the recognizance or bond, and the offense with which the principal is charged, and it must appear to be an offense against the law. *Thompson v. S.* 17 App. 318; *Jones v. S.* 15 App. 82. And it must be the offense named in the recognizance or bond. *Balles v. S.* 20 Tex. 498. It must state the date of the recognizance or bond correctly. *Holt v. S.* 20 App. 271; *Faubion v. S.* 21 App. 494; *Hedrick v. S.* 3 App. 571; *Garrison v. S.* 21 App. 342. The date of a bail-bond is the date on which it was executed, and not the date of its approval. *Holt v. S.* 20 App. 271; *Faubion v. S.* 21 App. 494. Where the citation described the undertaking forfeited as a recognizance, and the undertaking which was in fact forfeited was a bail-bond, the variance was held to be fatal. *Garrison v. S.* 21 App. 342. The citation must not vary essentially from the recognizance or bond. *Barringer v. S.* 27 Tex. 553; *Cushman v. S.* 38 Tex. 181; *Smith v. S.* 7 App. 160. It may, however, omit unessential particulars, provided it sets out all the substantial requisites. *Sass v. S.* 8 App. 426; *Cowen v. S.* 3 App. 380; *Brown v. S.* 43 Tex. 349; *Cox v. S.* 25 Tex. 404. Irrelevant and informal matter will not vitiate it. *Davidson v. S.* 20 Tex. 649; *S. v. Glaevecke*, 33 Tex. 53. The citation performs the double function of a petition and a citation, and in establishing the essential matters therein stated the *allegata* and the *probata* must substantially correspond. *Arrington v. S.* 13 App. 554; *Houston v. S.* *Id.* 558; *S. v. Cox*, 25 Tex. 404; *Cowen v. S.* 3 App. 380; *Brown v. S.* 43 Tex. 349; *Busby v. S.* 13 Tex. 136; *McWhorter v. S.* 14 App. 239; *Goodin v. S.* 14 App. 239; *Short v. S.* 16 App. 44. "To show cause why said judgment should not be made final," are the proper words to use in the conclusion of the citation. *Jones v. S.* 15 App. 82. It is not a valid objection to a judgment final that the citation issued during the term of the court at which the judgment *nisi* was rendered. *Jones v. S.* 15 App. 82. A citation may be issued to any county in which the defendant for whom it is issued resides, and it is not required that either the citation or the judgment *nisi* shall show the place of the defendant's residence. *Dyches v. S.* 24 Tex. 266. Where there is an apparent variance between the names of the principal or a surety as used in the recognizance or bond, or indictment, and as used in the citation, it must be shown by proper averment in the citation that the variant names designate the same person. Thus, where the bond was signed "W. J. McCulloch," when the information charged "John McCulloch," the citation should have averred that the two names referred to one and the same party. *Hutchings v. S.* 24 App. 242; *Vidauri v. S.* 22 App. 676; *McIntyre v. S.* 19 App. 443; *Weaver v. S.* 13 App. 191; *Loving v. S.* 9 App. 471; *Walter v. S.* 6 App. 254; *Cassaday v. S.* 4 App. 96; *Lowe v. S.* 15 Tex. 141. A citation may be amended under the same rules governing the amendment of citations and petitions in civil actions. *Hutchings v. S.* 24 App. 242; *Gragg v. S.* 18 App. 295. And defects of form are immaterial after a continuance of the cause. *Gragg v. S.* 18 App. 295. See, as to amendments, *Sayles' Civ. Stat.*, Arts. 1192, 1239 and notes.

**§2021—ART. 444.—Citation shall be served and returned as in civil actions.**—Sureties shall be entitled to notice by service of citation, the length of time and in the manner required in civil actions, and the officer executing the citation shall return the same in the manner provided for the return of citations in civil actions. [O. C. 412.]

For service and return of citations in civil actions, and decisions relating thereto, see Sayles' Civ. Stat., Title 29, Ch. 6.

**§2022—Service and return of citation—Decisions as to.**—Citation need not be served upon the principal. Service upon the sureties is sufficient. *Branch v. S. 25 Tex. 423; Vaughn v. S. 29 Tex. 273; Hutchings v. S. 24 App. 242.* The sureties are entitled to notice by service of citation for the length of time and in the manner required in a civil action. Each defendant must be served by delivering to him in person a true copy of the citation, and the return of the officer must show the manner of the service, and that it was in compliance with law. Thus, a return as follows: "Executed on July 14, at 3 P. M. 1881, by delivering to Marshall Fulton and R. S. Ross, in persons, a true copy of this citation," was held insufficient, because it failed to show that a true copy of the citation was served upon *each* of the defendants, but on the contrary shows that the defendants were jointly served with one copy. *Fulton v. S. 14 App. 32; Vaughn v. S. 29 Tex. 273; Covington v. Burleson, 28 Tex. 370; King v. Goodson, 42 Tex. 152; Middleton v. S. 11 Tex. 255; Winans v. S. 25 Tex. Sup. 175.* The return of service by an officer authorized to make service in certain contingencies is *prima facie* sufficient, and the authority of such officer cannot be questioned for the first time on appeal. *Gay v. S. 20 Tex. 504.* An answer cures the want of service. *Steen v. S. 27 Tex. 86.* Sayles' Civ. Stat., Art. 1242. A service wholly defective will support a default judgment on appeal, if not specially assigned as error. *Evans v. S. 25 Tex. 80; Davis v. S. 30 Tex. 352.* An assignment of error that no copy of the citation was served upon the surety, brings in question, on appeal, the sufficiency of the return. *Middleton v. S. 11 Tex. 255.* Objections to the copy of the citation served upon the defendant must be made by plea in abatement. *Wilson v. S. 25 Tex. 169.* The return of the officer of service of citation may be amended as in civil actions, and a continuance of the cause renders all defects of form immaterial. *Gragg v. S. 18 App. 295.*

**§2023—ART. 445.—Citation may be served by publication, when.**—Where the surety is a non-resident of the state, or where he is a transient person, or where his residence is unknown, the district or county attorney may, upon application in writing to the court or clerk, stating the facts, obtain a citation to be served by publication, and the same shall be served by publication and returned in the same manner as in like cases in civil actions. [Added in revising.]

See Sayles' Civ. Stat., Art. 1235-1238.

**§2024—ART. 446.—County shall pay cost of publication.**—When service of citation is made by publication, the county in which the forfeiture has been taken shall pay the costs of such publication, and the amount shall be taxed as costs in the case. [Added in revising.]

**§2025—ART. 447.—Service may be made out of the state, how.**—Service of a certified copy of the citation upon any absent or non-resident surety may be made outside of the limits of this state by any person competent to make oath of the fact, and the affidavit in writing of such person, stating the facts of such service, shall be a sufficient return. [Added in revising.]

See Sayles' Civ. Stat., Art. 1230, *et seq.*

**§2026—ART. 448.—When surety is dead, citation to legal representatives.**—When a surety is dead at the time the forfeiture is taken the forfeiture shall nevertheless be valid. But the final judgment shall not be rendered where a surety has died, either before or after the forfeiture has been taken, unless his executor, administrator or heirs, as the case may be, have been cited to appear and show cause why the judgment should not be made final, in the same manner as provided in the case of the surety. [Added in revising.]

In such case the judgment final should direct payment "in due course of administration" as to the estate of the deceased. *Wilcox v. S. 24 Tex. 544.*

**§2027—ART. 449.—Case shall be placed upon the civil docket.**—When a forfeiture has been declared upon a recognizance or bail-bond the

court or clerk shall docket the case upon the civil docket, in the name of the State of Texas, as plaintiff, and the principal and his sureties as defendants, and the proceedings had therein shall be governed by the same rules governing other civil actions. [Added in revising.]

§2028—**Nature of the action, and rules governing same.**—The proceeding of forfeiture of bail is a criminal action, but after the rendition of judgment *nisi*, all the proceedings, unless where otherwise expressly provided, are governed by the same rules as govern in civil causes. Hart v. S. 13 App. 555; Houston v. S. *Id.* 558-560; Perry v. S. 14 App. 166; Jones v. S. 15 App. 82; Thompson v. S. 17 App. 318; Holt v. S. 20 App. 271; Reddick v. S. 21 App. 267; Hutchings v. S. 24 App. 242; S. v. Ward, 9 App. 462; S. v. Norvell, 53 Tex. 427; Aber v. Warden, 49 Tex. 377. Judgment final upon a judgment *nisi*, where the proceeding is in the county court, can be rendered only at a civil term of said court. Houston v. S. 13 App. 558, which declares that a contrary doctrine laid down in Cassaday v. S. 4 App. 96; Carter v. S. *Id.* 165; Wills v. S. *Id.* 613, is not now the law. See, also, Hart v. S. 13 App. 555; Jones v. S. 15 App. 82. Titus county court, by peculiar legislation, is excepted from the rule above stated, Hutchings v. S. 24 App. 242. As in other *criminal* cases, the state cannot be awarded a new trial, nor is the state entitled to an appeal or writ of error, notwithstanding Articles 891, 892, *post*. Perry v. S. 14 App. 166; Robertson v. S. *Id.* 211; S. v. Arrington, 13 App. 611; Hart v. S. *Id.* 555; S. v. Ward, 9 App. 462. But a defendant in such proceeding may have a new trial, or may prosecute an appeal or writ of error, as in civil cases. *Post*, Arts. 891, 892, 893 and notes.

§2029—**ART. 450.—Sureties may answer at next term.**—At the next term of the court after forfeiture of the recognizance or bond, if the sureties have been duly notified, or at the first term of the court after the service of such notice, the sureties may answer in writing, and show cause why the defendant did not appear, which answer may be filed within the time limited for answering in other civil actions. [O. C. 410.]

If the proceeding be in the county court, the answer must be made at the next *civil* term of said court. *Ante*, §2028. See Sayles' Civ. Stat., Arts. 1228, 1280, *et seq.*, as to time of answering. The answer need not be sworn to. Odiorne v. S. 37 Tex. 122; except a plea of *non est factum*, which must be sworn to. McWhorter v. S. 14 App. 239; Holt v. S. 20 App. 271. And so also must a plea of former judgment *nisi* pending be under oath. McWhorter v. S. 14 App. 239. An answer or appearance cures the want of service, or of defective service, of citation. Steen v. S. 27 Tex. 86; Goode v. S. 15 Tex. 124.

§2030—**ART. 451.—Proceedings shall not be set aside for defect of form, etc.**—The recognizance or bail-bond, the judgment declaring the forfeiture, the citation and the return thereupon, shall not be set aside because of any defect of form; but such defect of form may at any time be amended under the direction of the court. [Added in revising.]

Hutchings v. S. 24 App. 242; Gragg v. S. 18 App. 295; Blalack v. S. 3 App. 376. As to amendments in civil cases, see Sayles' Civ. Stat., Arts. 1192, 1239 and notes.

§2031—**ART. 452.—Causes which will exonerate from liability on forfeiture.**—The following causes, and no other, will exonerate the defendant and his sureties from liability upon the forfeiture taken:

1. That the recognizance or bail-bond, is for any cause, not a valid and binding undertaking in law; but if it be valid and binding as to the principal, and one or more of his sureties, they shall not be exonerated from liability because of it being invalid and not binding as to another surety or sureties. If it be invalid and not binding as to the principal, each of the sureties shall be exonerated from liability. If it be valid and binding as to the principal, but not so as to the sureties, the principal shall not be exonerated but the sureties shall be.

2. The death of the principal before the forfeiture was taken.

3. The sickness of the principal, or some uncontrollable circumstance which prevented his appearance at court, and it must in every such case be shown that his failure to appear arose from no fault on his part. The causes mentioned in this subdivision shall not be deemed sufficient to exonerate the principal and his sureties, unless such principal appear before final judgment on the recognizance or bail-bond to answer the accusation against him, or show sufficient cause for not so appearing.

4. Failure to present an indictment or information at the first term of the court, which may be held after the principal has been admitted to bail, in case where the party was bound over before indictment or information, and the prosecution has not been continued by order of the court as provided in article 592. [O. C. 414.]

§2032—Cause 1.—See RECOGNIZANCE AND BAIL-BOND, *ante*, Title 5. Ch. 4.—A bail-bond, which obligated the principal to appear before the district court of Bexar county *instantly*, etc., was held sufficient as to time. *Instantly* means within the next twenty-four hours, or within a reasonable time under the circumstances of the case with reference to which it is used. *Fentress v. S.* 16 App. 79. Bail is not only a joint, but a joint and several undertaking, and if good as to the principal and any one of the sureties, they are not only bound, but are liable, though another surety may not be. And the proceeding may be dismissed as to one surety, and maintained as to another. Even where one surety has not been served, suit may be dismissed as to him, and judgment taken against those served. *Ray v. S.* 16 App. 268; *Goode v. S.* 15 Tex. 124; *Sass v. S.* 8 App. 426. Thus, the suretyship of a married woman invalidates the bail only as to her, not as to the principal and other sureties. *Pickett v. S.* 16 App. 648; *ante*, Art. 291. If the recognizance or bail-bond is defective in substance, such defect may be reached by a motion in arrest of judgment. *Sively v. S.* 44 Tex. 274. A recognizance or bail-bond, which binds only the sureties to appear, is invalid. *Wright v. S.* 22 App. 670. Where the indictment and judgment *nisi* named the principal *Atanacio Vidauri*, but the return of citation showed that the citation had been executed upon *Rafael Vidauri*, the judgment final was set aside on appeal, there being no evidence that *Atanacio* and *Rafael Vidauri* were the same person. *Vidauri v. S.* 22 App. 676. A recognizance or bail-bond, based upon a void indictment, is itself void. *Harrill v. S.* 22 App. 692. The validity of a bail-bond does not depend upon the approval of the officer taking it. *Holt v. S.* 20 App. 271; *Taylor v. S.* 16 App. 514. A bond was signed "J. W. Dixon," but in the body of the bond the name of the principal was stated to be "Jack Dixon." The indictment charged "Jack Dixon" and the citation was for "Jack Dixon." Held, that the middle initial being immaterial, "J" might stand for "Jack," and there was no variance. *Anderson v. S.* 19 App. 299. But where, in the body of the bond the principal's name was stated to be "Nell McIntyre," and the bond was signed "C. A. McIntyre," it was held that said signature could not be considered to be that of the principal named in the bond. *McIntyre v. S.* 19 App. 443. A bail-bond is fatally defective when its conditions require the appearance of the principal at a time when there can legally be no term of the court in which he is required to appear. *Burnett v. S.* 18 App. 283. A bail-bond is strictly a statutory bond, and must contain all the requisites prescribed by statute. *Wallen v. S.* 18 App. 414. For other decisions as to requisites of recognizances and bail-bonds, see, *ante*, §§1793-1800. A bail-bond may be filed *nunc pro tunc*, and judgment final entered thereon, although a capias has been issued for the principal. *Slocumb v. S.* 11 Tex. 15; *Haverty v. S.* 32 Tex. 602. That the bond bears no file mark, is not an objection that will be entertained when presented for the first time on appeal. *S. v. Franklin*, 35 Tex. 497; *Turner v. S.* 41 Tex. 549. Evidence *aliunde* will not be heard to impeach the bond, but if it is substantially defective on its face, exceptions to it may be taken and sustained at any stage of the proceedings. *S. v. Angell*, 37 Tex. 357; *Sively v. S.* 44 Tex. 274; *Smalley v. S.* 3 App. 202; *McAdams v. S.* 10 App. 317; *Barringer v. S.* 27 Tex. 553; *Cassaday v. S.* 4 App. 96. It is not a fatal objection to the recognizance or bond that the indictment is lost. *Crouch v. S.* 25 Tex. 755. Nor that the bond was void *ab initio* because of secession. *Shrader v. S.* 30 Tex. 386.

§2033—Cause 2.—The death of the principal in an appeal recognizance (*post*, Art. 852), before the time for his appearance in the lower court, will exonerate the obligors, notwithstanding the conviction has been affirmed. *Conner v. S.* 30 Tex. 94. The death of the principal prior to the time of declaring the forfeiture, exonerates his sureties, and where they set up such defense they are entitled to an opportunity to prove it. *Blalack v. S.* 3 App. 376.

§2034—Cause 3.—Sickness of the principal at the time the forfeiture is had, if established, is a statutory and valid defense. *Thompson v. S.* 17 App. 318; *Price v. S.* 4 App. 73. And the principal is a competent witness to establish such defense. *Reddick v. S.* 21 App. 267. See facts held sufficient to establish such defense. *Baker v. S.* 21 App. 359. But a physician's certificate is not competent to establish such defense. *Price v. S.* 4 App. 73.

§2035—Cause 4.—It is no sufficient answer by the sureties that the principal did not appear because no indictment had been found against him for the offense named in his bond. *S. v. Cocke*, 37 Tex. 155. Where the principal was bound to appear before the county court before indictment or information presented, and at the next term of said court no indictment or information was presented against him, and no cause shown for further holding the principal, it was held that his sureties were discharged from further liability on the bond. *Jones v. S.* 11 App. 412. See, *post*, Art. 592.

§2036—Other causes.—No other causes than those specified in the preceding article will exonerate from liability. *Burton v. S.* 24 Tex. 250; *Wheeler v. S.* 38 Tex. 173; *McCoy v. S.* 37 Tex. 219; *Thompson v. S.* 31 Tex. 166; *Martin v. S.* 16 App. 265.

It is well settled that neither the principal or the sureties will be permitted to question the sufficiency of the indictment or information, in answer to a citation on a judgment *nisi*.

Jones v. S. 15 App. 82; Hester v. S. *Id.* 418; Martin v. S. 16 App. 265; Brown v. S. 6 App. 188; Smalley v. S. 3 App. 202; S. v. Ake, 41 Tex. 166; S. v. Cocke, 37 Tex. 155; S. v. Rhodius, *Id.* 165; McCoy v. S. *Id.* 219; S. v. Angell, *Id.* 357. But, if in fact there was no indictment or information presented, the judgment *nisi* would be void. Brown v. S. 6 App. 188. And so, if the pretended indictment was presented by an illegal grand jury composed of more or fewer than *twelve* men, the indictment and all proceedings thereunder would be void. Harrill v. S. 22 App. 602.

A plea by the sureties that they executed and delivered the bail-bond to the sheriff on the condition that one B. should become a surety also on the bond, and that said B. had not become such surety, was held to present no valid defense. And so, also, a plea that the state's attorney, without their knowledge or consent, agreed with their principal, that he need not appear at a preceding term of the court, at which term he did not appear, and no forfeiture was taken at said term, and that thereby they were released, etc., was held to present no legal defense. Brown v. S. 18 App. 326. See an answer setting up several matters, none of which constituted a legal defense. Fentress v. S. 16 App. 79. When the judgment *nisi* is upon a recognizance given on appeal, the sureties cannot question the validity of the conviction of the principal. Martin v. S. 16 App. 265.

The state is not entitled to a new trial in this proceeding, and when it has been granted one, a subsequent forfeiture on the same recognizance or bond is a nullity. Perry v. S. 14 App. 166; Robertson v. S. *Id.* 211.

*Non est factum* is a valid defense, but it must be pleaded under oath, and the plea must deny the execution of the obligation by the person making the defense, or by any one acting under his authority. Holt v. S. 20 App. 271; McWhorter v. S. 14 App. 239. And so a plea of former judgment *nisi* pending, if properly pleaded under oath, is a valid defense. McWhorter v. S. 14 App. 239. Where the surety signed bail-bond blank as to the amount of the penalty, and delivered it to the principal with the understanding that the blank was to be filled with \$300—but the blank was afterwards filled with \$1000—it was held that the surety was liable for the amount of the bond, and that his plea of *non est factum* was not a valid defense. Gary v. S. 11 App. 527. Where a defendant pleads *non est factum* he must show that he is the party upon whom citation was served. Rutledge v. S. 36 Tex. 459; S. v. Rhodius, 37 Tex. 165.

The delivery of the principal in court is not a good answer to a citation, without a showing of legal cause for failure to have him in court at the proper time. Chambless v. S. 20 Tex. 197; Barton v. S. 24 Tex. 250. It is a sufficient answer in a misdemeanor case, punishable by fine only, that the principal appeared by attorney. Neaves v. S. 4 App. 1. It is a sufficient answer that the sureties had delivered the principal to the sheriff, and that he had thereafter escaped. S. v. Rosseau, 39 Tex. 614. It is a sufficient answer that at the time the judgment *nisi* was rendered the principal had been convicted of crime in another county, and was then held in custody under said conviction. Cooper v. S. 5 App. 215; Wheeler v. S. 38 Tex. 173. And, where the principal, before the rendition of the judgment *nisi* has been a second time arrested and has given new bail, the sureties upon the first obligation are released. Peacock v. S. 44 Tex. 11; Lindley v. S. 17 App. 120; Roberts v. S. 22 App. 64. It is not a sufficient answer that after the forfeiture the principal had been rearrested and had escaped. Chappell v. S. 30 Tex. 613.

The answer should show cause for a failure to move to set aside the judgment *nisi* at the term at which said judgment was rendered. Such motion should be made at the earliest practicable moment. Goode v. S. 15 Tex. 125; Barton v. S. 24 Tex. 250. When a former judgment *nisi* has been set aside at the instance of the defendant, such former judgment is not a bar to a subsequent forfeiture, and is no answer thereto. Anderson v. S. 19 App. 299. Where the principal appeared, was put upon his trial, but there was a mistrial, and the court proceeded with the regular call of the docket, and before said call was completed, recalled the case of the defendant, without previous order for its recall, and he being absent, a forfeiture was taken, it was held that such judgment was without authority of law and was void. Thomas v. S. 12 App. 416.

**§2037—ART. 453.—Judgment final, when.**—When, upon a trial of the issue presented by the answers of the sureties, no sufficient cause is shown for the failure of the principal to appear, the judgment shall be made final against him and his sureties for the amount in which they are respectively bound, and the same shall be collected by execution as in civil actions. Separate executions shall issue against each party for the amount adjudged against him, and the costs be equally divided between the sureties, if there be more than one. [O. C. 417.]

**§2038—Trial—Evidence and judgment final.**—The right of trial by jury is the same in this proceeding as in other civil cases, and is governed by the same rules. Short v. S. 16 App. 44. If a jury be not demanded the court may determine the facts. Dyches v. S. 24 Tex. 266. Where the defense is a variance between the name of the principal as it appears in the indictment, and in the recognizance or bail-bond, it is not error to submit the issue to the jury. Wilcox v. S. 24 Tex. 544. It was held in one case that where the only answer was a general denial, and that there was no indictment against the principal for the offense named in the bond, that the defendants were not entitled to a trial by jury. McCoy v. S. 37 Tex. 219. This decision, however, does not seem to accord with subsequent decisions cited above.

It is well settled that in this proceeding in the county court, a trial and judgment final can be legally had only at a term of said court held for civil business. A judgment final rendered at a criminal term of said court would be without authority of law, and a nullity. *Hutchings v. S. 24 Tex. 242; ante, §2028.* A judgment *nisi*, which does not contain the statutory requirements, is void and cannot be made the basis of a final judgment. *Cheatham v. S. 13 App. 32; Watkins v. S. 16 App. 646; ante, §§2019, 2020.* A judgment *nisi* which fails to specify the amount of money for which the judgment is rendered, both against the principal and the sureties, though in other respects it comply strictly with the requirements of law, is insufficient and will not support a judgment final. *Galindo v. S. 15 App. 319.*

This proceeding is in effect a suit upon the recognizance or bail-bond, in which the citation performs the double function of petition and citation. The foundation of the suit is the recognizance or bail-bond, and the judgment *nisi* which is the judicial declaration of the forfeiture of such obligation. The production in evidence of the recognizance or bond, and the judgment *nisi*, is essential to a recovery, and they must be adduced in evidence on the trial. *Hester v. S. 15 App. 418; McWhorter v. S. 14 App. 239; Martin v. S. 16 App. 265.*

A general denial puts in issue all the material issuable allegations in the citation, and the burden of proof is upon the state to establish such allegations. *Short v. S. 16 App. 44; Goodin v. S. 14 App. 443; Houston v. S. 13 App. 560; Holt v. S. 20 App. 271; Baker v. S. 21 App. 359.*

And the *allegata* and the *probata* must substantially correspond. *Arrington v. S. 13 App. 554; Werbiski v. S. 20 App. 331.* But to constitute a fatal variance the citation must misdescribe the cause of action in a manner calculated to mislead or surprise the adverse party. *Werbiski v. S. 20 App. 331.* Where the citation declared upon a forfeited *recognizance*, and the obligation offered in evidence by the state was a bail-bond, the variance was held to be fatal. *Garrison v. S. 21 App. 342.* Where the citation described the bail-bond as dated February 1, 1885, and the true date of said bond was December 13, 1884, the variance was held to be fatal. *Faubion v. S. 21 App. 494.* So where the citation described the bond as dated April 20, 1883, and the bond admitted in evidence was dated April 17, 1883, the variance was held fatal. *Holt v. S. 20 App. 271.* See, also, *Hedrick v. S. 3 App. 571.*

A defendant may testify in his own behalf, and in behalf of his co-defendants, as in other civil cases. *Reddick v. S. 21 App. 267.*

A judgment is not final, unless the whole matter in controversy is disposed of as to all the parties. Thus, where the case is not disposed of as to one of the sureties, although such surety has not been served with citation, and has not answered, the judgment is not final. *Thompson v. S. 17 App. 318.* See, also, *Cowen v. S. 3 App. 381; Walter v. S. 6 App. 254; Stephenson v. S. 9 App. 459; Brown v. S. 40 Tex. 49; Blalack v. S. 35 Tex. 89; Ellis v. S. 10 App. 324; Wells v. S. 4 App. 613; McIntyre v. S. 19 App. 443.*

The suit may be discontinued as to either the principal or one or more sureties, and judgment final may then be rendered against the other obligors. *Gay v. S. 20 Tex. 504; Thompson v. S. 31 Tex. 166.* A judgment *nisi* is properly rendered against the defendants *severally* for the amount of the recognizance or bond, and a final judgment rendered thereon against the defendants *jointly and severally*, though a variance from the judgment *nisi*, and not strictly correct, is immaterial error, and does not vitiate the judgment final. *Kiser v. S. 13 App. 201; ante, §§1830, 2016.*

Where a recognizance or bail-bond, upon which a recovery is sought, shows upon its face an erasure or alteration in a material matter, it devolves upon the state to satisfactorily explain such erasure or alteration, and show that it was made under such circumstances that the validity of the obligation was not affected thereby; and until such explanation is made the obligation is not admissible in evidence. *Kiser v. S. 13 App. 201.* It was held error to set aside a judgment *nisi* upon an answer unsworn to, and unsupported by evidence, setting up that the principal was dead at the time the judgment *nisi* was rendered. *S. v. Brown, 34 Tex. 146.*

**§2039—ART. 454.—Judgment final by default, when.**—When the sureties have been duly cited and fail to answer, and the principal also fails to answer within the time limited for answering in other civil actions, the court shall render judgment final by default as in other civil actions. [Added in revising.]

See, *ante, §2029.* The judgment in such case will be for the full amount of the penalty, and without a jury. *Lawton v. S. 5 Tex. 272.*

**§2040—ART. 455.—The court may remit, when.**—If, before final judgment is entered against the bail, the principal appear or be arrested and lodged in the jail of the proper county, the court may, at its discretion, remit the whole or part of the sum specified in the bond or recognizance. [O. C. 415.]

*Haverty v. S. 32 Tex. 602; Barton v. S. 24 Tex. 250; S. v. Warren, 17 Tex. 283; Jackson v. S. 13 Tex. 218; Chambliss v. S. 20 Tex. 197.*

**§2041—ART. 456.—Forfeiture shall be set aside, when, etc.**—When the principal appears before the entry of final judgment, and sufficient cause is shown for his failure to appear before the forfeiture taken, and a trial

is had of the criminal actions pending against him, he shall be entitled to have the forfeiture set aside and the criminal action against him shall stand for trial; but the state shall not be forced to try the same until reasonable time has been allowed to prepare for trial, and the state shall, in such case, be entitled to a continuance of the cause. [O. C. 416.]

§2042—**Decisions under preceding article.**—The mere appearance of the principal for trial, without excuse, does not entitle him to a remission of the forfeiture. *S. v. Warren*, 17 Tex. 283. The preceding article does not limit the appearance of the principal to a *voluntary* appearance. His appearance before entry of final judgment, whether voluntary or involuntary, requires the court to set aside the forfeiture, provided good cause be shown why he did not appear in court in accordance with his undertaking. *Baker v. S.* 21 App. 359.

§2043—**New trial.**—The state is not entitled to a new trial in this proceeding. *Robertson v. S.* 14 App. 211; *Perry v. S. Id.* 166. The cases cited virtually overrule *Gary v. S.* 11 App. 527, which holds that the state may be granted a new trial. But a new trial may be granted the defendants as in other civil causes. See, *ante*, §2028.

## II. OF THE CAPIAS.

§2044—**ART. 457.—Definition of a “capias.”**—A “capias” is a writ issued by the court or clerk, and directed “To any sheriff of the State of Texas,” commanding him to arrest a person accused of an offense and bring him before that court forthwith, or on a day or at a term stated in the writ. [O. C. 420.]

§2045—**ART. 458.—Its requisites.**—A capias shall be held sufficient if it have the following requisites:

1. That it run in the name of “The State of Texas.”
2. That it name the person whose arrest is ordered, or, if unknown, describe him.
3. That it specify the offense of which the defendant is accused, and it appear thereby that he is accused of some offense against the penal law of the state.
4. That it name the court to which it is returnable and the time when returnable.

5. That it be dated and attested officially by the court or clerk issuing the same. [O. C. 421.]

See Willson's Cr. Forms, 581, 582.

§2046—**ART. 459.—Capias shall issue at once in all felony cases.**—A capias shall be immediately issued by the clerk of the district court upon each indictment for felony presented, and shall be delivered by the clerk or forwarded by mail to the sheriff of the county where the defendant resides or is to be found. [Added in revising.]

§2047—**ART. 460.—In misdemeanor cases.**—In cases of misdemeanor the capias shall be issued from the court having jurisdiction of the same, and if the defendant be in custody or under bail a capias need not be issued for him. [Added in revising.]

In a misdemeanor case transferred from the district to an inferior court under Art. 435, *ante*, the capias must issue from the court to which the cause has been transferred. *Cassaday v. S.* 4 App. 98.

§2048—**ART. 461.—Capias in case of forfeiture of bail.**—In all cases when a forfeiture is declared upon a recognizance or bail-bond, a capias shall be immediately issued for the arrest of the defendant, and when arrested he shall be required to enter into a new recognizance or bail-bond, unless the forfeiture taken has been set aside under the third subdivision of article 452, in which case the defendant and his sureties shall remain bound under his present recognizance or bail-bond. [Added in revising.]

*Slocumb v. S.* 11 Tex. 15.

§2049—**ART. 462.—New bail in felony case, when.**—When a defendant who has been arrested for a felony under a capias has previously

given bail to answer said charge, his sureties shall be released by such arrest, and he shall be required to give new bail. [Added in revising.]

Gary v. S. 11 App. 527; *Ex parte* Mosby, 31 Tex. 566.

§2050—ART. 463.—**Capias does not lose its force, etc.**—A *capias* shall not lose its force or virtue if not executed and returned at the time fixed in the writ, but may be executed at any time afterward and return made, and all proceedings under such *capias* shall be as valid as if the same had been executed and returned within the time specified in the writ. [O. C. 423.]

§2051—ART. 464.—**Officer shall give reasons for retaining *capias*, when.**—When the *capias* is not returned at the time fixed in the writ, the officer holding the same shall notify the court from whence it issued, in writing, of his reasons for retaining it. [Added in revising.]

See Willson's Cr. Forms, 588.

§2052—ART. 465.—**Capiases may issue to several counties.**—*Capiases* for a defendant may be issued to as many counties as the district or county attorney may direct. [Added in revising.]

§2053—ART. 466.—**Sheriff, etc., cannot take bail in felony cases, when.**—In cases of arrest for felony in the county where the prosecution is pending, during a term of the court, the sheriff or officer making the arrest cannot take bail, but must forthwith bring the defendant before the court, that he may be dealt with according to law. [O. C. 427.]

See, *ante*, §§1790-1804.

§2054—ART. 467.—**Sheriff may take bail in felony cases, when.**—In cases of arrest for felony less than capital, made during vacation, or made in another county than the one in which the prosecution is pending, the sheriff may take bail. In such cases the amount of the bail shall be the same as is indorsed upon the *capias*, and if no amount be indorsed upon the *capias*, the sheriff shall require a reasonable amount of bail. [O. C. 426-432; consolidated in revising.]

See, *ante*, §§1790-1804.

§2055—ART. 468.—**Court shall fix amount of bail in felony cases, etc.**—In all felony cases which areailable, the district court shall, before adjourning, fix the amount of the bail to be required in each case, and the same shall be entered upon the minutes, and in issuing the *capias* the clerk shall indorse thereon the amount of bail required; but in case of neglect to comply with either of the requirements of this article, the arrest of the defendant, and the bail-bond taken by the sheriff, shall be as legal and valid as if there had been no such omission. [O. C. 424.]

Thraash v. S. 16 App. 271.

§2056—ART. 469.—**Who may arrest under *capias*.**—A *capias* may be executed by any constable or other peace officer, but in cases of felony the defendant must be delivered forthwith to the sheriff of the county where the arrest is made, together with the writ under which he was taken, to be dealt with according to law. [O. C. 425.]

§2057—ART. 470.—**Officer making arrest may take bail in misdemeanor, etc.**—In cases of misdemeanor, any officer making an arrest under a *capias* may take bail of the defendant, either in term time or in vacation. [O. C. 426.]

See, *ante*, §§1790-1804, 1826; *post*, Art. 908.

§2058—ART. 471.—**Arrest in capital case, in county where prosecution is pending.**—Where an arrest is made under a *capias* in a capital case the sheriff shall confine the defendant in jail, and the *capias* shall, for that purpose, be a sufficient warrant of commitment. This article is applica-



ble when the arrest is made in the county where the prosecution is pending. [Added in revising.]

§2059—ART. 472.—**Arrest in capital case in another county than that in which prosecution is pending.**—In every capital case where a defendant is arrested under a *capias* in a county other than that in which the prosecution is pending, it is the duty of the sheriff who arrests, or to whom the defendant is delivered by some other peace officer, to convey him forthwith to the county from which the *capias* issued and deliver him to the sheriff of such county, and upon failure to do so such sheriff shall be guilty of an offense. [O. C. 431.]

§2060—ART. 473.—**Bail-bond and *capias* must be returned, etc.**—When an arrest has been made and a bail-bond taken, the bail-bond, together with the *capias*, shall be returned forthwith through the mail or by other safe conveyance to the proper court. [O. C. 422.]

See, *ante*, §1805.

§2061—ART. 474.—**Defendant placed in jail in another county, etc., shall be discharged, when.**—If a defendant be placed in jail out of the county of the prosecution, on a charge of felony, he shall be discharged from custody if not applied for and taken by the sheriff of the proper county before the end of sixty days from the day of his commitment. If the defendant be placed in jail on a charge of misdemeanor, he shall be discharged from custody if not applied for and taken by the sheriff of the proper county before the end of thirty days from the day of his commitment. [O. C. 434.]

In the cases mentioned in the preceding article the sheriff of the county of the prosecution is the proper officer to take bail of the prisoner. Hill v. S. 15 App. 530.

§2062—ART. 475.—**Preceding article shall not apply, where.**—The preceding article shall not apply to cases where the defendant has been placed in jail out of the county of the prosecution under the provisions of this Code, for the want of a sufficient or safe jail in the county of the prosecution. [O. C. 434.]

§2063—ART. 476.—**Return of the *capias*, and what it shall show.**—The return of the *capias* shall be made to the court from which it issued, and if it has been executed the return shall state what disposition has been made of the defendant. If it has not been executed, the cause of the failure to execute the same shall be fully stated, and if the defendant has not been found the return shall further show what efforts have been made by the officer to find him, and what information, if any, he has obtained as to the defendant's whereabouts. [Added in revising.]

For forms of returns, see Willson's Cr. Forms, 583-587. A return of "executed," without showing how executed, does not purport an actual arrest of the party. Gary v. S. 11 App. 527.

### III. OF WITNESSES AND THE MANNER OF ENFORCING THEIR ATTENDANCE.

§2064—ART. 477.—**Definition of "subpoena."**—A "*subpoena*" is a writ issued to the sheriff or other proper officer commanding him to summon a person therein named to appear at a certain term of the court, or on a certain day, to testify in a criminal action, or upon any proceeding before an examining court, coroner's inquest, the grand jury, or before a judge hearing an application under *habeas corpus*, or in any other case in which the testimony of a witness may be required under the provisions of this Code. The writ shall be dated and signed officially by the court or clerk issuing the same, but need not be under seal. [O. C. 438.]

See Willson's Cr. Forms, 657.

§2065—Is a writ of right.—A defendant may procure a *subpoena* during the progress of the trial, and its issuance is not a matter of discretion with the judge or clerk, but of right, unless it be shown that the attendance of the witness cannot be procured. *Edmondson v. S.* 43 Tex. 230. The right of a defendant to have compulsory process for witnesses is a constitutional one. *Roddy v. S.* 16 App. 502; *Homan v. S.* 23 App. 212. And a *subpoena* is such process. *Neyland v. S.* 13 App. 536. If the witness resides in an unorganized county, the process should name such county as his residence. *Parkerson v. S.* 9 App. 72.

§2066—ART. 478.—What it may contain.—A *subpoena* may contain the names of any number of witnesses residing in the same county to which it is issued, and if a witness have in his possession any instrument in writing or other thing desired as evidence, the *subpoena* may specify such evidence and direct that the witness bring the same with him and produce it in court. [Added in revising.]

See Willson's Cr. Forms, 658.

§2067—ART. 479.—Service and return of a subpoena.—A *subpoena* is served by reading the same in the hearing of the witness. The officer having the *subpoena* shall make due return thereof, showing the time and manner of service if served, and if not served he shall show in his return the cause of his failure to serve it, and if the witness could not be found he shall state the diligence he has used to find him, and what information he has, if any, as to the whereabouts of the witness. [Added in revising.]

See Willson's Cr. Forms, 659, 660.

§2068—What return should show.—The return should show that the *subpoena* was read to the witness; and if the *subpoena* contains the names of several witnesses, it should show distinctly which were served and which not. *Tooney v. S.* 5 App. 163. The preceding article declares the legal requisites of the service and return of a *subpoena*. As a general rule an officer's return on process of any kind should state that he has performed what the mandatory part of the process required of him. And when the law requires and prescribes any particular forms of proceedings in the service, the return should show that they were specifically complied with, and should set them forth as fully and circumstantially as if they had been expressly required in the mandatory part of the process. See this subject fully discussed in *Neyland v. S.* 13 App. 536.

§2069—ART. 480.—Penalties for refusing to obey a subpoena.—If a witness refuse to obey a subpoena he may be fined at the discretion of the court, as follows: In a capital case, not exceeding five hundred dollars; in a case of felony less than capital, not exceeding two hundred dollars; in a case of misdemeanor, not exceeding one hundred dollars. [O. C. 444, 445; consolidated in revising.]

§2070—ART. 481.—Before fine is entered against witness, it must appear, etc.—Before a fine is entered against a witness for disobedience to a subpoena, it must be made to appear to the court by the oath of the defendant or some other credible person, or the statement of the attorney representing the state, that the testimony of such witness is believed to be material either to the prosecution or defense. [O. C. 446.]

These requisites are essential, and the unsworn statement of defendant's counsel will not suffice. *McGee v. S.* 4 App. 94; Willson's Cr. Forms, 661, 662.

§2071—ART. 482.—What constitutes disobedience of a subpoena.—It shall be understood that a witness refuses to obey a subpoena—

1. If he is not in attendance on the court on the day set apart for taking up the criminal docket or any day subsequent thereto, and before the final disposition or continuance of the particular case in which he is a witness.

2. If he is not in attendance at any other time named in a writ.

3. If he refuses without legal cause to produce evidence in his possession which he has been summoned to bring with him and produce. [O. C. 441.]

*Walker v. S.* 13 App. 618; *Long v. S.* 16 App. 128; *Hill v. S.* 18 App. 665.

§2072—ART. 483.—Fine against witness conditional, etc.—When a fine is entered against a witness for a failure to appear and testify, the

judgment shall be conditional and a citation shall issue to him to show cause why the same should not be made final; and such citation shall be served in the manner and for the length of time prescribed for citations in other civil actions. [O. C. 447.]

See Willson's Cr. Forms, 663, 664.

§2073—ART. 484.—**Witness may show cause, when and how.**—A witness cited to show cause as provided in the preceding article, may do so in writing or verbally at any time before judgment final is entered against him, but if he fail to show cause within the time limited for answering in civil actions, a judgment final by default shall be entered against him. [O. C. 448.]

§2074—ART. 485.—**Court may remit the whole or part of fine upon excuse made, etc.**—It shall be in the discretion of the court to judge of the sufficiency of an excuse rendered by a witness, and upon the hearing of the case the court shall render final judgment against the witness for the whole or any part of the fine, or shall remit the fine altogether, as to the court may appear proper and right. [O. C. 452.]

§2075—ART. 486.—**When witness appears and testifies, etc., fine may be remitted.**—When a fine has been entered against a witness but no trial of the cause takes place, and such witness afterward appears and testifies upon the trial thereof, it shall be discretionary with the judge, though no good excuse be rendered, to reduce the fine or remit it altogether; but the witness in such case shall, nevertheless, be adjudged to pay all the costs accruing in the proceeding against him by reason of his failure to attend. [O. C. 449.]

§2076—ART. 487.—**Definition and requisites of an attachment.**—An "attachment" is a writ issued by a clerk of a court, or by any magistrate, or by the foreman of a grand jury, in any criminal action or proceeding authorized by law, commanding some peace officer to take the body of a witness and bring him before such court, magistrate or grand jury on a day named, or forthwith, to testify in behalf of the state or of the defendant, as the case may be. It shall be dated and signed officially by the officer issuing it, and when issued by a clerk of a court, shall be authenticated by his official seal. [O. C. 439.]

See Willson's Cr. Forms, 667.

§2077—ART. 488.—**When an attachment may be issued.**—When a witness who resides in the county of the prosecution has been duly served with a subpoena to appear and testify in any criminal action or proceeding fails to so appear, the state or the defendant shall be entitled to have an attachment issued forthwith for such witness. [O. C. 436-440; consolidated in revising.]

§2078—**Decisions under preceding article.**—A witness residing in the county of the prosecution cannot be attached until he has disobeyed a *subpoena*. Colbert v. S. 1 App. 314; Tooney v. S. 5 App. 163. But if nothing appears to the contrary, it will be presumed that the attachment was properly issued. Farrar v. S. 5 App. 489. When a witness who resides in the county of the prosecution has been duly served with, and has disobeyed a *subpoena*, the party who had him summoned is entitled to have an attachment issued forthwith for such witness. Long v. S. 17 App. 128.

§2079—ART. 489.—**Attachment for witness out of the county may issue on application, when.**—Where a witness resides out of the county in which the prosecution is pending, the defendant shall be entitled on application, either in term time or in vacation, to the proper clerk or magistrate, to have an attachment issued to compel the attendance of such witness. Such application shall be in writing and under oath, shall state the name of the witness and the county of his residence, and that his testimony is material

to the defense. The state shall also be entitled to attachments under the provisions of this article upon the written application of the attorney representing the state, which application shall state the name and residence of the witness and that his testimony is believed to be material for the state. In the cases provided for in this article it is not required that there should be a disobedience of a subpoena by the witness before the issuance of the attachment for him, but the attachment may be issued as herein provided in the first instance. [O. C. 437.]

See Willson's Cr. Forms, 665, 666. Compulsory process for witnesses is a right guaranteed an accused person by the constitution, and of which he cannot be deprived by legislation. *Homan v. S.* 23 App. 212; *Roddy v. S.* 16 App. 502. See, *post*, Art. 1061*b*. When the witness resides in an unorganized county, the writ should name such county as his residence. *Parkerson v. S.* 9 App. 72.

§2080—ART. 490.—**When witness has forfeited bail, attachment shall issue, unless, etc.**—When a witness has given a recognizance or bail-bond to appear and testify and has forfeited the same, an attachment may issue forthwith for such witness to the county where he resides or where he may be found, unless the party whose witness he is shall waive the issuance of the same. [Added in revising.]

§2081—ART. 491.—**Execution and return of attachment.**—It is the duty of the officer receiving the attachment to execute the same by arresting the body of the witness named therein, and he shall make due return of the writ to the court, magistrate or foreman of the grand jury from which it issued, stating in such return the time and manner of its execution and the disposition that has been made of the witness. In case the writ has not been executed the officer shall state fully in his return the cause of his failure to execute it, and if the witness has not been found, the return shall show the diligence that has been used to find him, and shall state such information as the officer has, if any, as to the whereabouts of the witness. [Added in revising.]

See Willson's Cr. Forms, 668, 669; see, also, *Neyland v. S.* 13 App. 536.

§2082—ART. 492.—**When writ is returnable forthwith, duty of officer.**—When an attachment is made returnable forthwith it shall be the duty of the officer executing the same to take the witness immediately before the court, magistrate or foreman of the grand jury from whence the writ issued, unless such witness give bail for his immediate appearance in obedience to said writ in accordance with law. [O. C. 437*a*.]

§2083—ART. 493.—**When the writ is not returnable forthwith.**—If the attachment be not returnable forthwith, but at some future day, the officer executing the same shall have authority to take a bail-bond of such witness for his appearance in accordance with the requirements of such writ. [O. C. 437*a*.]

§2084—ART. 494.—**Bail-bond of witness—Its requisites.**—The bail-bond of a witness shall be held sufficient if it have the following requisites:

1. That it be made payable to the State of Texas.
2. That it state the amount in which the witness and his sureties are bound.
3. That it be conditioned for the appearance of the witness at the time and before the court, magistrate or grand jury named in the writ.
4. That it be signed by the witness or his sureties by writing their names or making their marks thereto. [Added in revising.]

See Willson's Cr. Forms, 597.

§2085—ART. 495.—**Amount of bail to be required of witness.**—The court or magistrate issuing the attachment may direct therein the amount

of bail to be required of the witness, in which case the officer executing the writ shall require the amount specified; but in case no amount of bail is specified in the writ, the officer executing the same shall require what he deems to be a reasonable amount of bail. [Added in revising.]

§2086—ART. 496.—**Good and sufficient security shall be required, etc.**—When the officer executing the writ takes a bail-bond of a witness he shall require that the security be good and sufficient for the amount of the bond as in other cases of bail, and shall approve the bond officially and return it with the writ to the court or magistrate from whence the writ issued. [Added in revising.]

§2087—ART. 497.—**Duty of officer when witness fails to give bond.**—In case the witness fails to give bond, it shall be the duty of the officer executing the writ to keep him in custody, and have him before the court or magistrate at the time and place named in the writ. [Added in revising.]

§2088—ART. 498.—**When writ is executed in another county, etc.—Duty of officer.**—When the writ is executed in a county other than the one in which the witness is required to appear, and the witness fails to give bond, it shall be the duty of the sheriff of the county in which such writ is executed to keep the witness in his custody, and forthwith to deliver him, together with such writ, to the sheriff of the county from whence the writ issued, who shall keep the witness in custody as provided in the preceding article. [O. C. 437a.]

§2089—ART. 499.—**Witness shall be released upon giving bond.**—A witness who is in custody for failing to give bond, shall be at once released upon giving the bond required. [Added in revising.]

§2090—ART. 500.—**Either party may have witness recognized, etc.**—Witnesses on behalf of the state or defendant may, at the request of either party, be required to enter into recognizance in an amount to be fixed by the court to appear and testify in a criminal action; but if it shall appear to the court that any witness is unable to give security upon such recognizance, he shall be recognized without security. [Added in revising.]

See Willson's Cr. Forms, 592; Hill v. S. 18 App. 665.

§2091—ART. 501.—**Personal recognizance of witness may be taken, when.**—When it appears to the satisfaction of the court that the personal recognizance of the witness will insure his attendance, no security need be required of him; but no bail shall be taken by any officer without security. [Added in revising.]

§2092—ART. 502.—**Recognizance or bail-bond of witness may be enforced, how.**—The recognizance or bail-bond of a witness may be enforced against him and his sureties in the manner pointed out in this Code for enforcing the recognizance or bail-bond of a defendant in a criminal action. [O. C. 437b.]

See, *ante*, §2013. *et seq.*

§2093—ART. 503.—**Sureties cannot discharge themselves after a forfeiture.**—The sureties of a witness have no right in any case to discharge themselves by the surrender of such witness after the forfeiture of their recognizance or bond. [O. C. 453.]

#### IV. SERVICE OF A COPY OF THE INDICTMENT.

§2094—ART. 504.—**Copy of indictment delivered to defendant in case of felony.**—In every case of felony, when the accused is in custody, or as soon as he may be arrested, it shall be the duty of the clerk of the

court where an indictment has been presented immediately to make out a certified copy of the same and deliver such copy to the sheriff, together with a writ directed to such sheriff commanding him forthwith to deliver such certified copy to the defendant. [O. C. 458.]

See Willson's Cr. Forms, 682; *post*, §2134.

§2095—ART. 505.—**Service of copy and return of writ.**—Upon receipt of such writ and copy the sheriff shall immediately deliver such certified copy of indictment to the defendant, and return the writ to the clerk issuing the same, with his indorsement thereon, showing when and how the same was executed. [Added in revising.]

See Willson's Cr. Forms, 683.

§2096—ART. 506.—**When defendant is on bail in felony.**—When the defendant in case of felony is on bail at the time the indictment is presented, it is not necessary to serve him with a copy; but the clerk shall deliver a copy of the same to the defendant or his counsel, when requested, at the earliest possible time. [O. C. 460.]

§2097—ART. 507.—**May demand a copy in misdemeanors.**—In misdemeanors it shall not be necessary before trial to furnish the defendant with a copy of the indictment or information; but he or his counsel may demand a copy, which shall be given at as early a day as possible. [O. C. 459.]

§2098—**Decisions under the four preceding articles.**—Unless the right to a copy of the indictment has been waived, it is error to put the defendant upon his trial in a capital case without having served him with a copy of the indictment at least two whole days before the trial. *Johnson v. S.* 36 Tex. 202. See, *post*, Art. 510. The defendant may waive the right to a copy of the indictment, but the fact of such waiver should not be left uncertain, and the better practice is to have it in writing and filed with the papers, and the waiver must be made by the defendant in person. *McDuff v. S.* 4 App. 58; *Richardson v. S.* 7 App. 486. On appeal, if the defendant was not served with a copy of the indictment, the record must affirmatively show the fact, or it will be presumed that he was served with such copy. *Record v. S.* 36 Tex. 521; *McDuff v. S.* 4 App. 58. It is too late after verdict to raise objections to the copy served. *Roberts v. S.* 5 App. 141; *Richardson v. S.* 7 App. 486. And mere technical inaccuracies in the copy served will not vitiate the service. *Johnson v. S.* 4 App. 268. That the names of the state's witnesses, as they appeared on the indictment, did not appear on the copy served, affords the defendant no ground for a postponement of the trial until he be served with a copy showing such names. *Hart v. S.* 15 App. 202. An objection to the copy served, on account of mistake or variance, is not available to a defendant who was not in custody when the indictment was presented. *Johnson v. S.* 4 App. 268. In a felony case it is the duty of the clerk to make a copy of the indictment and deliver it to the sheriff, and accompany it with a writ, commanding the sheriff to deliver said copy forthwith to the defendant, if in custody, or when arrested. The importance of the writ is chiefly to furnish record evidence that the copy has been delivered to the defendant. If the copy has been in fact delivered to the defendant, no right of his is prejudiced by neglect of the clerk to issue the writ. *Barrett v. S.* 9 App. 33.

## V. OF ARRAIGNMENT AND OF PROCEEDINGS WHERE NO ARRAIGNMENT IS NECESSARY.

§2099—ART. 508.—**No arraignment of defendant, except, etc.**—There shall be no arraignment of a defendant except upon an indictment for a capital offense. [O. C. 461.]

As to what are capital offenses, see, *ante*, §1444. For forms of entries of arraignment, see Willson's Cr. Forms, 685, 686, 687, 688.

§2100—ART. 509.—**An arraignment—For what purpose.**—An arraignment takes place for the purpose of reading to the defendant the indictment against him and hearing his plea thereto. [O. C. 462.]

§2101—ART. 510.—**No arraignment until two days after service of copy, etc.**—No arraignment shall take place until the expiration of at least two entire days after the day on which a copy of the indictment was served on the defendant, unless the right to such copy or to such delay be waived, or unless defendant is on bail. [O. C. 463.]

See, *ante*, §§2097-2101.

**§2102—ART. 511.—Court shall appoint counsel, when.**—When the defendant is brought into court for the purpose of being arraigned, if it appear that he has no counsel and is too poor to employ counsel the court shall appoint one or more practicing attorneys to defend him, and the counsel so appointed shall have at least one day to prepare for trial. [O. C. 466.]

It is only in capital cases that the court is required to appoint counsel. *Pennington v. S.* 13 App. 44.

**§2103—ART. 512.—Name as stated in indictment.**—When the defendant is arraigned his name, as stated in the indictment, shall be distinctly called, and unless he suggest by himself or counsel that he is not indicted by his true name, it shall be taken that his name is truly set forth, and he shall not thereafter be allowed to deny the same by way of defense. [O. C. 408.]

*Negro Ben v. S.* 9 App. 107.

**§2104—ART. 513.—If defendant suggests different name.**—If the defendant or his counsel for him suggest that he bears some name different from that stated in the indictment, the same shall be noted upon the minutes of the court, the indictment corrected by inserting therein the name of the defendant as suggested by himself, the style of the cause changed so to give his true name, and the cause proceed as if the true name had been first recited in the indictment. [O. C. 469.]

*Wardlow v. S.* 18 App. 356; *Plumley v. S.* 8 App. 530; *Morris v. S.* 4 App. 589. See *Willson's Cr. Forms*, 687.

**§2105—ART. 514.—If defendant refuse to give his real name.**—If the defendant allege that he is not indicted by his true name, and refuse to say what his real name is, the cause shall proceed as if the name stated in the indictment were true, and the defendant shall not be allowed to contradict the same by way of defense. [O. C. 470.]

**§2106—ART. 515.—Where name is unknown, etc.**—Where a defendant is described as a person whose name is unknown, he may have the indictment so corrected as to give therein his true name. [O. C. 471.]

**§2107—ART. 516.—Indictment read.**—The name of the accused having been called, if no suggestion such as is spoken of in the four preceding articles be made, or, being made, is disposed of as before directed, the indictment shall be read and the defendant asked whether he is guilty or not, as therein charged. [O. C. 472.]

*White v. S.* 18 App. 57.

**§2108—Arraignment—Decisions as to.**—The principal office of an arraignment is to fix the identity of the accused, and if he pleads generally, there is no necessity for proof of identity. *Henrick v. S.* 6 Tex. 341. In a trial for a capital offense the Code as well as the common law requires that the accused be arraigned and plead to the indictment, and a valid judgment cannot be rendered upon a verdict of guilty without an arraignment or plea. *Early v. S.* 1 App. 249; *Holden v. S.* *Id.* 226; *Avara v. S.* 2 App. 419. The arraignment should precede the commencement of the trial proper, but a conviction will not be set aside on appeal because the record shows an arraignment at an improper time. *Cordova v. S.* 6 App. 207; *Smith v. S.* 1 App. 408; *Lister v. S.* *Id.* 740. But, if the trial results in a capital conviction, the record on appeal must show that the accused was arraigned. But if the conviction be not for a capital felony, the record, on appeal, need not show an arraignment. *Nolan v. S.* 8 App. 585. If the record in a capital case, on appeal, shows that the defendant pleaded "not guilty," but shows no arraignment, it will be presumed that an arraignment was waived, but if the record shows neither arraignment nor plea the conviction will be set aside. *Steagald v. S.* 22 App. 464; *Wilson v. S.* 17 App. 525; *Plasters v. S.* 1 App. 673. In such case the conviction will be set aside even if it be for murder in the second degree. *Pringle v. S.* 2 App. 300; *Avara v. S.* *Id.* 419.

An arraignment is not necessary when on a former trial there had been a conviction for a lower grade of homicide than murder in the first degree. *Cheek v. S.* 4 App. 444. When a manacled prisoner is brought to the bar of the court for trial, his manacles should be removed, except in extreme cases when the safe custody of the prisoner and the peace of the tribunal imperatively demand the retention of the manacles. *Rainey v. S.* 20 App. 455. Where two persons are indicted jointly and tried separately, and the jury have retired to consider of the case as to one, and have the indictment, it is not error to send and get the indictment from

the jury for the purpose of arraigning the other defendant. *Rainey v. S.* 20 App. 455. After an arraignment has been had, the defendant cannot complain of misnomer. *Wilcox v. S.* 31 Tex. 586; *S. v. Carabin*, 33 Tex. 697. A failure to arraign until after change of venue is not material. *Caldwell v. S.* 41 Tex. 86; *Ex parte Cox*, 12 App. 665. For sufficient entries of arraignment upon the minutes, see *Smith v. S.* 21 App. 277; *Bohannon v. S.* 14 App. 271.

**§2109—ART. 517.—Plea of not guilty entered upon the minutes of the court.**—If the defendant answer that he is not guilty, the same shall be entered upon the minutes of the court; if he refuse to answer, the plea of not guilty shall in like manner be entered. [O. C. 473.]

See, *post*, §§2138, 2139, 2140.

**§2110—Entry of plea—Decisions as to.**—The preceding article is mandatory, and on appeal, if the record does not show affirmatively that it was complied with, the conviction must be set aside. *Stacey v. S.* 3 App. 121; *Parchman v. S. Id.* 225; *Peeler v. S. Id.* 347; *Satterwhite v. S. Id.* 428; *Hunt v. S.* 4 App. 53; *Thompson v. S. Id.* 93; *Everett v. S. Id.* 159-307; *Perry v. S. Id.* 566; *Morris v. S. Id.* 589; *Cannon v. S.* 5 App. 34; *Bush v. S. Id.* 64; *Gorman v. S.* 6 App. 112; *Freeman v. S. Id.* 462; *Ellison v. S. Id.* 248; *Morehead v. S.* 7 App. 126; *White v. S. Id.* 374; *Perez v. S.* 8 App. 610; *Hunt v. S.* 9 App. 570; *Gaiochio v. S. Id.* 387; *Cole v. S.* 11 App. 67; *George v. S. Id.* 95; *Bates v. S.* 12 App. 26-139; *Popineaux v. S. Id.* 140; *Warren v. S.* 13 App. 348; *Huddleston v. S.* 14 App. 73; *McHenry v. S. Id.* 209; *Jackson v. S.* 16 App. 373; *Shaw v. S.* 17 App. 225; *McFarland v. S.* 18 App. 313; *Roe v. S.* 19 App. 87; *Pate v. S.* 21 App. 191; *Gaither v. S. Id.* 527; *Jefferson v. S.* 24 App. 535.

And although the case was tried by the judge, a jury being waived, the record must show that the defendant pleaded, or that a plea was entered for him. *Roe v. S.* 19 App. 89; *Milton v. S.* 8 App. 619. The proper practice is to enter the plea on the minutes, but in felonies less than capital it may be recited in the judgment. *Stacey v. S.* 3 App. 121. And even in a capital case it may be recited in an entry of a judgment of the court disposing of an application for a change of venue. *Bohannon v. S.* 14 App. 271. Although the record may show that the defendant pleaded, or that a plea was entered for him, he may, in the trial court, on motion for new trial, contradict such record, and show by proof *dehors* the record, that in fact no plea was made by, or for him. *Smith v. S.* 4 App. 626. After an appeal has been perfected, the minutes cannot be corrected so as to show that a plea was made by or for the defendant. *Knight v. S.* 7 App. 206; *Gerard v. S.* 10 App. 690; *Hill v. S.* 4 App. 559.

**§2111—ART. 518.—Plea of guilty not received, unless, etc.**—If the defendant plead guilty he shall be admonished by the court of the consequences; and no such plea shall be received unless it plainly appear that he is sane, and is uninfluenced by any consideration of fear by any persuasion or delusive hope of pardon prompting him to confess his guilt. [O. C. 474.]

See *Willson's Cr. Forms*, 760. Plea cannot be received for a lower grade of offense than that charged. *Post*, Art. 1052, Sub. 4; see, also, *post*, §§2136, 2137.

**§2112—Plea of guilty—Decisions as to.**—In a felony case a plea of guilty can be made only by the defendant in person, and in open court. It can only be accepted under the three following named conditions, viz.: 1. The defendant must be admonished by the trial court of the consequences of the plea. 2. It must plainly appear that the defendant is sane at the time of making the plea; and 3. It must plainly appear that he is uninfluenced by any persuasion or delusive hope of pardon prompting him to make such plea. These prerequisites to the validity of the plea, and the acceptance thereof by the court, are indispensable and must be made manifest of record. They cannot be supplied by inference, intendment or presumption. *Saunders v. S.* 10 App. 336; *Wallace v. S. Id.* 407; *Frosh v. S.* 11 App. 280; *Harris v. S.* 17 App. 559; *Paul v. S. Id.* 583; *Turner v. S. Id.* 587; *Sanders v. S.* 18 App. 372. It is only in *felony* cases that these prerequisites need be observed. *Berliner v. S.* 6 App. 181.

**§2113—ART. 519.—Jury shall be impaneled, when.**—Where a defendant in a case of felony persists in pleading guilty, if the punishment of the offense is not absolutely fixed by law, and beyond the discretion of the jury to graduate in any manner, a jury shall be impaneled to assess the punishment, and evidence submitted to enable them to decide thereupon. [O. C. 476.]

See, *post*, §2135.

**§2114—Decisions under preceding article.**—The preceding article is mandatory, and it is fundamental error to disregard it. In so far as it requires evidence to be submitted, it is not intended solely for the benefit of the defendant, but is also intended, and more especially, to protect the interests of the state, by preventing aggravated cases of crime from being covered up by the plea of guilty, so as to allow the criminal to escape with the minimum punishment fixed by law. This provision of the statute should be fully observed and administered, and the proper practice is to have the judgment entry show affirmatively that evidence was adduced upon the plea of guilty. *Harwell v. S.* 19 App. 423; *Paul v. S.* 17 App. 583; *Turner v. S. Id.* 583; *Saunders v. S.* 10 App. 336; *Wallace v. S. Id.* 407; *Frosh v. S.* 11 App. 280.



§2115—ART. 520.—**Same proceedings in respect to name of defendant in all cases.**—The same proceedings shall be had in all cases with respect to the name of the defendant and the correction of the indictment, as provided with respect to the same in capital offenses. [O. C. 479.]

Wardlow v. S. 18 App. 356; *ante*, §§2107, 2108, 2109.

## VI. OF THE PLEADINGS IN CRIMINAL ACTIONS.

§2116—ART. 521.—**Indictment or information.**—The primary pleading in criminal action on the part of the state is the indictment or information. [O. C. 481.]

§2117—ART. 522.—**Defendant's pleading.**—On the part of the defendant the following are the only pleadings:

1. The motion to set aside the indictment or information.
2. A special plea setting forth one or more facts as cause why the defendant ought not to be tried upon the indictment or information presented against him.
3. An exception to the indictment or information for some matter of form or substance.
4. A plea of guilty.
5. A plea of not guilty. [O. C. 482.]

§2118—ART. 523.—**Motion to set aside indictment, etc.—For what causes only.**—A motion to set aside an indictment or information shall be based on one or more of the following causes, and no other:

1. That it appears by the records of the court that the indictment was not found by at least nine grand jurors, or that the information was not presented after oath made as required in article 431.

2. That some person not authorized by law was present when the grand jury were deliberating upon the accusation against the defendant, or were voting upon the same. [O. C. 483.]

See Willson's Cr. Forms, 602, 603.

§2119—**Decisions under preceding article.**—A motion to set aside an indictment is a written suggestion, and need not be technically sufficient in every particular, nor be verified by affidavit. When the second ground is alleged, it may be sustained by proof *dehors* the record. The prosecuting officer is an "unauthorized person," within the meaning of said second ground. Rothschild v. S. 7 App. 519. A motion to set aside an indictment is allowable only for the causes specified in the preceding article. Goode v. S. 2 App. 520; West v. S. 6 App. 485; Dodd v. S. 10 App. 370; Terry v. S. 15 App. 66; Williams v. S. 20 App. 357.

§2120—ART. 524.—**Motion shall be tried by judge without jury.**—An issue of fact arising upon a motion to set aside an indictment or information shall be tried by the judge without a jury. [O. C. 483.]

See, *post*, Arts. 539, 540, 541, 544.

§2121—ART. 525.—**Only special pleas for defendant.**—The only special pleas which can be heard for the defendant are:

1. That he has been before convicted, legally, in a court of competent jurisdiction, upon the same accusation, after having been tried upon the merits for the same offense.

2. That he has been before acquitted by a jury of the accusation against him, in a court of competent jurisdiction, whether the acquittal was regular or irregular. [O. C. 484.]

See Willson's Cr. Forms, 615, 616; also, *ante*, §§1449, 1450, 1466, 1467; also, *post*, Art. 553.

§2122—**Former acquittal or conviction—Decisions as to.**—A plea of former acquittal or conviction, to be valid, must consist of two matters: 1. Matters of record, to wit.: the complaint and information, or indictment, upon which the conviction was had, and the judgment of acquittal or conviction. 2. Matters of fact, to wit.: the identity of the person acquitted or convicted, and of the offense of which he was acquitted or convicted. Williams v. S. 13 App. 285; Adams v. S. 16 App. 162; Heffner v. S. *Id.* 573, correcting the rule as stated in Troy v. S. 10 App. 319; Pritchard v. S. 2 App. 69; Quizow v. S. 1 App. 47. The matters of record should

be set forth in the plea *in hæc verba*, or at least by exhibits. *Grisham v. S.* 19 App. 504. A plea of former conviction is available only where the transaction is the same, and the two charges are susceptible of and must be sustained by the proof. But, in the case of former conviction it is only required that the transaction or the facts constituting it, be the same. See the following cases for explanation of the difference between the two pleas. *Wright v. S.* 17 App. 152; *Simco v. S.* 9 App. 338; *Arnold v. S.* *Id.* 435; *Shubert v. S.* 21 App. 551. To sustain a plea of former acquittal, it must appear that the defendant had been acquitted by a jury, in a court of competent jurisdiction of the offense charged against him, upon a valid indictment, upon proof of the facts alleged in the second indictment. Former acquittal constitutes no defense against an accusation of which the defendant could not have been convicted in the former prosecution. This plea is only available where the transactions are identical, and the two indictments are susceptible of, and must be sustained by the same proof. *Simco v. S.* 9 App. 338; *Potter v. S.* *Id.* 55; *Pickens v. S.* *Id.* 270; *Swancoat v. S.* 4 App. 105; *Hozier v. S.* 6 App. 542; *Williams v. S.* 13 App. 285; *Wilson v. S.* 16 App. 497; *Nance v. S.* 17 App. 385; *Parchman v. S.* 2 App. 228; *Bogges v. S.* 43 Tex. 347; *Longley v. S.* *Id.* 490; *Alexander v. S.* 21 App. 406; *Shubert v. S.* *Id.* 551; *Brothers v. S.* 22 App. 447.

Theft of sundry articles at the same time and place, and by the same person, constitutes but a single offense, notwithstanding the articles stolen severally belonged to different persons, and were taken severally from the possession of their respective owners. A former acquittal or conviction for the theft of any of the articles is a defense against a prosecution for the others. *Hudson v. S.* 9 App. 151; *Wilson v. S.* 45 Tex. 76; *Addison v. S.* 3 App. 40; *Quit-zow v. S.* 1 App. 48; *Hozier v. S.* 6 App. 542; *Adams v. S.* 16 App. 162; *Wright v. S.* 17 App. 152; *Alexander v. S.* 21 App. 406; *Willis v. S.* 24 App. 586; *ante*, §1306. A former conviction on an indictment charging burglary, with intent to commit theft, is not a bar to a subsequent prosecution for a theft committed at the same time and place that the burglary was committed. *Howard v. S.* 8 App. 447; *ante*, §1234.

A conviction under an indictment for an assault with intent to murder, is not a bar to a prosecution for murder resulting from the same assault, where said conviction was had prior to the death of the assaulted party, the offenses being different, and the murder not being complete until after the conviction for the assault. *Johnson v. S.* 19 App. 453; *Curtis v. S.* 22 App. §1074; *ante*, §1074.

If the former acquittal or conviction was under an indictment or information, and for a minor offense embraced in a transaction which also constituted a higher offense, such acquittal or conviction will bar a subsequent prosecution for the higher grade of offense, although the court in which the former acquittal or conviction was had, did not have jurisdiction of the higher grade of offense, and although an indictment for said higher grade of offense was pending in another court having jurisdiction of it. *Grisham v. S.* 19 App. 504; *Kain v. S.* 16 App. 282; *White v. S.* 9 App. 390; *Achterberg v. S.* 8 App. 463; *Allen v. S.* 7 App. 298; *Thomas v. S.* 40 Tex. 36. The prosecutor may bar himself by selecting a special grade of the offense. He may carve as large an offense out of a single transaction as he can, yet he must cut only once. *Grisham v. S.* 19 App. 504; *Simco v. S.* 9 App. 338; *Quit-zow v. S.* 1 App. 47. An indictment charged the defendant with keeping a disorderly house on May 15, 1883, and was filed May 25, 1883. Defendant pleaded former acquittal before a mayor's court, on a complaint charging the same offense to have been committed by her on June 13, 1883. On the trial before the mayor, the same proof was adduced as on the trial under the indictment, covering the same period of time. Held, that the plea should have been sustained. *Handley v. S.* 16 App. 444.

Where a plea of former acquittal or conviction is interposed, the burden of proving the identity of himself as the person formerly acquitted or convicted, and the identity of the offense, is upon the defendant; and the state can under no circumstances be required to establish the contrary. Proof of identity of the offense is not made by proof that the offense of which the defendant has been acquitted or convicted, and that for which he is on trial, are identical in nature, name and designation, but it must be shown that the very acts or omissions constituting the offense are identical. A preponderance of proof will support the plea. *Kain v. S.* 16 App. 282; *Willis v. S.* 24 App. 586; *Aker v. S.* 6 App. 398; *Hozier v. S.* *Id.* 501; *Campbell v. S.* 2 App. 187; *Taylor v. S.* 4 App. 29; *Lowe v. S.* *Id.* 34.

A conviction of an assault with intent to murder will not bar a prosecution for threats to kill, though both prosecutions are founded on incidents of the same difficulty, and so *vice versa*. *Lewis v. S.* 1 App. 323. A former acquittal of bigamy will not bar a prosecution for adultery between the same parties. *Swancoat v. S.* 4 App. 105; *Hildreth v. S.* 19 App. 195; see, also, *ante*, §518. A conviction for unlawfully carrying a pistol is no bar to a prosecution for an assault committed with the pistol. *Thomas v. S.* 40 Tex. 36. An acquittal of "willfully and wantonly killing" an animal, is not a bar to "willfully killing" the same animal "with intent to injure the owner." *Irvin v. S.* 7 App. 78.

The usual test by which to determine whether or not the former acquittal or conviction was of the same offense charged in the subsequent prosecution is, would the same evidence which is necessary to support the second prosecution have supported the first? *Lowe v. S.* 4 App. 34; *Thomas v. S.* 40 Tex. 36. The defendant was convicted of attempting to pass a forged instrument to H. He was subsequently prosecuted for attempting to pass the same instrument on the same day, but at a different time and place and to another person than H. Held, that the former conviction did not bar the second prosecution. *Burks v. S.* 24 App. 328. If a burglary and a conspiracy to commit burglary involve the same transaction, they are distinct offenses, and a conviction of one will not bar a prosecution for the other. *Whitford v.*

S. 24 App. 489. An illegal marking or branding of several cattle at the same time and place is but one offense, although the cattle may belong to different owners, and a conviction of the offense as to any one of the cattle will bar a prosecution as to the others. *Adams v. S.* 16 App. 162.

A dismissal of a prosecution before jeopardy has attached, is not a bar to another prosecution for the same offense. *Ex parte Porter*, 16 App. 321; *Brill v. S.* 1 App. 152; *Quitow v. S.* *Id.* 47; *Goode v. S.* 2 App. 520; *Longley v. S.* 43 Tex. 490; *Swindell v. S.* 32 Tex. 102. Former acquittal or conviction in a court not having jurisdiction of the offense, does not bar a prosecution in a court of competent jurisdiction, unless the conviction was had under an indictment or information. *Achterberg v. S.* 8 App. 463; *Allen v. S.* 7 App. 298. A voluntary appearance before a magistrate and plea of guilty of simple assault, is no bar to a prosecution in a court of competent jurisdiction for aggravated assault. *Watson v. S.* 5 App. 271; *Warner v. S.* 3 App. 104; *Wilson v. S.* 16 Tex. 246; *Norton v. S.* 14 App. 387. The defense of former acquittal or conviction is not available under the plea of not guilty. It must be pleaded specially and under oath. *Swancoat v. S.* 4 App. 105.

The plea may be amended. *Post*, Art. 552; *Deaton v. S.* 44 Tex. 446. The plea may be excepted to for insufficiency. *Post*, Art. 552; *Bogges v. S.* 43 Tex. 347; *Grisham v. S.* 19 App. 504; *Pickens v. S.* 9 App. 270. Where the plea upon its face presents a legal defense, although defectively, and there is no exception made to it, evidence should be admitted in support of it, and the issue should be submitted along with the plea of not guilty, to be determined by the jury. *Post*, §§2144, 2145; *Troy v. S.* 10 App. 319; *Pickens v. S.* 9 App. 270; *Adams v. S.* 16 App. 162; *Grisham v. S.* 19 App. 504. The court should instruct the jury to return a special verdict upon the plea, and the verdict should find whether the plea be true or untrue. *Post*, Art. 712; *Burks v. S.* 24 App. 326; *Smith v. S.* 18 App. 329; *McCampbell v. S.* 9 App. 124; *Pickens v. S.* *Id.* 270; *White v. S.* *Id.* 390; *Brown v. S.* 7 App. 610; *Deaton v. S.* 44 Tex. 446; *Davis v. S.* 42 Tex. 494. But, in a misdemeanor case, where a jury has been waived and the cause submitted to the judge, an express finding on the plea is not required, *Taylor v. S.* 4 App. 29.

The question of former acquittal or conviction cannot be raised on *habeas corpus*. *Britt v. S.* 1 App. 152; *Ex parte Rogers*, 10 App. 655; *Pitner v. S.* 44 Tex. 578; *Perry v. S.* 41 Tex. 488. It is only when the former acquittal or conviction has been had in another tribunal, or in the same tribunal but under another and distinct proceeding, that the defense is required to be pleaded. Where such acquittal or conviction is had in the same court and in the same case, the court must take judicial cognizance of such defense without a plea. Thus, where the defendant had been previously tried in the same court, and in the same case, for aggravated assault, and convicted of simple assault only, and a new trial awarded him, such former conviction operated as an acquittal of the charge of aggravated assault, and it was incumbent upon the court to so adjudge, though such defense was not pleaded. *Robinson v. S.* 21 App. 160. In offenses which are graded, a conviction of a lower operates as an acquittal of any higher degree of the offense, and the defendant, thereafter, can be tried for no higher grade than that of which he was convicted. *Ante*, §1072; *post*, Art. 724. A defendant should be allowed reasonable time to prepare and file a special plea. See a case in which it was held that the court erred in not granting time. *Coon v. S.* 21 App. 332; see, *post*, Art. 531.

**§2123—Other special pleas.**—Former jeopardy is not a special plea provided for by the Code, but it is a defense guaranteed by the Constitution. For decisions as to this plea, see, *ante*, §§1452, 1453. For form of plea, see *Willson's Cr. Forms*, 617. Another special plea not provided for by the Code, but which is nevertheless allowable, is a plea to the jurisdiction of the court. *Blanford v. S.* 10 App. 627; *Kelly v. S.* 13 App. 158; *Lott v. S.* 13 App. 627. For a form of this plea, see *Willson's Cr. Forms*, 618. A plea in abatement is not recognized by the Code, and cannot be entertained. *S. v. Oxford*, 30 Tex. 428; *Morrison v. S.* 41 Tex. 516; *Hardin v. S.* 4 App. 355; *Cocke v. S.* 8 App. 639; *Shindler v. S.* 15 App. 394. A defect in the transfer of an indictment from the district to an inferior court can be availed of only by a plea to the jurisdiction of the court to which the transfer is made. *Ante*, §2012; *Milton v. S.* 24 App. 346. The pleas of jeopardy and to the jurisdiction of the court are the only special pleas, independent of the statutory pleas of former acquittal, or former conviction, that can be interposed by the defendant. *Williams v. S.* 20 App. 357; *Alonzo v. S.* 15 App. 378.

**§2124—ART. 526.—Special plea must be verified.**—Every special plea shall be verified by the affidavit of the defendant. [O. C. 485.]

**§2125—ART. 527.—Issues of fact on special plea to be tried by jury.**—All issues of fact presented by a special plea shall be tried by a jury. [O. C. 486.]

Except in a misdemeanor case, when a jury has been waived by the defendant. *Taylor v. S.* 4 App. 29; *ante*, §1470.

**§2126—ART. 528.—Exceptions to the substance of an indictment.**—There is no exception to the substance of an indictment or information, except—

1. That it does not appear from the face of the same that an offense against the law was committed by the defendant.

2. That it appears from the indictment or information that a prosecution for the offense is barred by a lapse of time, or that the offense was committed after the finding of the indictment.

3. That it contains matter which is a legal defense or bar to the prosecution.

4. That the indictment or information shows upon its face that the court trying the case has no jurisdiction thereof. [O. C. 487.]

See Willson's Cr. Forms, 604, 605, 606, 607.

§2127—**Decisions under preceding article.**—An indictment or information defective in substance may be taken advantage of on appeal, as well as by exception or in arrest of judgment. *S. v. Mann*, 13 Tex. 81. An exception must conform to the statute, and can be based only upon statutory grounds. The Code enumerates the permissible exceptions, and prescribes the forms thereof, and these forms should be followed. An exception for "uncertainty" is not one of the exceptions enumerated. The exception in such case should be that "the offense is not set forth in plain and intelligible words," which exception includes both form and substance. *S. v. Schwartz*, 25 Tex. 764. An exception that "the defendant is not legally charged with any crime in said indictment" is equivalent to exception first in the preceding article. *Collins v. S.* 25 Tex. Sup. 202. The Code does not contemplate that a general demurrer, or a general exception, which does not notify the court whether the defect is one of form or one of substance, shall be heard by the court, and if no defect be pointed out, the court will not consider the exception. *Phillips v. S.* 29 Tex. 226; *S. v. Schoolfield*, *Id.* 501. Where exceptions are filed, but not called to the attention of the court or acted upon, they will, on appeal, be treated as waived. *S. v. Thompson*, 18 Tex. 528; *Myers v. S.* 31 Tex. 173. Exceptions are allowable only for the causes specially enumerated in the statute. *Williams v. S.* 20 App. 357; *Lott v. S.* 18 App. 627; *West v. S.* 6 App. 485; *Schwartz v. S.* 25 Tex. 764. The allegations of the time and place of the offense are matters of substance and not amendable. *Robbins v. S.* 9 App. 666; *Goddard v. S.* 14 App. 566; *Drummond v. S.* 4 App. 150, overruling *S. v. Elliott*, 34 Tex. 148, and approving *Sanders v. S.* 26 Tex. 119; *post*, §2153. Defects of substance may be taken advantage of by motion in arrest of judgment, or on appeal, as well as by exception. *S. v. Mann*, 13 Tex. 61; *post*, Art. 787. An exception that the indictment does not conclude "against the peace and dignity of the state" is one of substance as well as form. *Cox v. S.* 8 App. 254; *Haun v. S.* 13 App. 383; *Holden v. S.* 1 App. 225; *S. v. Sims*, 43 Tex. 521; *S. v. Durst*, 7 Tex. 74. And so is an exception that the indictment does not commence properly. *Saine v. S.* 14 App. 144. As to time of making an exception, see, *post*, §2131. See, as to requisites of indictments and informations, *ante*, §1949, *et seq.*

§2128—**ART. 529.—Exceptions to the form of an indictment.**—Exceptions to the form of an indictment or information may be taken for the following causes only:

1. That the indictment or information does not appear to have been presented in the proper court, as required by article 420 or 430.

2. The want of any other requisite or form prescribed by articles 420 and 430, except the want of the signature of the foreman of the grand jury, or in the case of an information of the signature of the attorney representing the state. [O. C. 488.]

See Willson's Cr. Forms, 609, 610, 611, 612, 613, 614.

§2129—**Exceptions to form—Decisions as to.**—An exception on account of form must be taken before plea made, and before a change of venue is ordered. *Post*, Art. 580; *Ringo v. S.* 2 App. 291; *Loggins v. S.* 8 App. 434; *Caldwell v. S.* 41 Tex. 86. It may be taken after the state has announced ready for trial. *Carr v. S.* 19 App. 635. For requisites of an indictment or information, see, *ante*, §1949, *et seq.* The allegation as to the court in which the indictment is presented is matter of form. *Hauck v. S.* 1 App. 357; *Long v. S.* *Id.* 466; *James v. S.* 44 Tex. 314; *Mathews v. S.* *Id.* 376; *Bosshard v. S.* 25 Tex. Sup. 207. And so is the statement of the time of the meeting of the court. *Sharp v. S.* 6 App. 650.

§2130—**ART. 530.—Motions, etc., shall be in writing.**—All motions to set aside an indictment or information, all special pleas and exceptions, shall be in writing. [O. C. 489.]

§2131—**ART. 531.—Two days allowed for filing written pleadings.**—In all cases the defendant shall be allowed two entire days, exclusive of all fractions of a day after his arrest, and during the term of the court, to file written pleadings. [O. C. 491, 494, 495, 496.]

§2132—**ART. 532.—When defendant is entitled to service of copy of indictment, etc.**—In cases where the defendant is entitled to be served with a copy of the indictment, he shall be allowed the two days' time

mentioned in the preceding article to file written pleadings after such service. [O. C. 496.]

See, *ante*, §§2097-2101.

§2133—ART. 533.—**Defendant may file written pleadings at any time, etc.**—The two preceding articles shall not be construed so as to preclude the defendant from filing written pleadings at any time before the case is called for trial, except in case of change of venue. [O. C. 496a.]

See, *post*, Art. 580.

§2134—ART. 534.—**Plea of guilty—How made in felony case.**—A plea of guilty, in a felony case, must be made in open court, and by the defendant in person, and in such case the proceedings shall be as provided in articles 518 and 519. [Added in revising.]

See, *ante*, §§2113, 2114, 2115, 2116.

§2135—ART. 535.—**Plea of guilty in misdemeanor.**—A plea of guilty, in a case of misdemeanor, may be made either by the defendant or his counsel in open court, and in such case the defendant or his counsel may waive a jury, and the punishment may be assessed by the court, either upon evidence or without it, at the discretion of the court. [Added in revising.]

Plea cannot be received for lower grade of offense than that charged. *Post*, Art. 1052, Sub. 4.

§2136—ART. 536.—**Plea of not guilty—How made.**—The plea of not guilty may be made by the defendant, or by his counsel in open court, and in all cases where the defendant refuses to plead the plea of not guilty shall be entered for him by the court. [O. C. 480.]

See, *ante*, §§2111, 2112. In cases less than capital, plea must be made when case is called for trial. *Post*, Arts. 603, 604; *Shaw v. S.* 17 App. 225; *Cole v. S.* 11 App. 68. When exception to indictment is overruled. *Post*, §2158.

§2137—ART. 537.—**Plea of not guilty—How construed.**—The plea of “not guilty” shall be construed to be a denial of every material allegation in the indictment or information. Under this plea evidence to establish the insanity of the defendant, and every fact whatever tending to acquit him of the accusation may be introduced, except such facts as are proper for a special plea under article 525. [O. C. 497.]

§2138—ART. 538.—**Pleas of guilty and not guilty may be oral, etc.**—The plea of “guilty” and the plea of “not guilty” may be made orally, and shall be entered of record on the minutes of the court. [Added in revising.]

See, *ante*, §§2111, 2112, 2113.

## VII. OF THE ARGUMENT AND DECISION OF MOTIONS, PLEAS AND EXCEPTIONS.

§2139—ART. 539.—**Motions, etc., to be heard and decided without delay.**—The motion to set aside an indictment or information, and all exceptions, shall be heard together, and shall be decided without delay. [O. C. 502.]

§2140—ART. 540.—**Same subject.**—The court, at its discretion, may hear and determine such pleadings as are named in the preceding article at any time before a trial upon the plea of not guilty has been entered upon, but not afterward. [Added in revising.]

Must be disposed of before venue is changed. *Post*, Art. 580.

§2141—ART. 541.—**Defendant may open and conclude argument.**—The counsel of the defendant has the right to open and conclude the argument upon all pleadings of the defendant presented for the decision of the judge. [Added in revising.]

**§2142—ART. 542.—Special pleas setting forth matters of fact.**—Such special pleas as set forth matter of fact proper to be tried by a jury, shall be submitted and tried with the plea of “not guilty.” [O. C. 503.]

As to verdict, see, *post*, ART. 712.

**§2143—Decisions under preceding article.**—The plea of not guilty, and the special plea should be submitted together, with directions to the jury to first consider the special plea; and if they find that to be true to proceed no further than to return their verdict upon it. *Wilson v. S.* 45 Tex. 76; *Davis v. S.* 42 Tex. 494; *Prine v. S.* 41 Tex. 300; *Norton v. S.* 14 Tex. 387; *Pritchford v. S.* 2 App. 69; *Pickens v. S.* 9 App. 270; *White v. S.* *Id.* 390; *Troy v. S.* 10 App. 319; *Adams v. S.* 10 App. 162; *Grisham v. S.* 19 App. 504. See further upon this subject, *ante*, §2124.

**§2144—ART. 543.—Process to procure testimony on written pleadings.**—Where the matters involved in any written pleading depend in whole or in part upon testimony, either written or verbal, and not altogether upon the record of the court, every process known to the law may be obtained, either on behalf of the state or of the defendant, for the purpose of procuring such testimony; but there shall be no delay on account of the want of the testimony, unless it be shown to the satisfaction of the court that all the means given by the law have been used to procure the same. [O. C. 503.]

**§2145—ART. 544.—Where motion to set aside, etc., is sustained in misdemeanor.**—Where the motion to set aside an indictment or information, or an exception to the same is sustained, the defendant, in a case of misdemeanor, shall be discharged, but may be again prosecuted within the time allowed by law. [O. C. 504.]

See *Turner v. S.* 21 App. 198.

**§2146—ART. 545.—In cases of felony.**—If the motion to set aside, or the exception to the indictment in cases of felony be sustained, the defendant shall not therefore be discharged, but may be immediately recommitted by order of the court, upon motion of the attorney representing the state, or without motion, and proceedings may afterward be had against him as if no prosecution had ever been commenced. [O. C. 505.]

This article does not apply in case of the dismissal of the prosecution by the state. *Venters v. S.* 18 App. 198.

**§2147—ART. 546.—Shall be fully discharged, when.**—Where, after the motion or exception is sustained, it is made known to the court, by sufficient testimony, that the offense of which the defendant is accused will be barred by limitation before another indictment can be preferred, he shall in every case be fully discharged. [O. C. 506.]

**§2148—ART. 547.—When exception is that no offense is charged.**—If an exception to an indictment or information is taken and sustained upon the ground that there is no offense against the law charged therein, the defendant shall be discharged, unless an affidavit be filed accusing him of the commission of an offense punishable by law. [O. C. 507.]

See *S. v. Thornton*, 32 Tex. 104; *S. v. Bowden*, 41 Tex. 635. In such case the defendant cannot be detained to answer another indictment or information, without an affidavit charging him with an offense. *Crouch v. S.*, decided at Galveston, February 11, 1876, unreported.

**§2149—ART. 548.—When defendant is held by order of court, etc., shall be discharged in ten days, unless, etc.**—In case the motion to set aside the indictment, or the exceptions thereto are sustained, but the court refuses to discharge the defendant, at the expiration of ten days from the order sustaining such motions or exceptions the defendant shall be discharged, unless in the meanwhile complaint under oath has been made before a magistrate charging him with an offense against the law, or unless another indictment has been presented against him for such offense. [Added in revising.]

§2150—ART. 549.—**When exception is on account of form.**—When the exception to an indictment or information is merely on account of form, the same shall be amended, if decided to be defective, and the cause proceed upon such amended indictment or information. [O. C. 508.]

See, *ante*, §§2130, 2131; see, also, Willson's Cr. Forms, 546, 547.

§2151—ART. 550.—**Amendment of indictment or information.**—Any matter of form in an indictment or information may be amended at any time before an announcement of ready for trial upon the merits, by both parties, but not afterward. No matter of substance can be amended. [Added in revising.]

§2152—ART. 551.—**Amendments, made how.**—All amendments of an indictment or information shall be made with the leave of the court and under its direction. [Added in revising.]

§2153—ART. 552.—**State may except to plea, etc.**—When a special plea is filed by the defendant, the state may except to its inefficiency for substantial defects, and if the exception be sustained the plea may be amended. If the plea be not excepted to it shall be considered that issue has been taken upon the same. [O. C. 509, 510.]

§2154—**Decisions as to amendments.**—The preceding provisions allowing amendments of indictments are not *ex post facto* as to indictments already found and pending at the date of their enactment. *S. v. Manning*, 14 Tex. 402. Neither the counsel for the defendant, nor the defendant himself, nor the prosecuting officer, nor the court, can alter an indictment in a material respect. *Calvin v. S.* 25 Tex. 789. Matter of substance in an indictment or information is not amendable. *Edwards v. S.* 10 App. 25; *ante*, §§2128, 2129; *ante*, §2153. Such for instance as the venue of the offense. *Robins v. S.* 9 App. 666; *Collins v. S.* 6 App. 647. Or the time of the commission of the offense. *Goddard v. S.* 14 App. 566; *Drummond v. S.* 4 App. 150; see, also, *Brown v. S.* 11 App. 451; *Bates v. S.* 12 App. 26. A misstatement in an indictment as to the day on which the term of the court at which the same was presented began, goes to the form and not to the substance, and may be amended under the direction of the court by merely erasing the wrong date, and substituting the proper one. But amendment in such case is unnecessary, as the allegation of the time when the term began is mere surplusage. *Osborne v. S.* 24 App. 398; same case, 23 App. 431. An allegation as to the court and the term of the court in which the indictment was presented is matter of form and amendable. *Osborne v. S.* 23 App. 431; *Sharp v. S.* 6 App. 650; *Hauck v. S.* 1 App. 357; *Long v. S.* *Id.* 466; *Mathews v. S.* 44 Tex. 376; *Bosshard v. S.* 25 Tex. Sup. 207. A complaint is not amendable in matter of substance. *Huff v. S.* 23 App. 291. An amendment is not allowable after both parties have announced ready for trial. *Osborne v. S.* 23 App. 431; *ante*, §2153. A wrong docket number having been through mistake placed upon a substituted information, the court should have ordered a correction of such mistake. *Stiff v. S.* 21 App. 255. A file mark upon an indictment or information may be amended at any time under the direction of the court. *DeOlles v. S.* 20 App. 145. A simple order of court that an indictment be amended, is not sufficient. The record must show affirmatively that the amendment was in fact made. *Robins v. S.* 9 App. 666; *Cox v. S.* 7 App. 495; *Turner v. S.* *Id.* 596. Where the defendant suggests that the name by which he is charged is not his correct name, the correct name may be inserted in the indictment. *Wardlow v. S.* 18 App. 356; *ante*, §§2107-2117; *Ben v. S.* 9 App. 107; *Plumley v. S.* 8 App. 529; *Morris v. S.* 4 App. 589.

§2155—ART. 553.—**Former acquittal or conviction—When a bar and when not a bar.** A former judgment of acquittal or conviction in a court of competent jurisdiction shall be a bar to any further prosecution for the same offense, but shall not bar a prosecution for any higher grade of offense, over which said court had not jurisdiction, unless such trial and judgment were had upon indictment or information, in which case the prosecution shall be barred for all grades of the offense. [Added in revising.]

*Ante*, §§1451, 1452, 1712, 1713, 2123, 2124, 2125.

§2156—ART. 554.—**Plea of not guilty allowed where motion, etc., has been overruled.**—Judgment shall in no case be given against the defendant where his motion, exception or plea is overruled; but he shall in all cases be allowed to plead not guilty. If he refuses to plead it shall be considered as if the plea were offered and be noted accordingly. [O. C. 512.]

*Ante*, §§2111, 2112, 2138.

## VII. [VIII.] OF CONTINUANCE.

**§2157—ART. 555.—Continuance by operation of law, when.**—Criminal actions are considered as continued by operation of law when there is not sufficient time for trial at any particular term of a court, or where the defendant has not been arrested. [O. C. 513.]

**§2158—ART. 556.—By consent of parties.**—A criminal action may be continued by consent of the parties thereto, in open court, at any time. [Added in revising.]

See Willson's Cr. Forms, 630.

**§2159—ART. 557.—For sufficient cause shown.**—A criminal action may be continued on the written application of the state, or of the defendant, upon sufficient cause shown, which cause shall be distinctly and fully set forth in the application. [O. C. 514, 517, 520; consolidated in revising.]

See, *post*, §2181.

**§2160—ART. 558.—First application by the state for a continuance.**—It shall be sufficient upon the first application by the state for a continuance, if the same be for the want of a witness, to state—

1. The name of the witness and his residence, if known, or that his residence is unknown.

2. The diligence which has been used to procure his attendance; and it shall not be considered sufficient diligence to have caused to be issued, or to have applied for a *subpoena*, in cases where the law authorized the issuance of an attachment.

3. That the testimony of the witness is believed by the applicant to be material for the state. [O. C. 515.]

See Willson's Cr. Forms, 619.

**§2161—ART. 559.—Subsequent application by the state.**—On any subsequent application for a continuance by the state, for the want of a witness, the application, in addition to the requirements in the preceding article, must show—

1. The facts which the applicant expects to establish by the witness, and it must appear to the court that they are material.

2. That the applicant expects to be able to procure the attendance of the witness at the next term of the court.

3. That the testimony cannot be procured from any other source during the present term of the court. [O. C. 516.]

See Willson's Cr. Forms, 620.

**§2162—ART. 560.—First application by defendant for a continuance.**—In the first application by the defendant for a continuance, it shall be necessary, if the same be on account of the absence of a witness, to state under oath—

1. The name of the witness and his residence, if known, or that his residence is not known. [See §2163.]

2. The diligence which has been used to procure his attendance, and it shall not be considered sufficient diligence, to have caused to be issued, or to have applied for a *subpoena*, in cases where the law authorizes the issuance of an attachment. [See §2164.]

3. The facts which are expected to be proved by the witness, and it must appear to the court that they are material. [See §2165.]

4. That the witness is not absent by the procurement or consent of the defendant. [See §2166.]

5. That the application is not made for delay. [See §2167.]



6. That there is no reasonable expectation that the attendance of the witness can be secured during the present term of the court by a postponement of the trial to some future day of said term; and the truth of the first, or any subsequent application, as well as the merit of the ground set forth therein and its sufficiency, shall be addressed to the sound discretion of the court called to pass upon the same, and shall not be granted as a matter of right; *provided*, that should an application for continuance be overruled, and the defendant convicted, if it appear upon the trial that the evidence of the witness or witnesses, named in the application, was of a material character, and that the facts set forth in said application were probably true, a new trial should be granted, and the cause continued for the term, or postponed to a future day of the same term. [See §§2168, 2169; O. C. 518.]

Amended by Act April 14, 1879, p. 94, Ch. 82. See Willson's Cr. Forms, 621.

§2163—**Name and residence of witness.**—Failing to state the residence of the absent witness, or that his residence is unknown, renders the application fatally defective. *Thomas v. S. 17 App. 437; Vanway v. S. 41 Tex. 639; Wolf v. S. 4 App. 332.* Every requisite of the statute must be complied with. *Anderson v. S. 8 App. 542.*

§2164—**Diligence—Decisions as to.**—An application for a continuance, to be sufficient, must show affirmatively and clearly that due diligence had been used to obtain the testimony of the witness, or it must, in like manner, disclose facts which will excuse the use of such diligence. The diligence used must be fully and distinctly set forth, and it must be apparent therefrom that all the means provided by law were promptly resorted to. It is the duty of the defendant, as soon as he is arrested, to use the means provided by law to obtain the testimony he desires, or he must show good cause for failure to do so upon applying for a continuance. The burden is upon the party seeking a continuance to show himself entitled to it by definite, exact and certain averments. He should show such facts as negative a want of legal diligence. A mere general statement that he has used due diligence will not be sufficient, but the acts of diligence must be stated fully and clearly, and where process has been issued and returned, it is better to make the same a part of the application. It is not sufficient to merely state that process was sued out, but it must be shown what was done with it; to whom and when it was delivered, and when issued to another county, the manner and time of its transmission must be shown, and when process has been returned, the time when it was returned must be shown. *Barrett v. S. 18 App. 64; Fimbrook v. S. Id. 1; Hughes v. S. Id. 130; Bond v. S. 20 App. 421; Hawkins v. S. 17 App. 593; Long v. S. Id. 128; Lane v. S. 16 App. 172; Childers v. S. Id. 524; Lewis v. S. 15 App. 647; Buntain v. S. Id. 515; O'Neal v. S. 14 App. 582; Walker v. S. 13 App. 618; Lowe v. S. 11 App. 253; Atkins v. S. 11 App. 8; Greenwood v. S. 9 App. 638; Burton v. S. Id. 605; Skipworth v. S. 8 App. 135; Cooper v. S. 7 App. 420; Murphy v. S. 6 App. 420; Henderson v. S. 5 App. 134; Robles v. S. Id. 346; Fields v. S. Id. 616; Johnson v. S. 4 App. 268; Donovan v. S. Id. 372; Summerlin v. S. 3 App. 444; Huebner v. S. Id. 459; Bowen v. S. Id. 618; Grant v. S. 2 App. 164; Murray v. S. 1 App. 174; Dill v. S. Id. 279; Canter v. S. Id. 403; Buie v. S. Id. 453; Townsend v. S. 41 Tex. 134; Wall v. S. 18 Tex. 682; Shanks v. S. 25 Tex. Sup. 326.* Where process has been issued it should also be shown whether or not it has been served, and if not served, the diligence used to procure its service, and also that the process was issued by the proper authority. *Williams v. S. 10 App. 114.* It is not sufficient for the applicant to state that he is "informed and believes" that process issued, with a like statement as to what had been done with it. *Labbaite v. S. 6 App. 257.* And where the disposition made of the process is alleged upon information and belief, the name of the informant should be disclosed. *Pullen v. S. 11 App. 89.* When an attachment is authorized the issuance of a *subpœna* is not diligence. *Chaplin v. S. 7 App. 87; DeWarren v. S. 29 Tex. 464.* Where the witness resides out of the county in which the prosecution is pending, issuance of a *subpœna* for him is not diligence, because an attachment may and should be issued. And where a witness who has been *subpœnaed* and fails to attend, an attachment should be obtained as soon as his absence is discovered, or would be discovered by proper diligence, which would ordinarily be on the day set apart for the call of the criminal docket. *Hyde v. S. 16 Tex. 445; Walker v. S. 13 App. 618; Long v. S. 17 App. 128.* The law requires of the defendant a strict compliance with its exact requirements upon application for a continuance. What constitutes legal diligence to enforce the attendance of witnesses is explicitly prescribed by the statute, and a defendant, who deviated from its directions, must abide the consequences. *Skipworth v. S. 8 App. 135.* A witness is in default if he is not in attendance on the day set apart for the call of the criminal docket, or any day of the term subsequent thereto, and before final disposition or continuance of the cause, or, if he is not in attendance at any other particular time named in the writ, or in his bond or recognizance. If the process under which he was summoned be a *subpœna*, and he disobey it, the defendant should promptly sue out an attachment. If the witness be under bond or recognizance to appear, such bond or recognizance should be forfeited, and unless these steps are taken diligence cannot be shown. *Hill v. S. 18 App. 665; Walker v. S. 13 App. 618.* Where an attachment is authorized it must be applied for promptly. *Rowland v. S. 35 Tex. 487; Holland v. S. 38 Tex. 474; Townsend v. S. 5 App. 574.* And

when not returned or executed other steps must be promptly taken to obtain the testimony or good cause shown for a failure to do so. *Fernandez v. S.* 4 App. 419; *Nash v. S.* 2 App. 362; *White v. S.* 6 App. 476; *Lowe v. S.* 11 App. 253; *Hart v. S.* 14 App. 657; *Barrett v. S.* 18 App. 64; *Hughes v. S. Id.* 130; *Jackson v. S.* 23 App. 183. In a case where the deposition of a witness is authorized to be taken, the application for continuance must show diligence to obtain the testimony by that mode or good excuse for the want of such diligence. *Bowen v. S.* 3 App. 617; *Adams v. S.* 19 App. 250; *Hennessey v. S.* 23 App. 340. It is not a good excuse for a failure to use diligence, that the testimony could not have been obtained between the time of the presentment of the indictment and the trial. *Murphy v. S.* 6 App. 420. Nor is confinement in jail, and a want of information as to the requirements of the law. *Cox v. S.* 43 Tex. 101. But see *Allphin v. S.* 41 Tex. 79; *Yanes v. S.* 20 Tex. 656, which hold that such excuse may be considered. Nor that the defendant's attorney neglected and abandoned the defense. *Goodman v. S.* 4 App. 349. Nor that a *capias pro fine* had been issued against the witness because of a failure to attend at a previous trial; nor that the state had summoned the witness. *Drake v. S.* 5 App. 649; *Handlin v. S.* 6 App. 347. But, that the defendant was called upon to announce for trial so soon after the presentment of the indictment that service of process upon an absent witness in a distant county was impracticable, was held to be a sufficient excuse for failure to sue out process for such witness. *Mapes v. S.* 14 App. 582.

Service of a *subpoena* upon a witness who resides in a different county than that of the prosecution is not diligence. *Chaplin v. S.* 7 App. 87. Nor is the acceptance of service of a *subpoena* on the day of the trial by a witness who resides several miles distant from the court house. *Gaston v. S.* 11 App. 143. It is not diligence to place process for a witness who resides in another county than that of the forum in the hands of the sheriff of the county of the forum. The sheriff of the county in which the witness resides is the proper officer to execute such process. *Hailes v. S.* 10 App. 490; *Skipworth v. S.* 8 App. 135. Process for a witness who resides in an unorganized county should name such county as his residence in order to enable the sheriff to find him. *Parkerson v. S.* 9 App. 72. An application made several days before the trial should show that the attendance of the witness could not be had at the trial, or that the proper diligence would have been useless. *Morgan v. S.* 44 Tex. 511. An application should, in a case requiring it, state why the necessary steps were not taken to procure the attendance of the witness prior to the issuance of attachment. *Coward v. S.* 6 App. 59. Where an order granting a continuance was set aside, and another application made for another witness, the latter application should be considered a *first* one. *Brown v. S.* 3 App. 295.

§2165—Facts expected to be proved and their materiality.—The application must set out the facts expected to be proved by the absent witness, and in such manner, in connection with other facts when necessary, as to show the relevancy and materiality of the desired testimony. *Huebner v. S.* 3 App. 459; *Fernandez v. S.* 4 App. 419; *Canter v. S.* 1 App. 402; *Mitchell v. S. Id.* 195; *Wright v. S.* 44 Tex. 645; *Murphy v. S.* 6 App. 420; *Cordova v. S. Id.* 445; *Willison v. S.* 7 App. 400; *Winkfield v. S.* 41 Tex. 149; *Bowman v. S.* 40 Tex. 8. It must also appear that the absent testimony is competent and would be admissible on the trial. *Hennessey v. S.* 23 App. 340; *Allen v. S.* 17 App. 637; *Lewis v. S.* 15 App. 647; *Bowen v. S.* 3 App. 617; *Krebs v. S.* 8 App. 1; *Aiken v. S.* 10 App. 610; *Means v. S. Id.* 16. If the absent testimony be consistent with defendant's guilt it is immaterial. *Fernandez v. S.* 4 App. 419; *Chaplin v. S.* 7 App. 87; *Frye v. S. Id.* 94; *Hildreth v. S.* 19 App. 195. The defendant will not be permitted to select a fact abstractly indifferent in regard to which he finds the witness mistaken, and base his application upon a necessity to disprove such fact, without showing how it has become material. *Bruton v. S.* 21 Tex. 337.

The mere fact that the injured party had said that the defendant had been guilty of theft is immaterial in a prosecution for aggravated assault. *Boone v. S.* 31 Tex. 557. So, also, is mere threats by deceased in a prosecution for murder. *Carter v. S.* 8 App. 372; *Halbert v. S.* 31 Tex. 357; *Goodson v. S.* 32 Tex. 121; *Brooks v. S.* 24 App. 274. In a capital prosecution the age of the defendant may be material. *Sheffield v. S.* 43 Tex. 378. And so may testimony to prove that certain blood stains were not made by human blood. *Landers v. S.* 35 Tex. 359. And the identity of money found upon the deceased may be material. *White v. S.* 36 Tex. 347.

A general statement that the absent witness will prove the defendant's innocence is insufficient. The facts which it is expected the witness will testify to must be stated definitely. Mere inferences or negations or conclusions or vague indefinite allegations, will not suffice. *Grisson v. S.* 8 App. 386; *Thomas v. S.* 17 App. 437; *Williams v. S.* 10 App. 114; *Summerlin v. S.* 3 App. 444; *Holland v. S.* 38 Tex. 474; *Brown v. S.* 23 Tex. 195; *Winkfield v. S.* 41 Tex. 149; *Mitchell v. S.* 1 App. 195; *Cockburn v. S.* 32 Tex. 359. Where the issue upon which the testimony is desired is insanity, it is no objection to its materiality that it is cumulative. *Webb v. S.* 5 App. 596. Nor where the testimony for the state conflicts with that for the defendant. *Bozler v. S.* 5 App. 220. Nor is this a good objection to the absent testimony in any case on a first application for a continuance. *Irvine v. S.* 20 App. 12; *Wilson v. S.* 18 App. 577; *Hughes v. S. Id.* 130; *Ninnon v. S.* 17 App. 650; *Pinckord v. S.* 13 App. 463; *McAdams v. S.* 24 App. 86, *contra*; *Graves v. S.* 9 App. 559. The defendant is not entitled to a continuance merely for the purpose of finding compurgators to join with him in a motion for change of venue. *Wall v. S.* 18 App. 682. But by reason of surprise may be entitled to a postponement for such purpose. *Blackburn v. S.* 43 Tex. 522.

§2166—**Witness not absent by procurement, etc., of defendant.**—All applications for a continuance on account of the absence of a witness must state that the witness is not absent by the defendant's procurement or with his consent. Pullen v. S. 11 App. 89; Cocker v. S. 31 Tex. 498; White v. S. 9 App. 41.

§2167—**Not made for delay.**—The application must state that the continuance is not made for delay. Peck v. S. 5 App. 611; Zumwalt v. S. *Id.* 521; White v. S. 9 App. 41.

§2168—**Expectation of securing attendance of witness.**—Even though sufficient in other respects, an application for a continuance is properly refused if it fails to allege that there is no reasonable expectation of securing the testimony of the absent witness during the term of the court by a postponement of the trial to a future day thereof. Strickland v. S. 13 App. 364; Beaty v. S. 16 App. 421; Thomas v. S. 17 App. 437. A first application need not aver that the desired testimony cannot be procured from any other source. Pinckord v. S. 13 App. 468.

§2169—**Discretion of the court to grant or refuse a continuance.**—Subdivision 6 of the preceding article, which confers upon the courts discretionary power to grant or refuse a continuance, is not violative of the constitution. Lillard v. S. 17 App. 114. Said subdivision vests the courts with discretionary power to grant or refuse a first or any subsequent application for a continuance, although the application may comply strictly with the statute. Howard v. S. 8 App. 53; Dunlap v. S. 9 App. 179; Woodard v. S. *Id.* 412; Early v. S. *Id.* 476; Williams v. S. 10 App. 114; Williams v. S. *Id.* 528; Aikin v. S. *Id.* 610; Wooldridge v. S. 13 App. 443. But the discretion thus conferred is not an arbitrary but a sound one. Irvin v. S. 20 App. 12; Harris v. S. 18 App. 287; McAdams v. S. 24 App. 86. Prior to the enactment of subdivision 6 of the preceding article, the discretionary power conferred by it did not exist when the application was a *first* one, and complied with the statute, but in such case the continuance was a matter of right. Howard v. S. 8 App. 53; Dinkens v. S. 42 Tex. 250; Shackelford v. S. 43 Tex. 138; Jenkins v. S. 30 Tex. 444; Austin v. S. 42 Tex. 345; Peeler v. S. 2 App. 455; Swofford v. S. 3 App. 77; Lansburg v. S. 4 App. 99; Stephenson v. S. 5 App. 79; Tooney v. S. *Id.* 163; Farrar v. S. *Id.* 489. For other decisions referring to subdivision 6 of the preceding article, when considered on a motion for a new trial, see, *post*, §2186.

§2170—**ART. 561.—Subsequent application by defendant.**—Subsequent applications for continuance on the part of the defendant, shall, in addition to the requisites in the preceding article, state also—

1. That the testimony cannot be procured from any other source known to the defendant.

2. That the defendant has reasonable expectation of procuring the same at the next term of the court. [O. C. 519.]

See Willson's Cr. Forms, 622; see, also, preceding notes as to first application.

§2171—**Decisions as to subsequent applications.**—If a continuance is charged to the defendant by agreement, an application for a continuance thereafter is a subsequent one. McKinney v. S. 8 App. 626. A subsequent application must show that the absent testimony could not be procured from any other source, and that the defendant had reasonable expectation of producing it at the next term of the court. Smith v. S. 22 App. 316; Henderson v. S. 5 App. 134. Nothing is to be presumed in aid of a subsequent application. It must show that the applicant has been guilty of no laches or neglect. Henderson v. S. 5 App. 134; Peck v. S. *Id.* 611; Handlin v. S. 6 App. 347; Swofford v. S. 3 App. 77. Even before the revision of the Code it was discretionary with the court to grant or refuse a subsequent application for continuance. Myers v. S. 7 App. 640; Johnson v. S. *Id.* 297; Krebs v. S. 8 App. 1. As to strictness necessary in a subsequent application, see Barrett v. S. 9 App. 33. When the defendant had the opportunity of having the absent witness put under recognizance, and failed to do so, sufficient diligence is not shown on a subsequent application. Parkerson v. S. 9 App. 72; Martin v. S. *Id.* 293.

§2172—**ART. 562.—Defendant shall swear to his application.**—All applications for continuance on the part of the defendant must be sworn to by himself. [O. C. 521.]

As to *jurat*, see Morris v. S. 2 App. 502; Dishough v. S. 4 App. 158.

§2173—**ART. 563.—Written motion not necessary.**—It shall not be necessary to file any written motion for continuance—the motion based upon the written statement may be made orally. [O. C. 522.]

§2174—**ART. 564.—Statements in application may be denied under oath, etc.**—Any material fact stated, affecting diligence, in an application for a continuance may be denied by the adverse party. The denial shall be in writing, and supported by the oath of some credible person, and filed as soon as practicable after the filing of the application for a continuance. [Added in revising.]

See Willson's Cr. Forms, 624, 625.

**§2175—ART. 565.—Proceedings when denial is filed.**—When a denial is filed, as provided in the preceding article, the issue shall be tried by the judge, and he shall hear testimony by affidavits, and grant or refuse the continuance according to the law and the facts of the case. [Added in revising.]

**§2176—Decisions under the two preceding articles.**—Before the adoption of the two preceding articles the application might be controverted as to diligence, or the probability of obtaining the testimony, but not as to the materiality of the testimony. *Hyde v. S. 16 Tex. 445; Murray v. S. 1 App. 174; Dixon v. S. 2 App. 530; Rucker v. S. 7 App. 549.* But not by the unsworn statement of the sheriff. *Merritt v. S. 2 App. 177.* Nor by statements of the defendant made while he was in jail, based upon rumor. *Vickery v. S. 7 App. 401.* It is only upon such controverted allegations as affect the question of diligence, or that the testimony cannot be obtained, that evidence will be heard. *Howard v. S. 9 App. 53; Rucker v. S. 7 App. 549; Murray v. S. 1 App. 174. Dixon v. S. 2 App. 531.* A failure to controvert the application does not preclude the state from controverting it as to diligence on a motion made by the defendant for a new trial. *Walker v. S. 13 App. 618.*

**§2177—ART. 566.—No argument heard, unless, etc.**—No argument shall be heard on an application for a continuance unless requested by the judge, and when argument is heard the applicant shall have the right to open and conclude the same. [Added in revising.]

Argument is within the discretionary control of the trial judge. *Parkerson v. S. 9 App. 72.*

**§2178—ART. 567.—Defendant in capital case entitled to bail, when, etc.**—If a defendant in a capital case demand a trial, and it appear that more than one continuance has been granted to the state, and that the defendant has not before applied for a continuance, he shall be entitled to be admitted to bail, and unless it be made to appear to the satisfaction of the court that a material witness of the state had been prevented from attendance by the procurement of the defendant or some person acting in his behalf. [O. C. 524.]

See *Ex parte Walker*, 3 App. 668; see, *ante*, §1606; see, also, *Willson's Cr. Forms*, 629.

**§2179—ART. 568.—Continuance after trial commenced, when.**—A continuance may be granted on the application of the state or defendant after the trial has commenced, when it is made to appear to the satisfaction of the court that by some unexpected occurrence since the trial commenced, which no reasonable diligence could have anticipated, the applicant is so taken by surprise that a fair trial cannot be had, or the trial may be postponed to a subsequent day of the term. [O. C. 526.]

See *Willson's Cr. Forms*, 623.

**§2180—Decisions under preceding article.**—The preceding article seems to have been the law before the adoption of the Codes. *Cotton v. S. 4 Tex. 260.* The unexpected attendance of a state's witness, no deception having been used upon defendant, does not constitute surprise. *Townsend v. S. 5 App. 574.* But if deception be practiced upon the defendant in relation to the attendance of such witness it may constitute surprise. *March v. S. 44 Tex. 64.* If a defendant, after the commencement of the trial, is taken too ill to remain in court, the cause should be postponed or continued. *Brown v. S. 38 Tex. 482.* The mere fact that an application for continuance has been overruled does not prevent another application during the progress of the trial, on account of surprise. *McKinney v. S. 8 App. 626.* An application to continue or postpone on account of surprise is addressed to the sound discretion of the court, but if the court improperly refuses it, and the trial develops that because of such refusal the defendant has probably been injured in his rights, a new trial should be granted. *Roch v. S. 21 App. 249; Eldredge v. S. 12 App. 208; Childs v. S. 10 App. 183; McDaw v. S. Id. 98; Hood v. S. 8 App. 383.*

It is not contemplated by the preceding article that, in case of a postponement of the trial, after the jury has been impaneled, the court has the right to discharge the jury; nor would the court have such right even in the case of a continuance for the term, except upon a clear showing of necessity. *Pizarro v. S. 20 App. 139.* The primary remedy against a surprise by reason of the self-contradictory testimony of a witness is by seeking a continuance, or a postponement of the trial to a future day of the term. *Cunningham v. S. 20 App. 162; Cresswell v. S. 14 App. 1; Childs v. S. 10 App. 183; Webb v. S. 9 App. 490; Walker v. S. 7 App. 245; Higginbotham v. S. 3 App. 447.* The unauthorized departure of a material witness in the course of the trial and before his examination is such surprise as will be good cause for a continuance or postponement. *Eldredge v. S. 12 App. 208; Cotton v. S. 4 Tex. 260; Hodge v. S. 8 App. 382.* When during the trial a material witness becomes so intoxicated as to render him incapable of testifying, it is good ground for a postponement of the cause. *McDaw*

v. S. 10 App. 98. After going into trial a party is not entitled to a continuance unless he shows that by some unexpected occurrence since the trial began, which no reasonable diligence could have anticipated, he was so taken by surprise as that he cannot have a fair trial. *Stanley v. S.* 16 App. 392.

Where the defendant was taken by surprise by material testimony of a new witness who had not been produced by the prosecution at neither of two judicial investigations of the case previously had, it was held that this was good cause for a postponement of the cause to enable the defendant to obtain the testimony of a witness for whom he had sued out process, by which he expected to show the falsity of the testimony of the new witness. A reasonable delay of an hour or two in the progress of a trial involving the life of a defendant, or his liberty for life, is trivial when taken in comparison with the graver issues at stake. Dispatch is to be commended in judicial proceedings, but never at the sacrifice of a full and fair investigation, by which the defense and the prosecution alike are afforded all reasonable means and opportunity for adducing all evidence on their respective sides which may tend to illustrate the very truth of the issues before the court. *Hodde v. S.* 8 App. 382. Where the defendant was surprised by the failure of his witness to produce an account-book which he had been summoned to bring with him, it was held that a postponement should have been granted. *Lutton v. S.* 14 App. 518. Defendant was charged with rape and was preparing an application for change of venue, the one day's service of a copy of the special venire not having expired. The state dismissed the charge of rape, and immediately the defendant was put upon his trial for assault with intent to rape, a motion to postpone to allow him time to complete his motion for a change of venue having been overruled. Held that a postponement should have been granted. *Blackburn v. S.* 43 Tex. 522. See an insufficient application based upon the ground of surprise, because a witness testified to material facts which he did not testify to on an examining trial of the case. *Evans v. S.* 13 App. 225.

§2181—Application outside of the statute.—An application based upon a ground not provided for in the statute, like other applications for continuance, is addressed to the sound discretion of the court, and unless it be shown that such discretion has been abused the action of the court will not be revised. *Townsend v. S.* 41 Tex. 134; *Burrell v. S.* 18 Tex. 713; *Zunwalt v. S.* 5 App. 521; *Jackson v. S.* 4 App. 292. Absence of counsel for the defense is not good cause for continuance, when it appears that the defendant was faithfully represented on the trial by other counsel, and it does not appear that injury resulted to the defendant because of such absence. *Walker v. S.* 13 App. 618; *Stockholm v. S.* 24 App. 598; *Booth v. S.* 4 App. 217. Where one co-defendant obtained a severance from and a prior trial of another, for the purpose of procuring the testimony of the latter, if acquitted, a conviction of the latter in the trial court concludes the matter so far as the former is concerned, and he is not entitled to a continuance until the cause of his co-defendant is decided on appeal. *Krebs v. S.* 8 App. 1. It is not cause for a continuance that a prosecution against a defendant's witness had been continued by the state, which prosecution rendered said witness incompetent to testify in behalf of defendant. *Moore v. S.* 15 App. 1; *Phelps v. S.* Id. 45. Sickness of the defendant rendering him unable to be present in court at every stage of the trial is cause for continuance or postponement. *Brown v. S.* 38 Tex. 482.

§2182—Joint application.—If a joint application is granted as to one defendant the continuance must operate as to all, notwithstanding there is a motion for severance. *Krebs v. S.* 3 App. 348; *Thompson v. S.* 9 App. 301. But, if there has been a severance and conviction of one defendant, the other is not entitled to a continuance to await the result of an appeal. *Slawson v. S.* 7 App. 63; *Myers v. S.* Id. 640; *Krebs v. S.* 8 App. 1.

§2183—Amendment of application.—It is discretionary with the trial judge to permit an application for a continuance or postponement to be amended. *McKinney v. S.* 8 App. 626. The policy of the law is against permitting the amendment of affidavits. *Sydnor v. Chambers, Dallam.* 601. When an amendment is allowed, the defendant must swear to the amended statement. *Patillo v. S.* 3 App. 442. A defendant made application for a continuance which was refused, because it did not show proper diligence. After a jury was impaneled to try the cause, defendant's counsel who had been employed after the continuance had been refused, discovered that diligence had in fact been used, and he thereupon made another application for continuance, it was held that to have granted the second application would have been a proper exercise of judicial discretion. *Skaro v. S.* 43 Tex. 88.

§2184—Admissions, etc., to defeat application.—An admission that a witness, on account of whose absence a continuance is asked, would swear, if present, as stated in the application, will not defeat the application; it could only have that effect when the facts stated in the application are admitted to be true. *Skaro v. S.* 43 Tex. 88; *DeWarren v. S.* 29 Tex. 464; *Hyde v. S.* 16 Tex. 445. It is no answer to an application for a continuance that the defendant declined to go with the court and jury to the place where his witness was sick, which place was outside of the court-house, and there hear the testimony of such witness. *Adams v. S.* 19 App. 1. The rule that an admission that an absent witness would testify to the facts stated in the application will not defeat a continuance, applies only when the defendant is legally entitled to a continuance. *Hackett v. S.* 13 App. 406.

§2185—Setting aside order granting continuance.—An order of continuance may be set aside by the court granting it, but this power should be exercised only in rare and exceptional cases. *Brown v. S.* 3 App. 295. A conditional continuance may be set aside as soon as the contingency transpires. *Callahan v. S.* 30 Tex. 448.

**§2186—Refusal of continuance or postponement—Ground for new trial—Decisions as to.**—Subdivision 6. of Article 560, *ante*, §2164, provides that, though a continuance shall not be granted as a matter of right, still, if the application therefor be overruled and the defendant be convicted, a new trial should be granted, if it appears upon the trial that the evidence of the absent witness was material, and that the facts set forth in the application were probably true. The rule which should govern the trial court in passing, first, upon an application for continuance, and subsequently upon a motion for a new trial is, if there is such a conflict between the culpatory facts and those set forth in the application as to render it improbable that the facts stated in the application are material and probably true, the continuance should be refused, and also a new trial based upon such refusal should be denied. There must, however, not only be such a conflict, but the inculpatory facts should be so strong and convincing as to render the truth of the facts set forth in the application improbable. *McAdams v. S. 24 App. 86; Hollis v. S. 9 App. 643.* That a continuance was refused because of a want of diligence, does not absolve the trial court on a motion for a new trial from the duty of considering the materiality and probable truth of the testimony expected from the absent witness in connection with the evidence adduced on the trial. Though an application for a continuance fails to comply with the requirements of the statute, if, in view of the evidence adduced on the trial, the absent testimony appears to be material and probably true, the trial court should award a new trial. *Jackson v. S. 23 App. 183; Covey v. S. Id. 388; Mayfield v. S. Id. 645; Shultz v. S. 20 App. 315; Stanley v. S. 16 App. 393; Beatey v. S. Id. 421; Tyler v. S. 13 App. 205; Price v. S. 22 App. 110; Lawson v. S. 21 App. 172; Sims v. S. Id. 649.*

When the trial court is called upon to reconsider, upon a motion for a new trial, the refusal of a continuance, the truth, materiality and sufficiency of the application for continuance are to be considered in connection with the evidence adduced on the trial, and are not to be considered as already predetermined by the refusal of the continuance anterior to the trial, nor to be disposed of by an arbitrary, as distinguished from a sound discretion. *Harris v. S. 18 App. 287; Irvine v. S. 20 App. 12; see, also, Aiken v. S. 10 App. 610; Williams v. S. Id. 528; Wooldridge v. S. 13 App. 443; Hughes v. S. 18 App. 130; Word v. S. 12 App. 174; Ratliff v. S. Id. 330; Casanova v. S. Id. 554; Laubach v. S. Id. 583; Pinckord v. S. 13 App. 468; Miles v. S. 14 App. 436; Garcia v. S. 15 App. 120; Cooper v. S. 16 App. 341; Smith v. S. 17 App. 244; Parker v. S. 18 App. 72; Miller v. S. 18 App. 232; Wilson v. S. Id. 578; Turner v. S. 20 App. 56; Frazier v. S. 22 App. 120.* But when the facts as stated in the application for continuance are considered in connection with the evidence adduced on the trial, and do not appear to be material, or do not appear to be probably true, a new trial because of the refusal of the continuance should not be granted. *Cunningham v. S. 20 App. 162; Collins v. S. 24 App. 141; Milton v. S. Id. 47; Parker v. S. Id. 61; Henning v. S. Id. 315; Hennessey v. S. 23 App. 340; Rice v. S. 22 App. 654; Harvey v. S. 21 App. 178; Murray v. S. Id. 466; Doss v. S. Id. 505; Ruby v. S. 9 App. 353.* Complaint of the action of the trial court in refusing a continuance cannot be heard when it appears that the absent witness was present in court before the conclusion of the evidence. *Hackett v. S. 13 App. 406; Brown v. S. 23 App. 214.* If substantially the same testimony as that which is absent was adduced on the trial, the defendant cannot be heard to complain of the refusal of the continuance. *Walker v. S. 13 App. 618; Tucker v. S. 23 App. 512; McAdams v. S. 24 App. 86; Allison v. S. 14 App. 402; Beatey v. S. 13 App. 421.* Nor can he complain if it was within his power to supply the absent testimony on the trial, and he failed to do so. *Wooldridge v. S. 13 App. 443; Nolan v. S. 14 App. 474.*

**§2187—Practice on appeal—Bill of exceptions, etc.**—Without a bill of exceptions in the record the refusal of a continuance will not be revised on appeal. *Cocker v. S. 31 Tex. 498; Cotton v. S. 32 Tex. 614; Bowman v. S. 40 Tex. 8; Jones v. S. Id. 188; Davis v. S. Id. 478; Meredith v. S. Id. 480; Townsend v. S. 41 Tex. 134; Anderson v. S. 42 Tex. 359; Nelson v. S. 1 App. 41; Brooks v. S. 2 App. 1; Grant v. S. 3 App. 1; Allen v. S. 4 App. 581; Blankenship v. S. 5 App. 218; Harris v. S. 6 App. 97; Dill v. S. Id. 113; Tuttle v. S. Id. 556; Reynolds v. S. 7 App. 516; Plumley v. S. 8 App. 529; Hollis v. S. 9 App. 643; Delphino v. S. 11 App. 30; Gaston v. S. Id. 143; Taylor v. S. 12 App. 489; Cone v. S. 13 App. 483; Esher v. S. Id. 607; Bohannon v. S. 14 App. 271; Taylor v. S. Id. 340; Prator v. S. 15 App. 363; Spear v. S. 16 App. 98; Makinson v. S. Id. 133; Lucas v. S. 19 App. 79; Young v. S. Id. 536; James v. S. 21 App. 353; Scott v. S. 23 App. 521; Williams v. S. 24 App. 32.*

A recital in the judgment that a continuance was refused, and that the defendant excepted, will not supply the place of a specific bill of exceptions. *Gaston v. S. 11 App. 143; Hollis v. S. 9 App. 643; Prator v. S. 15 App. 363.* A bill of exceptions should contain all the facts necessary to a full understanding of the question to be determined. *Buntain v. S. 15 App. 515.* The application for continuance, or its contents, must be set out in the record, or the ruling upon it will not be revised. *Swift v. S. 8 App. 614; Taylor v. S. 14 App. 340.* The action of the court refusing a continuance cannot be revised in the absence from the record of a statement of facts. *Trevino v. S. 2 App. 90; Richardson v. S. Id. 322; Willison v. S. 7 App. 400.* In revising the refusal of a continuance on account of the absence of a witness, the appellate court must consider the evidence adduced on the trial for the purpose of determining whether the absent testimony was probably true, as well as whether it was material if true, and hence the necessity of a statement of facts in the record. *Dowdy v. S. 9 App. 292; Sheekles v. S. Id. 326; Lyons v. S. Id. 636; Aiken v. S. 10 App. 610; Word v. S. 12 App. 174; Wooldridge v. S. 13 App. 443.*

The ruling of the trial court refusing a continuance will not be revised, unless in addition to its other requisites the application shows the relevancy and materiality of the absent testimony. *Brooks v. S. 24 App. 274; Hennessey v. S. 23 App. 340.* Though a continuance was

properly refused by the trial court, yet upon motion for a new trial, if the evidence adduced at the trial denotes that the absent testimony was material and probably true, the trial court should grant a new trial, and the action of the trial court in this matter will be revised on appeal if it appears that the defendant may have sustained injury in consequence of the continuance, and if it be reasonably probable that the absent testimony would induce a verdict more favorable to him. *Corey v. S.* 23 App. 388; *Shultz v. S.* 20 App. 315; *Tyler v. S.* 13 App. 205. But if the facts set out in the application for a continuance do not appear to be relevant and material and probably true, when considered in connection with the evidence adduced on the trial, the action of the trial court in refusing a new trial, will not be revised on appeal. *Rice v. S.* 22 App. 654; *Harvey v. S.* 21 App. 178; *Doss v. S.* *Id.* 505; *Cunningham v. S.* 20 App. 162; *Weaver v. S.* 19 App. 547.

## IX. DISQUALIFICATION OF THE JUDGE.

**§2188—ART. 569.—Causes which disqualify judges, etc.**—No judge or justice of the peace shall sit in any case where he may be the party injured, or where he has been of counsel for the state or the accused, or where the accused or the party injured may be connected with him by consanguinity or affinity within the third degree. [Const. art. V, sec. 11; inserted here in revising.]

**§2189—Disqualification—Decisions as to.**—A judge is disqualified from sitting in a case in which he has been of counsel. *Thompson v. S.* 9 App. 649. Such disqualification does not prevent him from receiving an indictment from the grand jury, or from making incidental orders, such as an order changing the venue, or entering an order appointing a special judge. *Cock v. S.* 8 App. 659. This disqualification exists, if the judge has, before becoming such judge, been consulted, and has given his advice in regard to the case, although he charged no fee for such consultation and advice. *Railroad v. Ryan*, 44 Tex. 426. Relationship is to be computed by the common law rule, and according to this rule it was held that a judge who was a cousin to the wife of a party to a suit was related by affinity to such party within the third degree. 1 App. C. C. §§533, 534, 535, 536. The interest which disqualifies a judge does not signify every bias, prejudice or partiality which he may entertain with reference to the case, and which may be included in the broadest sense of the word "interest," as contradistinguished from its use as indicating a pecuniary or personal right or privilege in some way dependent upon the result of the case. The tests are pecuniary interest, relationship, or whether he has been counsel in the case. 3 App. C. C. §201.

In a prosecution for theft, the fact that the judge was the person from whom the property is alleged to have been stolen, does not disqualify him. *Davis v. S.* 44 Tex. 523. R. and S. were jointly indicted for murder. S. was not arrested. The judge was related to S. within the third degree of consanguinity, and for this reason excused himself from trying R., and the governor appointed a special judge to try him. R. pleaded to the jurisdiction of the special judge to try him. Held, that the plea should have been sustained,—that the judge was not disqualified to try R., and could not because of his relationship to S., who had not been arrested, excuse himself. But if R. and S. had been upon trial jointly, the judge would have been disqualified. *Reed v. S.* 11 App. 587. The fact that the title to a school house was vested in the county judge in his official capacity, for the use of the county, does not disqualify him from presiding over a trial for defacing the said school house. *Clark v. S.* 23 App. 260. Nor is a county judge disqualified by reason of fees allowed him by law in criminal cases. *Bennett v. S.* 4 App. 72. Nor is a county judge disqualified from trying a case where the defendant is charged with being a defaulting road hand. *Ex parte Call*, 2 App. 497. An issue, as to the disqualification of a judge, should be tried and determined by him. His evidence should be given under oath, and the facts in evidence on the issue should be incorporated in the record on appeal. *Slaven v. Wheeler*, 58 Tex. 23.

**§2190—ART. 570—Proceedings when judge of district court is disqualified.**—If a judge of the district court shall be disqualified from sitting in any criminal action pending in his court, no change of venue shall be made necessary thereby; but the parties, or their counsel, shall have the right to select and agree upon an attorney of the court to preside as special judge in the trial thereof. [Act Aug. 15, 1876, p. 141.]

See Willson's Cr. Forms, 644.

**§2191—Decisions under preceding article.**—It is not required that the agreement should be in writing, but the proper practice is to reduce it to writing, sign and file it with the papers in the cause. *Thompson v. S.* 9 App. 649. The preceding article does not transcend the constitutional provision in providing that such agreement may be made by the attorneys of the parties, and the attorney representing the state may make such agreement with the defendant or his attorney. *Davis v. S.* 44 Tex. 523; *Early v. S.* 9 App. 476, overruling, upon this point, *Murray v. S.* 34 Tex. 331. But the state is not bound by such agreement if it be verbal. *Thompson v. S.* 9 App. 649.

**§2192—ART. 571.—Should the parties fail to agree.**—Should the parties not agree upon an attorney to try the case on or before the day set for the trial of the criminal docket, the district judge shall forthwith certify the facts to the governor, who shall at once appoint some practicing attorney, learned in the law, to try such case. [Added in revising.]

Reed v. S. 11 App. 587; Thompson v. S. 9 App. 649.

**§2193—ART. 572.—Special judge shall take oath of office.**—The attorney agreed upon or appointed, as provided in the two preceding articles, shall, before he enters upon his duties as special judge, take the oath of office required by the constitution of the state, and his selection by the parties, or appointment by the governor, as the case may be; and the fact that the oath of office was administered to him shall be entered upon the minutes of the court as a part of the record of the cause, and he shall have all the power and authority of the district judge that may be necessary to enable him to conduct try, determine and finally dispose of such case. [Added in revising.]

For forms of entries upon the minutes and for oath of office, see Willson's Cr. Forms, 645, 646, 647.

**§2194—Decisions as to special judge.**—Three modes only are prescribed by statute for the election, selection or appointment of a special judge, viz: 1. If the regular judge fails to appear at the appointed time and place for holding his court, an election of a special judge for the term shall be held. See Sayles' Civ. Stat., Art. 1094 *et seq.* 2. If the regular judge is, from any cause, disqualified to try a case, the parties thereto, by agreement, may select a special judge. 3. If the parties fail to agree, the district judge shall certify the fact to the governor, who shall appoint a special judge to try the case. In either event, it is required that the special judge, before entering upon the discharge of his duties as such, take the oath of office required by the constitution. The manner of the selection or appointment of the special judge, together with the reasons therefor, and the fact that the oath of office was administered to him, shall be entered upon the minutes of the court as a part of the record in the cause, and the same must appear in the transcript on appeal. Smith v. S. 24 App. 290; distinguished from Early v. S. 9 App. 484. See, also, Perry v. S. 14 App. 166; Wilson v. S. *Id.* 205; Harris v. S. *Id.* 676; Snow v. S. 11 App. 99; McMurray v. S. 9 App. 207. A special judge has all the power and authority of the regular judge with reference to the case or cases which he is selected or appointed to try. Powers v. S. 22 App. 42. He may enter a judgment *nunc pro tunc* at a subsequent term in a case tried by him. Pennington v. S. 13 App. 44. In a case tried before a special judge, in which an appeal is taken, and a statement of facts is desired, he must approve such statement. In such case the regular judge cannot authenticate the statement of facts. Myers v. S. 9 App. 157.

**§2195—ART. 573.—When judge of county court is disqualified, etc.**—Any case pending in the county court, which the county judge may be disqualified to try, shall be transferred to the district court of the same county. [Const. art. 5, sec. 16.]

See Willson's Cr. Forms, 648.

**§2196—Decisions under preceding article.**—When a cause is transferred from the county to the district court, under the preceding article, the jurisdiction of the latter court attaches as amply as if it was original and exclusive, and said court has no authority to transfer it back to the county court, although a new county judge, not disqualified from trying it, has succeeded the disqualified judge. Such a transfer will not invest the county court with jurisdiction. If the district judge be disqualified also to try the case, a special judge of said court must be selected or appointed to try it. Snow v. S. 11 App. 99. A special judge of the county court may be elected when the regular judge fails to appear at the time appointed for holding the court, or when, during the term, he is absent, or unable or unwilling to hold his court. Sayles' Civ. Stat., Arts. 1140, 1141; 2 App. C. C. §707. But there is no authority of law for the selection of a special judge of the county court by agreement of the parties. 2 App. C. C. §790.

**§2197—ART. 574.—When a justice of the peace is disqualified.**—If a justice of the peace shall be disqualified from sitting in any criminal action pending before him, he shall transfer the same to the nearest justice of the peace of the county, who is not disqualified, to try it. [Added in revising.]

See Willson's Cr. Forms, 648a.

**§2198—ART. 575.—What the order of transfer shall state, etc.**—In the cases provided for in the two preceding articles the order of transfer



shall state the cause of the transfer, and name the court to which the transfer is made, and the time and place, when and where, the parties and witnesses shall appear before such court, and the rules governing the transfer of cases from the district to inferior courts shall govern in the transfer of cases under the two preceding articles. [Added in revising.]

See Willson's Cr. Forms, 648, 648a; Snow v. S. 11 App. 99; Reed v. S. *Id.* 587.

## X. CHANGE OF VENUE.

**§2199—ART. 576.—District judge may order change of venue on his own motion, when.**—Whenever, in any case of felony, the district judge presiding shall be satisfied that a trial, alike fair and impartial to the accused and to the state, cannot from any cause, be had in the county in which the case is pending, he may upon his own motion order a change of venue to any county in his own or in an adjoining district, stating in his order the grounds for such change of venue. [Act Aug. 21, 1876, p. 274; Const. art. 5, sec. 45.]

See Willson's Cr. Forms, 631, 632. This act is constitutional. *Ex parte Cox*, 12 App. 665; *Cox v. S.* 8 App. 254.

**§2200—Decisions under preceding article.**—A district judge may, upon his own motion, change the venue in a criminal case to any other county in his own or in an adjoining district, when he becomes satisfied that a trial alike fair and impartial to the accused and the state cannot, for any cause, be had in the county where the cause is pending. *Brown v. S.* 6 App. 286. And when a district judge is satisfied that from any cause a fair and impartial trial of a felony case cannot be had in the county of the prosecution, he should exercise the power conferred upon him by the preceding article and change the venue. *Webb v. S.* 9 App. 490. The discretion conferred upon district judges by the preceding article is not restricted by Article 581, *post*, and whether such discretionary authority is a dangerous power, is not a question for judicial determination. No instance of its abuse has yet been made manifest. *Bohannon v. S.* 14 App. 271. The action of the court in changing the venue upon its own motion will not be revised on appeal, unless it be shown that the defendant has been materially prejudiced thereby. *Rothschild v. S.* 7 App. 519; *Bohannon v. S.* 14 App. 271; *Woodson v. S.* 24 App. 153. The requirement in the preceding article that the judge shall state in his order changing the venue the grounds therefor, is complied with in an order stating the grounds to be, "influences from terrorism prevailing among the good people of the county" where the case is pending. *Cox v. S.* 8 App. 254. See a case in which the judge should have ordered a change of venue upon his own motion. *Steagald v. S.* 22 App. 464.

**§2201—ART. 577.—State may have change of venue, when, etc.**—Whenever the district or county attorney shall represent in writing to the district court before which any felony case is pending, that by reason of existing combinations or influences in favor of the accused, or on account of the lawless condition of affairs in the county, a fair and impartial trial as between the accused and the state cannot be safely and speedily had, or whenever he shall represent that the life of the prisoner, or of any of the witnesses, would be jeopardized by a trial in the county in which the case is pending, the judge shall hear proof in relation thereto, and if satisfied that such representation is well founded, and that the ends of public justice will be subserved thereby, he shall order a change of venue to any county in his own or in an adjoining district. [Act Aug. 21, 1876, p. 274.]

See Willson's Cr. Forms, 633, 634, 635; *Webb v. S.* 9 App. 490.

**§2202—ART. 578.—Change of venue—When granted on application of defendant.**—A change of venue may be granted on the written application of the defendant, supported by his own affidavit and the affidavit of at least two credible persons, residents of the county where the prosecution is instituted, for either of the following causes, the truth and sufficiency of which the court shall determine:

1. That there exists in the county where the prosecution is commenced so great a prejudice against him that he cannot obtain a fair and impartial trial.

2. That there is a dangerous combination against him instigated by influential persons, by reason of which he cannot expect a fair trial. [O. C. 527.]

See Willson's Cr. Forms, 635-638.

§2203—**On application of defendant—Decisions as to.**—If the statute is not fully complied with, the application is fatally defective. *Mitchell v. S. 43 Tex. 512.* And a change cannot be granted upon a different ground than that set out in the application. *Dupree v. S. 2 App. 613.* A defendant is not entitled to a continuance to enable him to obtain compurgators, but should be accorded a reasonable time for the purpose in case the state, by an unexpected course, brings on the trial sooner than expected. *Wall v. S. 18 Tex. 682; Blackburn v. S. 43 Tex. 522.* The requirement that the application shall be supported by the affidavits of at least two credible persons, residents of the county of the prosecution, is not met by the affidavit of the defendant and one other person. *O'Neal v. S. 14 App. 582.* If the defendant's application for a change of venue complies with the requirements of the statute, and is not properly controverted when it comes on to be heard, no triable issue is raised, and he is entitled to the change of venue as a matter of right. *Davis v. S. 19 App. 201.* But see *Daugherty v. S. 7 App. 480.* Where both the grounds mentioned in the preceding article are set up in the application, the defendant is entitled to a change of venue if he establishes either. *Carr v. S. 19 App. 635.* Only one change of venue is allowable at the instance of a defendant. *Webb v. S. 9 App. 490; Rothschild v. S. 7 App. 519.* The presence of the defendant at the hearing of his application is not essential. *Rothschild v. S. 7 App. 519.*

§2204—**ART. 579.—Where jury cannot be procured for trial of felony.**—When an unsuccessful effort has been once made in any county to procure a jury for the trial of a felony, and all reasonable means have been used, if it be made to appear to the court, by the written affidavit of the attorney for the state or any other credible person, that no jury can probably be had in that county, the court may order a change of venue and cause the reasons therefor to be placed upon the minutes of the proceedings. [O. C. 528.]

See Willson's Cr. Forms, 634a; *Webb v. S. 9 App. 490.*

§2205—**ART. 580.—Application may be made before announcing ready for trial, etc.**—An application for a change of venue may be heard and determined before either party has announced ready for trial, but in all cases before a change of venue is ordered, all motions to set aside the indictment, and all special pleas and exceptions which are to be determined by the judge, and which have been filed, shall be disposed of by the court, and if overruled the plea of not guilty entered. [O. C. 592.]

§2206—**Decisions under preceding article.**—The preceding article evidently contemplates that all questions relating to the form of the indictment, and other incidental questions, must be raised and disposed of before a change of venue, and that nothing should remain thereafter but the trial of the general issue. *Caldwell v. S. 41 Tex. 86; Loggins v. S. 8 App. 434; Ex parte Cox, 12 App. 665.* An application by the defendant for a change of venue is in time, if it be made before the defendant has announced ready for trial, although the state has announced ready. *Carr v. S. 19 App. 635.*

§2207—**ART. 581.—Venue changed to nearest county, unless, etc.**—Upon the grant of a change of venue the criminal cause shall be removed to some adjoining county, the court-house of which is nearest to the court-house of the county where the prosecution is pending, unless it be made to appear to the satisfaction of the court that such nearest county is subject to some objection sufficient to authorize a change of venue in the first instance. [O. C. 530.]

See *Bohannon v. S. 14 App. 271; Cox v. S. 8 App. 254; Brown v. S. 6 App. 286; Preston v. S. 4 App. 186; Woodson v. S. 24 App. 153; Mondragon v. S. 33 Tex. 480; Rothschild v. S. 7 App. 519.*

§2208—**ART. 582.—Where adjoining counties are all subject to objection, etc.**—If it be shown in the application for a change of venue, or otherwise, that all the counties adjoining that in which the prosecution is pending, are subject to some valid objection, the cause may be removed to such county as the court may think proper. [O. C. 531.]

See *Preston v. S. 4 App. 186; Brown v. S. 6 App. 286; Cox v. S. 8 App. 254; Bohannon v. S. 14 App. 271; Rothschild v. S. 7 App. 519; Harrison v. S. 3 App. 559.*

**§2209—ART. 583.—Application for change of venue may be controverted, how.**—The credibility of the persons making affidavit for change of venue, or their means of knowledge, may be attacked by the affidavit of a credible person, and the issue, thus formed, shall be tried and determined by the judge, and the application granted or refused, as the law and facts shall warrant. [Enacted in adopting the revised Code.]

See Willson's Cr. Forms, 639, 640.

**§2210—Controverting application—Decisions as to.**—The credibility of the compurgators, or their means of knowledge, may be controverted by the affidavit of a credible person, and such attacking affidavit may be made by the district attorney. *Dunn v. S. 7 App. 600.* The controverting affidavit on the part of the state must directly impeach the credibility of the compurgators, or show that their means of knowledge are not sufficient to support and justify the statements contained in their affidavits. A triable issue on the application is raised only when the state has filed a contesting affidavit in compliance with the preceding article. *Davis v. S. 19 App. 201.* Where both the grounds mentioned in Art. 578, *ante*, are alleged in the application, and the controverting affidavit assails but one of them, the change of venue should be awarded upon the other. *Carr v. S. 19 App. 635.* For a controverting affidavit held to be sufficient, see *Hunnicut v. S. 20 App. 632.* When an application is properly contested the burden of proof upon the issue thus raised is upon the applicant. *Davis v. S. 19 App. 201; Pierson v. S. 21 App. 14.* In determining as to the credibility of the compurgators the court may inquire into their motives, intent and feelings, relationship to the party and the like, and their opportunities and means of knowledge. A person may be a truthful man, and still not a credible witness in matters involving information, feeling, prejudice and the like. *Dunn v. S. 7 App. 600; Henning v. S. 24 App. 315.* The court may examine the compurgators touching their means of knowledge with regard to the facts. *Buie v. S. 1 App. 452; Dixon v. S. 2 App. 531; Dupree v. S. Id. 613.* And may take the sworn statements of citizens as to the existence of the alleged local prejudice. *Labbaite v. S. 6 App. 257; Crow v. S. 41 Tex. 468; Winkfield v. S. Id. 149; Griscom v. S. 4 App. 374; McCarty v. S. Id. 461; Pierson v. S. 21 App. 14.* Whether a witness on such inquiry has formed an opinion as to the guilt or innocence of the defendant is not material. *Myers v. S. 7 App. 640.* The credibility of the controverting affiant is an issue for the determination of the trial judge. His credibility cannot be impugned merely upon the grounds that he was the physician of the injured party, or that he is a witness in the case for the prosecution. *Smith v. S. 21 App. 277.*

**§2211—ART. 584.—Order of judge shall not be revised on appeal, unless, etc.**—The order of the judge granting or refusing a change of venue shall not be revised upon appeal, unless the facts upon which the same was based are presented in a bill of exceptions, prepared, signed, approved and filed at the term of the court at which such order was made. [Added in revising.]

**§2212—Practice on appeal—Decisions as to.**—The action of the court with reference to a change of venue will not be revised on appeal, unless the facts are brought up by bill of exceptions perfected at the term whereat the order was made. *Bowden v. S. 12 App. 246.* Exception must be taken and reserved in the court by which the change was ordered. *Krebs v. S. 8 App. 1.* Where exceptions to the refusal of an application made by defendant for change of venue were reserved, and thereafter the defendant applied for and obtained a continuance of the cause to the next term of the court, such exception will not be considered on appeal. *Ellison v. S. 12 App. 557.* See further, as to necessity and requisites of bill of exceptions in such case. *Pruitt v. S. 20 App. 129; Preston v. S. 4 App. 186; post, Art. 686.* The action of the trial court, changing or refusing to change the venue of a cause, will not be revised on appeal, unless it is made clearly to appear that such action was an abuse of the discretion confided to the trial judge, and was prejudicial to the defendant. *Cox v. S. 8 App. 254; Myers v. S. Id. 321; Griscom v. S. Id. 386; Clappitt v. S. 9 App. 27; Bohannon v. S. 14 App. 271; Magee v. S. Id. 366; O'Neal v. S. Id. 582; Martin v. S. 21 App. 1; Noland v. S. 3 App. 598; Johnson v. S. 4 App. 268; Labbaite v. S. 6 App. 257; Long v. S. Id. 643; Daugherty v. S. 7 App. 480.* The rule in civil cases that objections to a change of venue not made in the court below will not be considered on appeal, has been extended and applies in criminal cases, and in the absence of such objection duly taken and saved, the order changing the venue cannot be attacked in the tribunal to which the venue has been changed by plea to the jurisdiction or otherwise. *Harrison v. S. 3 App. 558; Preston v. S. 4 App. 186; Brown v. S. 6 App. 286; Rothschild v. S. 7 App. 519; Krebs v. S. 8 App. 1; Ex parte Cox, 12 App. 665.*

**§2213—ART. 585.—Clerks' duties in case of change of venue.**—When an order for a change of venue has been made, the clerk of the court where the prosecution is pending shall make out a true transcript of all the orders made in the cause, and certify thereto under his official seal, and shall transmit the same, together with all the original papers in the case, to the clerk of the court to which the venue has been changed. [O. C. 532.]

See Willson's Cr. Forms, 643.

§2214—**Transcript—Decisions as to.**—The court to which a cause is sent on change of venue may issue any order necessary to compel the clerk of the court from which the case was sent to supply any deficiencies in the transcript which may be necessary to a full understanding of the previous proceedings. *Brown v. S.* 6 App. 286. If the transcript fails to show the order of transfer, such defect cannot be supplied by parol proof, unless it be shown that a copy of such order cannot be obtained. *Valentine v. S.* 6 App. 439.

§2215—**ART. 586.—Same subject.**—The clerk shall also, in a change of venue before transmitting the original papers, make a correct copy of the same, certifying thereto under his official seal, and retain such copy in his office, to be used in case the originals or any of them be lost. [O. C. 533.]

§2216—**ART. 587.—If defendant is on bail, shall be recognized.**—When a change of venue is ordered and the defendant is on bail, he shall be required to enter into recognizance forthwith, conditioned for his appearance before the proper court at the next succeeding term thereof; or if the court of the county to which the cause is taken be then in session, he shall be recognized to appear before said court on a day fixed, and from day to day, and term to term thereafter, until discharged. [O. C. 534.]

*S. v. Butler*, 38 Tex. 560; but see succeeding article.

§2217—**ART. 588.—Defendant failing to give recognizance shall be kept in custody, etc.**—If the defendant fail to give recognizance, as required in the preceding article, he shall be safely kept in custody by the sheriff, to be disposed of as provided in the two succeeding articles. [Added in revising.]

§2218—**ART. 589.—If defendant be in custody.**—When the venue is changed in any criminal action, if the defendant be in custody, an order shall be made for his removal to the proper county, and his delivery to the sheriff thereof before the next succeeding term of the district court of the county to which the case is to be taken, and he shall be removed by the sheriff accordingly, and delivered as directed in the order [O. C. 535.]

§2219—**ART. 590.—If the court be in session, etc.**—If the court of the county to which the case is removed be then in session, the defendant shall be removed forthwith and delivered to the sheriff of such county. [O. C. 536.]

The court to which the case is transferred may take bail in a proper case. *Ex parte Walker*, 3 App. 668.

§2220—**ART. 591.—Witness need not again be summoned, etc.**—When the venue in a criminal action has been changed, it shall not be necessary to have the witnesses therein again *subpoenaed*, attached or recognized, but all the witnesses who have been *subpoenaed*, attached or recognized to appear and testify in the cause shall be held bound to appear before the court to which the cause has been transferred in the same manner as if there had been no such transfer. [Added in revising.]

*Maus v. S.* 10 App. 16.

## XI. OF DISMISSING PROSECUTIONS.

§2221—**ART. 592.—Defendant in custody and no indictment presented, prosecution dismissed, unless, etc.**—When a defendant has been detained in custody, or held to bail for his appearance to answer any criminal accusation before the district court, the prosecution, unless otherwise ordered by the court for good cause shown, supported by affidavit, shall be dismissed and the bail discharged, if indictment or information be not presented against such defendant at the next term of the court which is held after his commitment or admission to bail. [O. C. 537.]

See Willson's Cr. Forms, 649-653.

§2222—**Decisions under preceding article.**—If no bill is found, the defendant is entitled to a discharge, even though the only reason why a bill was not presented was because of the absence of the state's attorney and the inability of the court to find some one to act *pro tem*. *Bennett v. S.* 27 Tex. 701; *Ex parte Porter*, 16 App. 321. A dismissal of a prosecution before jeopardy has attached, will not bar another prosecution for the same offense. *Ex parte Porter*, 16 App. 321; *ante*, §1452. When the prosecution is dismissed it is a termination of that prosecution, and there is no legal authority to detain the accused in custody when no new proceedings have been instituted against him by complaint or otherwise. *Venters v. S.* 18 App. 198. It seems that a dismissal may be set aside at any time during the term, and certainly so, if done with the consent of the defendant. *Parry v. S.* 21 Tex. 746.

§2223—**ART. 593.—Prosecution may be dismissed by state's attorney, etc.**—The district or county attorney may, by permission of the court, dismiss a criminal action at any time upon complying with the requirements of article 38 of this Code. [O. C. 538.]

See, *ante*, §1491; see, also, Willson's Cr. Forms, 654, 655, 656; *Parchment v. S.* 2 App. 228; *S. v. McLane*, 31 Tex. 260. See, also, *post*, Arts. 671, 672. Cannot dismiss as to higher, and accept plea of guilty as to lower grade of offense. *Post*, Art. 1052.

## TITLE 8.—OF TRIAL AND ITS INCIDENTS.

## CH.

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2. OF THE SPECIAL VENIRE IN CAPITAL CASES.
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## CH.

5. OF THE TRIAL BEFORE THE JURY.
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7. OF EVIDENCE IN CRIMINAL ACTIONS.
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## CH. 1.—OF THE MODE OF TRIAL.

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§2224—ART. 594.—Jury the only mode of trial, when.—The only mode of trial upon issue of fact is by jury, unless in cases specially excepted. [O. C. 539.]

Short v. S. 16 App. 44; Const. Bill of Rights, §15; *ante*, §§1454, 1455.

§2225—ART. 595.—Jury; when of 12, when of 6.—In the district court the jury shall consist of twelve men; in the county court and inferior courts the jury shall consist of six men. [Added in revising.]

Const. Art. 5, §13-17; *ante*, §1455.

§2226—ART. 596.—Defendant must be personally present, etc., when.—In all prosecutions for felonies, the defendant must be personally present on the trial, and he must likewise be present in all cases of indictment or information for misdemeanors where the punishment or any part thereof is imprisonment in jail. [O. C. 640.]

§2227—Decisions under preceding article.—The defendant must not only be within the walls of the court house, but in the very room in which the case is conducted. *Brown v. S. 38 Tex. 482.* He has the right to be present in court, in a felony case, when his motion for a new trial is heard, and on appeal, if the record shows affirmatively that his motion for a new trial was heard and determined in his absence, and that he subsequently objected thereto in the court below, the conviction will be set aside and the cause remanded for a new trial. *Gibson v. S. 3 App. 137; Berkley v. S. 4 App. 122; Krantz v. S. Id. 534; Garcia v. S. 5 App. 337.* But on appeal, to constitute material error, the record must show affirmatively the absence of the defendant, and that the attention of the trial court was called to the fact. *Sweat v. S. 4 App. 617; Cordova v. S. 6 App. 207.* However trivial or unimportant may be any proceeding in the trial of a felony case, it should not be had in the absence of the defendant. The defendant is entitled to be present when the judgment is entered against him, and when the sentence is pronounced, and when a motion to enter judgment *nunc pro tunc* is heard and determined. *Mapes v. S. 13 App. 85; Gordon v. S. Id. 196.* Where the prosecution is for a misdemeanor punishable by fine and imprisonment, the waiver of defendant's presence at the trial is in violation of law, but, where the punishment assessed is a pecuniary fine only, the judgment is not void because of the defendant's absence at the trial. *Cain v. S. 15 App. 41.* In a capital case the defendant need not be present at the drawing of the special venire. *Pocket v. S. 5 App. 552; Cordova v. S. 6 App. 207.* Nor when his motion for a change of venue is heard and determined. *Rothschild v. S. 7 App. 519.* His counsel's presence is not essential in any case. *Berkley v. S. 4 App. 122; Beaumont v. S. 1 App. 533.* When the record shows that defendant's presence on hearing of his motion for a new trial was waived by his

counsel, it will be presumed that such waiver was authorized by the defendant. *Escareno v. S.* 16 App. 85; see, also, *post*, Arts. 695, 696, 697, 698.

**§2228—ART. 597.—Defendant may appear by counsel, when, etc.**—In all other cases of misdemeanor, the defendant may, by consent of the attorney representing the state, appear by counsel, and the trial may proceed without his personal presence. [O. C. 541.]

**§2229—Decisions under preceding article.**—If the defendant appears by counsel, the latter need not bring into court the money to pay fine and costs. *Neaves v. S.* 4 App. 1. Where the defendant having been convicted in a justice's court appealed to the county court, and executed an appeal bond, it was held that he had the right to appear in the county court by counsel even without the consent of the attorney representing the state. *Page v. S.* 9 App. 466. Where a defendant is tried in his absence under the provision of the preceding article, he must be under bond to waive the right of appeal, or he must appear at the proper time and enter into recognizance, if he desires the benefit of an appeal. His counsel cannot enter in such recognizance for him. *Ferrill v. S.* 29 Tex. 489; *Chancy v. S.* 23 Tex. 24.

**§2230—ART. 598.—Defendant on bail.**—When the defendant in a case of felony is on bail he shall, before the trial commences, be placed in the custody of the sheriff and his bail be considered as discharged. [O. C. 542.]

**§2231—ART. 599.—Sureties still bound in case of mistrial.**—If there be a mistrial in a case of felony, the original sureties of the defendant shall be still held bound for his appearance until they surrender him in accordance with the provisions of this Code. [O. C. 543.]

**§2232—ART. 600.—Criminal docket shall be kept.**—There shall be kept by each clerk of the district and county court, and by each inferior court having jurisdiction in criminal cases, a docket in which shall be set down the style of each criminal action, the file number thereof, the nature of the offense, the names of counsel, and the proceedings had therein, and the date of each proceeding. [O. C. 544.]

**§2233—ART. 601.—District court shall fix a day for criminal docket.**—The district court shall, on the first day of its organization at each term, fix a day for taking up the criminal docket, which shall be noted on the minutes; but in case of failure to make such order, the criminal docket may be taken up on any day not earlier than the third day of the term. [O. C. 545.]

**§2234—ART. 602.—County court shall hold a term for criminal business.**—The county court of each county shall hold a term for criminal business on the first Monday in every month, or at such other time as may have been fixed in accordance with law, but no criminal action shall be called for trial before nine o'clock A. M. of the first day of such term. [Act June 16, 1876, p. 17, §2.] A plea of guilty may be received and the cause disposed of in vacation, in the county court. Acts 1891, 22 Leg., Chap. 53, p. 69.

See Const. Art. 5, §17; also, Amendment to Const. Acts, 1883, pp. 134, 135; *Wilson v. S.* 15 App. 150; *Thomas v. S.* 14 App. 200.

**§2235—ART. 603.—Defendant required to plead.**—In all cases less than capital the defendant is required, when his cause is called for trial, before it proceeds further, to plead by himself or his counsel whether or not he is guilty. [O. C. 546.]

*Ante*, Arts. 522, *et seq.*, and notes; *Cole v. S.* 11 App. 67; *Shaw v. S.* 17 App. 225.

**§2236—ART. 604.—Meaning of term "called for trial."**—By the term "called for trial" is meant the stage of the cause when both parties have announced that they are ready, or when a continuance having been applied for has been denied. [O. C. 547.]

A case cannot be called out of its order and defendant forced to trial in advance of a number of cases preceding his on the docket. *Thomas v. S.* 36 Tex. 315.

## CH. 2.—OF THE SPECIAL VENIRE IN CAPITAL CASES.

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608. Order of court shall state what, and writ shall issue accordingly.	2241	613. Service of writ.	2250
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609. Capital case may be set for particular day.	2243	Decisions as to return of writ.	2252
610. Manner of selecting special venire.	2244	615. Sheriff shall be instructed by court as to summoning jurors.	2253
Decisions under preceding article.	2245	616. Copy of list of jurors shall be served on defendant.	2254
		617. One day's service of copy before trial.	2255
		Decisions under preceding article.	2256

§2237 — ART. 605. — **Definition of a special venire.** — A “special venire” is a writ issued by order of the district court, in a capital case, commanding the sheriff to summon such a number of persons, not less than thirty-six, as the court in its discretion may order, to appear before the court on a day named in the writ, from whom the jury for the trial of such case is to be selected. [O. C. 548.]

Amended by act March 14, 1897, p. 20, omitting maximum number of sixty. See Willson's Cr. Forms, 692.

§2238.—**Decisions under preceding article.**—A special venire writ which showed the style and number of the case, though in its preliminary recitals it omitted the name of the court or county in which the case was pending, but distinctly stated in the mandatory part that the persons named were to be summoned to be and appear before the district court of Williamson county, Texas, at the court-house thereof, in Georgetown town, on a day specified, was held to be sufficient, and not obnoxious to the objection that it did not show in what case it was issued, nor in what cause the said proceedings were pending. *Murray v. S.* 21 App. 466. It shall issue for not less than thirty-six persons to serve as jurors. *Taylor v. S.* 14 App. 340; *Harrison v. S.* 3 App. 558; *Wasson v. S.* *Id.* 474. It is not necessary that the writ shall designate the offense of which the defendant is charged. *Bowen v. S.* 3 App. 617. Defendant moved to quash a special venire because the seal impressed upon it bore the words “District Court, Bexar County,” instead of the words, “District Court of Bexar County.” Held, that the motion was properly overruled. *Cordova v. S.* 6 App. 207. A special venire will not be quashed on account of discrepancies between the names of some of the persons drawn, and the names written in the list served on the defendant, when such persons did serve on the trial jury, and the defendant did not exhaust his challenges. *Bowen v. S.* 3 App. 617. When a special venire has issued, the court has no authority to issue another without the defendant's consent, until said venire has been exhausted or discharged. *Sharpe v. S.* 17 App. 486. A venire will not be quashed because two of the persons named in the list were beyond the jurisdiction of the court. *Smith v. S.* 21 App. 277.

§2239 — ART. 606.—**State may obtain order for special venire, etc.**—When there is pending in any district court a criminal action for a capital offense, the district or county attorney may, at any time after indictment found, on motion either written or oral, obtain an order for a special venire to be issued in such case. [O. C. 548.]

See Willson's Cr. Forms, 689; *Taylor v. S.* 14 App. 340.

§2240—ART. 607.—**Defendant may obtain special venire, when.**—The defendant in a capital case may also obtain an order for a special venire at any time after his arrest upon an indictment found upon motion in writing, supported by the affidavit of himself or counsel, stating that he expects to be ready for the trial of his case at the present term of the court. [Added in revising.]

See Willson's Cr. Forms, 690. Where the defendant is prosecuted for murder in the first, but is convicted of murder in the second degree, and is awarded a new trial, he is not entitled to a special venire. *Cheek v. S.* 4 App. 441.

§2241—ART. 608.—**Order of the court; writ.**—The order of the court for the issuance of the writ shall specify the number of persons re-



quired to be summoned, and the time when such persons shall attend, and the time when such writ shall be returnable, and the clerk shall forthwith issue the writ in accordance with such order. [Added in revising.]

See Willson's Cr. Forms, 691.

§2242.—**Decisions as to the order.**—The order must be for not less than thirty-six persons. *Harrison v. S.* 3 App. 558; *Wasson v. S.* *Id.* 474; *Taylor v. S.* 14 App. 346. On appeal the record must show the order for a special venire, or the conviction will not be affirmed, although no objection *in limine* was made to the organization of the jury. It will not be presumed or inferred that such order was made and entered. *Steagald v. S.* 22 App. 464.

§2243.—**ART. 609.—Capital case may be set for particular day.**—A capital case may, by agreement of the parties, be set for trial or disposition for any particular day of the term with the permission of the court, or the court may, at its discretion, set a day for the trial or disposition of the same; and the day agreed upon by the parties, or fixed by the court, may be changed and some other day fixed should the court at any time deem it advisable. [Added in revising.]

§2244.—**ART. 610.—Manner of selecting special venire.**—Whenever a special venire is ordered all the names of all the persons selected by the jury commissioners to do jury service for the term at which such venire is required, shall be placed upon tickets of similar size and color of paper, and the tickets placed in a box and well shaken up; and from this box the clerk, in presence of the judge, in open court, shall draw the number of names required for such special venire, and shall prepare a list of such names in the order in which they are drawn from the box, and attach such list to the writ and deliver the same to the sheriff. [Act Aug. 1, 1876, p. 82, sec. 23.]

§2245.—**Decisions under preceding article.**—The drawing of a special venire is a proceeding preliminary to trial, and it is not essential that the defendant or his counsel should be present thereat. *Cordova v. S.* 6 App. 207; *Pocket v. S.* 5 App. 552. Nor is it essential that the clerk in person should draw the names from the box. And the box used may be an ordinary cigar box with any kind of a lid. *Pocket v. S.* 5 App. 552. A special venire shall be selected from the names of those persons selected by the jury commissioners to do service for the term. *Weaver v. S.* 19 App. 547.

§2246.—**ART. 611.—In case no jurors, or not a sufficient number.**—When from any cause no jurors have been selected by the jury commissioners for the term, or when there shall not be a sufficient number of those selected to make the number required for the special venire, the court shall order the sheriff to summon a sufficient number of good and intelligent citizens, who are qualified jurors in the county, to make the number required by the special venire. [Added in revising.]

§2247.—**Decisions under preceding article.**—Where a special venire is exhausted it is proper for the court to order the names of the regular panel of jurors summoned for the week to be placed in the box, to be drawn from to complete the jury. A special venire shall be selected from the names of those persons who have been selected by the jury commissioners to do service during the term, and until those names are exhausted the court is not authorized to send to the body of the county for a special venire, or for talesmen to complete the panel. *Weaver v. S.* 19 App. 547; *Sharpe v. S.* 17 App. 486; *Roberts v. S.* 5 App. 141. When there has been a failure by jury commissioners to select persons for jury service, the court may order the requisite number to be summoned from the body of the county. In the absence of a contrary showing, the presumption obtains that the jurors had been selected in the manner required by law, and an objection that one of the venire men named in the list was dead, and that another was beyond the jurisdiction of the court, does not invalidate the venire. *Smith v. S.* 21 App. 277. Before summoning talesmen, the oath prescribed by Art. 3056, Rev. Stat., must be administered to the sheriff or his deputies, and a disregard of this requirement will vitiate a conviction. *Myers v. S.* 22 App. 258; *Hicks v. S.* 5 App. 488.

§2248.—**ART. 612.—Same subject.**—When from any cause there is a failure to select a jury from those who have been summoned upon the special venire, the court shall order the sheriff to summon any number of persons that it may deem advisable for the formation of the jury. [Added in revising.]

§2249—**Decisions under preceding article.**—The order mentioned in the preceding article may be verbal. *Roberts v. S. 5 App. 141*; *Harris v. S. 6 App. 97*. A special venire having been exhausted, talesmen to complete the panel were summoned from the city in which the trial was being had. Defendant moved to quash this second venire upon the ground of local prejudice, and to have jurors summoned from the country. Held, that the motion was properly overruled. *Grissom v. S. 4 App. 374*. Before summoning talesmen the sheriff and his deputies must take the oath prescribed by Art. 3056 of the Revised Statutes. *Myers v. S. 22 App. 258*; *Hicks v. S. 5 App. 488*.

§2250—**ART. 613.—Service of writ.**—The sheriff or other officer executing the writ shall summon the persons whose names are upon the list attached to the writ, to be and appear before the court at the time named in such writ, which summons shall be made verbally upon the jurors in person. [Added in revising.]

Under a previous statute the service of the writ might also be made by leaving a written notice at the juror's place of residence, with a member of his family over sixteen years old. *Cordova v. S. 6 App. 207*. And such is the law now with respect to service upon regular jurors. *Sayles' Civ. Stat. Art. 3048*.

§2251—**ART. 614.—Return of writ.**—The officer executing the writ shall return the same promptly on or before the time it is made returnable. The return shall state the names of those who have been summoned; and if any of those whose names are upon the list have not been summoned, the return shall state the diligence that has been used to summon them and the cause of the failure to summon them. [Added in revising.]

See Willson's Cr. Forms, 693.

§2252—**Decisions as to return of writ.**—A return which named certain of the veniremen, and stated that they were not served because they could not be found in the county, though diligent search had been made for them by the sheriff and his deputies, said veniremen being absent from the county, and that others of the veniremen were not served because they could not be found after diligent search made for them at their residences and places of business, and at other places at which they were likely to be found, was held to be sufficient. *Lewis v. S. 15 App. 646*. It is the duty of the trial judge to see that the law is substantially observed and to enforce it with such strictness as to certainly accomplish its purpose, which is to secure an impartial jury for the trial of the cause. But a slight disregard of the provisions of the statute will not be sufficient *per se* to warrant the setting aside of a conviction. *Charles v. S. 13 App. 658*. It is no valid objection to a special venire, or return thereon, that all the persons named in the writ were not summoned, or that a less number than thirty-six were summoned. *Taylor v. S. 14 App. 340*; *Charles v. S. 13 App. 658*; *Harris v. S. 6 App. 97*; *Rodriguez v. S. 23 App. 503*. A return may be amended under direction of the court. *Powers v. S. 23 App. 42*; *Rodriguez v. S. Id. 503*; *Murray v. S. 21 App. 466*; *Sterling v. S. 15 App. 249*; *Washington v. S. 8 App. 377*.

§2253—**ART. 615.—Sheriff shall be instructed by court as to summoning jurors.**—When the sheriff is ordered by the court to summon persons upon a special venire, whose names have not been selected as provided in article 610, the court shall in every such case caution and direct the sheriff to summon such men as have legal qualifications to serve on juries, informing him of what those qualifications are; and shall further direct him, as far as he may be able, to summon men of good character, who can read and write, and such as are not prejudiced against the defendant or biased in his favor, if he knows of the existence of such bias or prejudice. [O. C. 553.]

Instructions to the sheriff were not required prior to the enactment of the preceding article. *Dill v. S. 1 App. 278*. And the oath prescribed by Art. 3056, Rev. Stat., should be administered to the sheriff and his deputies before summoning talesmen. *Hicks v. S. 5 App. 488*; *Myers v. S. 22 App. 258*.

§2254—**ART. 616.—Copy of list of jurors shall be served on defendant, &c.**—The clerk, immediately upon receiving the list of names of persons summoned under a special venire, shall make a certified copy thereof, and issue a writ commanding the sheriff to deliver such certified copy to the defendant, and such sheriff shall immediately deliver such copy to the defendant and return the writ, indorsing thereon the manner and time of its execution. [O. C. 553.]

See Willson's Cr. Forms, 694, 695; *post*, §2272.

§2255—ART. 617.—One day's service of copy before trial.—No defendant in a capital case shall be brought to trial until he has had one day's service of a copy of the names of persons summoned under a special *venire facias*, except where he waives the right, or is on bail; and when such defendant is on bail he shall not be brought to trial until after one day from the time the list of persons so summoned shall have been returned to the clerk of the court in which said prosecution is pending; but the clerk shall furnish the defendant, or his counsel, a list of the persons so summoned, upon their application therefor. [O. C. 554; amended by act February 15, 1887, p. 5.]

§2256—Decisions under preceding article.—The defendant is entitled to a copy of the names of the persons *summoned*, not *drawn*. Service of the names *drawn* is not a compliance with the preceding article. *Harrison v. S.* 3 App. 558. It is not necessary that the copy served on the defendant should set out the return of the sheriff on the original writ. *Sterling v. S.* 15 App. 249. The preceding article requires no more than that the names of all the jurors summoned under the special *venire* shall be served upon the defendant more than one day before the case is called for trial. It is immaterial that such copy contains other names which have been erased. *Murray v. S.* 21 App. 466. The defendant is not entitled to service of a list of talesmen summoned. *Johnson v. S.* 4 App. 268; *Drake v. S.* 5 App. 649; *Harris v. S.* 6 App. 97; *Gardenhire v. S.* *Id.* 147; *Sharp v. S.* *Id.* 650; *Richardson v. S.* 7 App. 486. "One day's service" means an entire day, excluding the day of service and return. *Speer v. S.* 2 App. 246. Service of the copy may be made at any time after indictment. *Robles v. S.* 5 App. 346. Service of such copy may be waived, and will be held to have been waived, unless asserted *in limine*. *Houillon v. S.* 3 App. 537; *Roberts v. S.* 5 App. 141. Mere discrepancies in some of the names, as they appear in the original and copy, is not material, if it appears that none of them served in the trial of the case. *Bowen v. S.* 3 App. 617. If certain names on the copy have not in fact been summoned, the defendant is entitled to have process for such persons, and it is error in such case to proceed with the formation of the jury, but the proceedings should be suspended until said persons are brought in, or a new *venire* should be summoned, and the organization of the jury accomplished *de novo*. *Osborne v. S.* 23 App. 431. But the defendant may waive the right to have the said persons present, and when he declines proffered process to bring them in, it will be held that he has waived such right. *Jackson v. S.* 4 App. 292. The clerk's certificate to the copy served, as well as the sheriff's return, may be amended. *Washington v. S.* 8 App. 377; *Sterling v. S.* 15 App. 249. If the name of a juror varies in the copy from the original, on objection, he should be set aside; and if nothing appears to the contrary it will be presumed he was. *Swofford v. S.* 3 App. 76; *Thompson v. S.* 19 App. 593.

## CH. 3.—OF THE FORMATION OF THE JURY IN CAPITAL CASES.

ART.	SEC.	ART.	SEC.
618. In capital cases names of jurors to be called, etc.	2257	632. When held to be qualified, etc.	2277
Decisions under preceding article.	2258	633. Two kinds of challenges.	2278
619. Shall be sworn to answer questions.	2259	634. A peremptory challenge.	2279
Decisions under preceding article.	2260	635. Number of challenges in capital cases.	2280
620. Excuses heard and determined by court.	2261	636. A challenge for cause may be made for what reasons.	2281
621. May be excused by consent of parties.	2262	Challenge for cause—Decisions as to.	2282
Excuses—Decisions as to.	2263	637. Other evidence may be heard in support of or against challenge.	2283
622. Challenge to the array may be heard, when.	2264	638. Juror shall not be asked certain questions.	2284
623. State may challenge array, when.	2265	639. No juror shall be impaneled, when.	2285
624. Defendant may challenge array, when.	2266	640. Names of jurors summoned shall be called in their order.	2286
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626. Challenge to the array must be in writing, etc.	2268	641. Judge shall decide qualifications of jurors.	2288
Challenge to the array—Decisions as to.	2269	642. Oath to be administered to each juror.	2289
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628. Proceedings when such challenge is sustained.	2271	643. Court may adjourn persons summoned, etc., but jurors, when sworn, should not separate, unless, etc.	2291
629. Defendant entitled to copy of list summoned, as in first instance.	2272	644. Persons not selected as jurors shall be discharged.	2292
630. Court shall proceed to try qualifications of persons summoned.	2273	Formation of jury — Practice —	
631. Mode of testing qualifications.	2274	Other decisions.	2293
Qualified voter.	2275		
Householder and freeholder.	2276		

§2257—ART. 618.—In capital cases names of jurors to be called, etc.—When any capital case is called for trial, and the parties have announced ready for trial, the names of those summoned as jurors in the case shall be called at the court-house door, and such as are present shall be seated in the jury box, and such as are not present may be fined by the court a sum not exceeding fifty dollars, and at the request of either party an attachment may issue for any person summoned, who is not present, to have him brought forthwith before the court. [O. C. 555.]

§2258.—Decisions under preceding article.—An attachment cannot issue for a person not summoned. *Thompson v. S.* 19 App. 593. When the defendant fails to ask for an attachment for an absent venireman he cannot be heard to complain. *Kennedy v. S.* 19 App. 618; *Thompson v. S.* *Id.* 593. The preceding article is directory merely, and a disregard of it will not be error for which, on appeal, the conviction will be set aside, unless it be made to appear that because of the irregularity the defendant has been injured. *Murray v. S.* 21 App. 466.

§2259—ART. 619.—Shall be sworn to answer questions.—When those who are present are seated in the jury box the court shall cause to be administered to them the following oath: “You, and each of you, solemnly swear that you will make true answers to such questions as may be propounded to you by the court, or under its direction, touching your service and qualification as a juror, so help you God.” [Added in revising.]

§2260.—Decisions under preceding article.—The preceding article is directory merely. *Murray v. S.* 21 App. 466. Any number of the special venire may be sworn together to answer questions touching their qualifications; but the jurors should be examined separately. *Wasson v. S.* 3. App. 474; *Taylor v. S.* *Id.* 170.

§2261—ART. 620.—Excuses heard and determined by court.—The court shall now hear and determine the excuses offered by persons summoned for not serving as jurors, if any there be, and if an excuse offered be considered by the court sufficient, the court shall discharge the person offering it from service. [Added in revising.]

**§2262—ART. 621.—May be excused by consent of parties.**—A person summoned upon a special venire may be excused from attendance by the court at any time before he is impaneled, by consent of both parties. [Added in revising.]

**§2263.—Excuses—Decisions as to.**—The two preceding articles are directory merely. *Murray v. S.* 21 App. 466. Ordinarily, it is not competent for the court to excuse a juror summoned upon a special venire, until he has appeared at the trial, and has been sworn to answer questions touching his service and qualifications, even though he may be exempt from jury service and the court apprised of the fact. His excuse, if any he has, must be claimed and established under oath. *Robles v. S.* 5 App. 346; *Foster v. S.* 8 App. 254; *Hill v. S.* 10 App. 618; *Thurston v. S.* 18 App. 26. But to this, as to every other general rule, there must, as there ought to be, exceptions where the rule should fail for the want of reason in its enforcement. Thus, a postmaster may be unable to leave his office without endangering the public service, just as one who is sick may be absolutely unable, from physical ailment, to appear and present in person his excuse. In either of such cases he might send his excuse by another, and the court could hear and determine it in his absence. If the defendant is dissatisfied or desires to disprove the fact or ground of excuse, he should apply for an attachment to have the juror brought forthwith into the court. *Kennedy v. S.* 19 App. 618; *Thompson v. S.* *Id.* 593. If, upon the call of the venire, it satisfactorily appears that a venireman whose name is called is absent on account of sickness, or other unavoidable cause over which he has no control, the court is authorized to excuse him. But when the court exercises this authority without the consent of parties, or over the objection of the defendant, it should be only upon the most satisfactory evidence of unavoidable necessity, and even then an attachment is available to test the *bona fides* of the excuse. *Thompson v. S.* 19 App. 593. If a juror is improperly excused, objections should be made at once. *Bejarino v. S.* 6 App. 265. The court has no authority to excuse a juror after he has been impaneled. *Ellison v. S.* 12 App. 557; *Hill v. S.* 10 App. 618.

**§2264—ART. 622.—Challenge to the array may be heard, when.**—Before proceeding to try the persons summoned as to their qualifications to serve as jurors, the court shall hear and determine a challenge to the array, if any be made. [Added in revising.]

No challenge to the array of jurors selected by jury commissioners can be entertained. *Post*, §2267. *O'Bryan v. S.* 12 App. 118; *Williams v. S.* 24 App. 32.

**§2265—ART. 623.—State may challenge array, when.**—The array of jurors summoned for the trial of any capital case may be challenged by the state when it is shown that the officer summoning the jurors has acted corruptly, and has willfully summoned jurors with a view to securing an acquittal. [O. C. 568.]

See Willson's Cr. Forms, 700.

**§2266—ART. 624.—Defendant may challenge array, when.**—The defendant may challenge the array for the following causes only:

That the officer summoning the jury has acted corruptly, and has willfully summoned persons upon the jury known to be prejudiced against the defendant, and with a view to cause him to be convicted. [O. C. 569.]

See Willson's Cr. Forms, 701.

**§2267—ART. 625.—Two preceding articles do not apply, when, etc.**—The two preceding articles do not apply when the jurors summoned are those who have been selected by jury commissioners. In such case no challenge to the array is allowed. [Added in revising.]

See, *ante*, §2264.

**§2268—ART. 626.—Challenge to the array must be in writing, etc.**—All challenges to the array must be made in writing, setting forth distinctly the grounds of such challenge, and when made by the defendant it must be supported by his affidavit or the affidavit of some credible person. [Added in revising.]

See Willson's Cr. Forms, 700, 701.

**§2269—Challenge to the array—Decisions as to.**—A challenge to the array is allowed only upon the grounds specified in the statute. *Williams v. S.* 41 Tex. 34; *Harris v. S.* 6 App. 97; *Tuttle v. S.* *Id.* 556; *Coker v. S.* 7 App. 83; *Cantaunedo v. S.* *Id.* 582; *Bean v. S.* 17 App. 60. And only in the manner prescribed by the statute. *Woodard v. S.* 9 App. 412. A challenge to the array cannot be entertained to jurors selected by jury commissioners. *Ante*, §2267.

Nor is it a good ground to quash a special venire, or of challenge to the array, that the jury commissioners selected jurors solely from persons known to be not defendant's equals, but his superiors, and unjustly discriminated against persons of his race and kind by refusing to select them as jurors. *Cavitt v. S.* 15 App. 190. Where the defendant is a negro, it is not a ground for challenge to the array that it is composed of white men exclusively. *Williams v. S.* 44 Tex. 34. Nor is it a ground for such challenge that a large number of the venire are incompetent to serve as jurors. *Mitchell v. S.* 43 Tex. 512. Nor that the sheriff had summoned persons not drawn on the special venire. *Harris v. S.* 6 App. 97. Nor that the officer who summoned the jury was prejudiced against the defendant. *Tuttle v. S.* 6 App. 556. Nor that the jury commissioners had failed to certify the jury list. *Coker v. S.* 7 App. 83. The overruling a challenge to the array is not revisable on appeal, unless excepted to at the trial and a proper bill of exception is reserved. *Castanedo v. S.* 7 App. 582. A failure to challenge the array at the proper time, and accepting the jury as summoned, is a waiver of defendant's right to such challenge. *Bule v. S.* 1 App. 453. A challenge to the array must precede a challenge to the poll, and must be in writing. *Cooley v. S.* 38 Tex. 636.

**§2270—ART. 627.—Judge shall decide challenge without delay.**—When a challenge to an array is made the judge shall hear evidence and decide whether the challenge shall be sustained or not, without delay. [Added in revising.]

**§2271—ART. 628.—Proceedings when such challenge is sustained.**—If the challenge be sustained the array of jurors summoned shall be discharged, and the court shall order other jurors to be summoned in their stead, and shall direct that the officer who summoned the persons so discharged, and on account of which officer's misconduct the challenge has been sustained, shall not summon any other jurors in the case. [Added in revising.]

See Willson's Cr. Forms, 703, 704.

**§2272—ART. 629.—Defendant entitled to list of persons summoned.**—When a challenge to the array has been sustained the defendant shall be entitled to service of a copy of the list of names of those summoned by order of the court, as in the first instance. [Added in revising.]

See, *ante*, §§2254-2256.

**§2273—ART. 630.—Court shall proceed to try qualifications of persons summoned.**—When no challenge to the array has been made, or having been made has been overruled, the court shall proceed to try the qualifications of those who have been summoned, and who are present, to serve as jurors. [Added in revising.]

**§2274.—ART. 631.—Mode of testing qualifications.**—In testing the qualifications of a juror, he having first been sworn as provided in article 619, he shall be asked the following questions by the court, or under its direction:

1. Are you a qualified voter in this county and state, under the constitution and laws of this state?
2. Are you a householder in the county or a freeholder in the state?

If the person interrogated answers the foregoing questions in the affirmative, the court shall hold him to be a qualified juror, until the contrary be shown by further examination or other proof. [Added in revising.]

**§2275—Qualified voter.**—Every male person who has attained the age of twenty one years shall be a citizen of the United States, and who shall have resided in this state one year next preceding an election, and the last six months in the district or county in which he offers to vote; and every male person, who has attained the age of twenty-one years, who, at any time before an election, shall have declared his intention to become a citizen of the United States in accordance with the federal naturalization laws, and shall have resided in the state one year next preceding such election, and the last six months in the county in which he offers to vote, shall be deemed a qualified voter. But the following named are not qualified voters: 1. Persons under twenty-one years of age. 2. Idiots and lunatics. 3. All paupers supported by any county. 4. All persons convicted of any felony, subject to such exceptions as the legislature may make. 5. All soldiers, marines and seamen employed in the service of the army or navy of the United States. Const. Art. VI, §§1, 2; Sayles' Civ. Stat., Arts. 1687, 1688. The residence of a married man, if not separated from his wife, shall be where his wife resides. If a married man be separated from his wife, he shall be considered, as to residence, a single man. The residence of a single man shall be where he usually sleeps. Sayles' Civ. Stat., Art. 1690. A citizen householder and voter of an unorganized county is a competent

juror to serve on juries impannelled in the organized county to which the unorganized county of his residence is attached for judicial purposes. *Groom v. S.* 3 App. 82.

§2276—**Householder and freeholder.**—A single man renting land and living upon it with a younger brother and occupying the house for all purposes of a home, but taking his meals elsewhere, was held to be a householder. *Lester v. S.* 2 App. 433. So a person who rents a room and boards is a householder. *Robles v. S.* 5 App. 346. And so may a married man who lives with his father be a householder. *Bijarino v. S.* 6 App. 265. If a juror answers that he is a freeholder, his affidavit to a contrary effect will not be entertained on a motion for a new trial. *Brennan v. S.* 33 Tex. 266. A juror who tried the case, qualified himself on his *voir dire* by declaring himself a freeholder in the state. It transpired after the trial he was neither a freeholder in the state nor a householder in the county. Applying for a new trial, the defendant and his counsel made affidavit that they did not know of the disqualification of the juror until after the return of the verdict. Held, that the new trial should have been awarded, notwithstanding defendant and his counsel had intimately known the juror for years. *Boren v. S.* 23 App. 28. When a juror has qualified himself on *voir dire* the defendant is not required to presume him guilty of perjury and extend the investigation. *Armendares v. S.* 10 App. 44; *Hanks v. S.* 21 Tex. 526; *Henrie v. S.* 41 Tex. 573.

§2277—**ART. 632.—When held to be qualified, etc.**—When a juror has been held to be qualified he shall be passed to the parties, first to the state and then to the defendant, for acceptance or challenge. [Added in revising.]

§2278—**ART. 633.—Two kinds of challenges.**—Challenges to individual jurors are of two kinds: *peremptory* and *for cause*. [O. C. 570.]

§2279—**ART. 634.—A peremptory challenge.**—A peremptory challenge is made to a juror without assigning any reason therefor. [O. C. 571.]

See, *post*, §§2280-2301, 2302.

§2280—**ART. 635.—Number of challenges in capital cases.**—In capital cases the defendant shall be entitled to twenty peremptory challenges, and the state to ten, and where there are more defendants than one tried together, each defendant shall be entitled to twelve peremptory challenges, and the state to six for each defendant. [O. C. 572.]

If the defendant is convicted of murder in the second degree, and a new trial is awarded him, he is restricted to ten challenges. *Cheek v. S.* 4 App. 444.

§2281—**ART. 636.—A challenge for cause may be made for what reason.**—A challenge for cause is an objection made to a particular juror, alleging some fact which renders him incapable or unfit to serve on the jury. It may be made for any one of the following reasons:

1. That he is not a qualified voter in the state and county, under the constitution and laws of the state.

2. That he is neither a householder in the county, nor a freeholder in the state.

3. That he has been convicted of theft or any felony.

4. That he is under indictment or other legal accusation for theft or any felony.

5. That he is insane or has such defect in the organs of seeing, feeling or hearing, or such bodily or mental defect or disease, as render him unfit for jury service.

6. That he is a witness in the case.

7. That he served on the grand jury which found the indictment.

8. That he served on a petit jury in a former trial of the same case.

9. That he is related within the third degree of consanguinity or affinity to the defendant.

10. That he is related within the third degree of consanguinity or affinity to the person injured by the commission of the offense, or to the private prosecutor, if there be one.

11. That the juror has conscientious scruples in regard to the infliction of the punishment of death for crime.

12. That he has a bias or prejudice in favor of or against the defendant.

13. That from hearsay, or otherwise, there is established in the mind of the juror such a conclusion as to the guilt or innocence of the defendant, as will influence him in his action in finding a verdict.

For the purpose of ascertaining whether this cause of challenge exists, the juror shall be first asked whether, in his opinion, the conclusion so established will influence his verdict. If he answer in the affirmative, he shall be discharged; if he answer in the negative, he shall be further examined by the court, or under its sanction, as to how his conclusion was formed and the extent to which it will affect his action, and if it appears to have been formed from reading newspaper accounts, communications, statements or reports, or from mere rumor or hearsay, and the juror states on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that he is impartial and will render such verdict, may, in its discretion, admit him as competent to serve in such case; but if the court, in its discretion, is not satisfied that he is impartial, the juror shall be discharged.

14. That he cannot read and write. This cause of challenge shall not be sustained when it appears to the court that the requisite number of jurors, who are able to read and write, cannot be found in the county. [O. C. 575.]

Amended by Act of 1876, p. 83. Again amended by Act March 31, 1885, p. 90. The change made by the preceding amendment is in the 13th sub-division of the article which, prior to said amendment, was as follows:

13. That from hearsay, or otherwise, there is established in the mind of the juror such a conclusion as to the guilt or innocence of the defendant as will influence him in his action in finding a verdict. For the purpose of ascertaining whether this cause of challenge exists, the juror shall be first asked whether, in his opinion, the conclusion so established will influence his verdict. If he answer in the affirmative, he shall be discharged; if he answer in the negative, he shall be further examined by the court, or under its direction, as to how his conclusion was formed, and the extent to which it will affect his action\* and if the court is not satisfied that he is impartial, the juror shall be discharged.

(\*) Down to here it is the same as the new law.

§2282—Challenges for cause—Decisions as to.—

1. *Not a qualified voter.* See, ante, §§2274, 2275.
2. *Not a householder or freeholder.* See, ante, §§2274–2276.
3. *That he is a convict.* Const. Art. VI. §1.
4. *That he is under indictment for theft or felony.* Sewell v. S. 15 App. 56.
5. *That he is insane, etc.* Caldwell v. S. 41 Tex. 87.
6. *That he is a witness in the case.* West v. S. 8 App. 119.
7. *That he was a member of the grand jury that found the bill.* Franklin v. S. 2 App. 8; Greenwood v. S. 34 Tex. 334.

8. *That he served as a petit juror in a former trial of the same case.* Any person who has sat as a petit juror in a former trial of the same case, involving the same questions of fact, may be challenged for cause. Jacobs v. S. 9 App. 278; Willis v. S. *Id.* 297; Dunn v. S. 7 App. 600.

9 and 10. *That he is related, etc.* That a juror is related to the prosecutor is not cause for challenge by the state, but is for the defendant. Black v. S. 9 App. 328. A private prosecutor is one who prefers an accusation against a party whom he suspects to be guilty of an offense against the law, and such person cannot be allowed to try the case as a juror, if challenged for this cause by the defendant, nor can a person who is related to the private prosecutor within the third degree of consanguinity or affinity. Subscribers to a fund for the employment of counsel to prosecute a defendant are not private prosecutors. Heacock v. S. 13 App. 971; McInturff v. S. 20 App. 335. Defendant was on trial for the theft of A.'s horse. He challenged certain jurors because they were related within the prohibited degree to the owners of other horses with the theft of which at the same time and place the defendant was charged by other indictments. Held, that it was error to overrule the challenge. Wright v. S. 12 App. 163. Second cousins are related to each other within the third degree, and where one of the trial jurors was the husband of the second cousin of the alleged injured party, and on a motion for a new trial it was made to appear that upon his *voir dire* such juror stated that he was not related to the alleged injured party, and that he was accepted as a juror by the defendant under the belief that his statement was true, it was held that a new trial should have been granted. Page v. S. 22 App. 551.

11. *That he has conscientious scruples, etc.* "Conscientious scruples" was cause for challenge prior to the enactment of the Code. White v. S. 16 Tex. 206; Burrell v. S. 18 Tex. 713. This is a cause for challenge, though such scruples be limited to cases of circumstantial evidence. Shafer v. S. 7 App. 289; Clanton v. S. 13 App. 139. And notwithstanding the law permits the jury to assess the punishment at imprisonment for life. Thompson v. S. 19 App. 593; Kennedy v. S. *Id.* 618.



12. *That he has a bias or prejudice in favor of or against the defendant.* The word "bias" means a leaning of the mind; propensity towards an object; not leaving the mind indifferent; inclination; prepossession; bent. See facts held to show bias in favor of defendant. *Pierson v. S. 18 App. 524*. Bias or prejudice in favor of or against the alleged injured party does not constitute cause for challenge. *Jones v. S. 8 App. 648*. If a colored defendant objects to a trial by white jurors, he must do so by challenge for cause upon the ground of "bias or prejudice." *Williams v. S. 44 Tex. 34*. On the trial of a white man for the murder of a negro, it was held proper to permit the state's counsel to ask the jurors the following question: "If they could return the same kind of a verdict against a white man for killing a negro that they would against a white man for killing another white man, upon the same evidence?" *Lester v. S. 2 App. 432*. But it is not allowable to ask a proposed juror whether he has the "same neighborly regard" for a negro that he has for a white man. *Cavitt v. S. 15 App. 190*. Where a proposed juror, on the day before the trial, expressed to the defendant the hope or belief that he would be acquitted, it was held that the challenge for cause made by the state was properly allowed. *Mason v. S. 15 App. 534*; see also, *Long v. S. 11 App. 186*. The state is as much entitled to an unbiased, unprejudiced jury as the defendant. *Pierson v. S. 18 App. 524*.

13. *That he has in his mind an established conclusion as to the guilt or innocence of the defendant.* Light impressions, which may readily yield to the testimony and leave the mind open to its fair consideration, constitute no objection; but impressions which are apparently of such a nature as will close the mind to opposing testimony, and combat its force, constitute a valid objection. The investigation is addressed exclusively to the *present* condition of the juror's mind; and the mode by which he has reached a conclusion, whether upon evidence or hearsay, is wholly immaterial, except as it may tend to illustrate the strength or weakness of the conclusion; and that the juror may say such conclusion will not affect his verdict, is not of potent significance. If the juror formed an opinion, at the time he first heard of the murder, that the accused was the perpetrator, which opinion had remained unchanged for two years, up to the time of trial; had heard the case talked about a great deal, and believed what he had heard; and had frequently expressed the opinion that the accused was guilty, and would take his seat upon the jury prepared to act upon such opinion, in case he heard nothing to change it, he ought to be excluded for incompetency. And where the competency of the juror is doubtful, he should be excluded. *Rothschild v. S. 7 App. 519*. If, however, the juror, sometime before the trial, had read in the newspapers a statement of the evidence, and had then formed an opinion, which opinion he remembered, but not the evidence, and thought the opinion then formed would not influence his verdict; but if the testimony on the trial corresponded with the testimony he had read, his conclusion would be the same, and would require other evidence to change it, he is a competent juror. But whenever the opinion of the juror has been formed upon the evidence given at a former trial, or has been so deliberately entertained that it has become a fixed belief of the prisoner's guilt, it would be wrong to receive him. *Grisson v. S. 4 App. 374*. An opinion previously entertained, of a temporary nature, does not disqualify, if it is not shown to exist at the time of trial. *Grisson v. S. 8 App. 386*. Even when the juror had heard the evidence on a former trial of the case. *Shields v. S. 8 App. 427*. But he is not a competent juror, who at the time of impaneling the jury, entertains such an opinion respecting the guilt or innocence of the accused as will influence his verdict. *Tooney v. S. 8 App. 452*. In the trial of a defendant charged as an accomplice, he may test the qualifications of a juror by inquiring whether he had formed an opinion as to the guilt or innocence of the party alleged to be the principal offender; and the juror's disqualifying opinion with respect to the principal constitutes cause for challenge on the trial of the accomplice. *Arnold v. S. 9 App. 435*. When the juror answers that the conclusion formed in his mind as to the guilt or innocence of the defendant will influence his verdict, he shall be discharged, and no further examination of such juror is legitimate. If, however, he answer that his conclusion will not influence his verdict, he shall be further examined as to how such conclusion was formed and the extent to which it may influence his verdict. This further examination is to satisfy the court of the juror's impartiality, and if the court is not so satisfied the juror should be discharged, whether challenged or not. No formula or general rule controls this further examination, but it should be restricted to the imputed disqualification; and the juror, unless contumacious, should not be subjected to the treatment of a refractory witness. *Stagner v. S. 9 App. 440*. Where a juror stated that he had formed an opinion which it would require evidence to remove, but had never heard witnesses, or any one who pretended to know the facts, detail them; that such opinion was not fixed and definite, and he had no present conviction, but could render a verdict entirely free from any previous opinion, he was held competent. *Post v. S. 10 App. 579*. The better practice is to discharge a juror whose impartiality is questionable. *Dreyer v. S. 11 App. 631*. A proposed juror stated that he had heard all of the evidence in the preliminary examination of the case before a magistrate, but that he had neither formed nor expressed an opinion which would influence him in finding a verdict. Held, error to sustain the challenge of the state to such juror. *Wade v. S. 12 App. 358*. A juror stated that from what he had heard he had formed an impression respecting the guilt or innocence of the defendant, but that he had not heard the evidence, nor talked with any of the witnesses about the case, that if the evidence should prove what he had heard, then he had an opinion, but that he did not know whether what he had heard was true, and had formed no conclusion that it was true. Held, that he was a competent juror. *Ellison v. S. 12 App. 557*. A juror stated that when he first heard of the homicide he said the defendant ought to have killed

the deceased, but denied that he had formed or entertained any opinion about the case. Held, that he was a competent juror. *Lewis v. S.* 15 App. 647. A juror stated that, although he had heard about the homicide, there was not established in his mind, from hearsay or otherwise, any conclusion as to the guilt or innocence of the accused, such as would influence his verdict. Held, competent. *Sharpe v. S.* 17 App. 486. When a proposed juror answers that there is established in his mind a conclusion as to the guilt or innocence of the accused that will influence his verdict, he is disqualified as a juror in the case, and should be discharged without further examination. It is only when he answers the qualifying question in the negative that any further examination is required. *Spear v. S.* 16 App. 98; *Rockhold v. S.* *Id.* 557; *Stagner v. S.* 9 App. 440. A juror is not disqualified by the mere fact that he has heard the evidence adduced on a former trial of the cause. To disqualify him there must be a conclusion established in his mind as to the guilt or innocence of the accused which will influence his verdict. *Thompson v. S.* 19 App. 593. See, also, *Kennedy v. S.* *Id.* 618. And for circumstances under which the trial court should have held certain jurors incompetent, see *Ward v. S.* *Id.* 664. A juror on his *voir dire* disclaimed bias or prejudice, or any conclusion as to the guilt or innocence of the defendant, but on motion for a new trial it was shown by the affidavit of two of the jurors that before the jury was fully impaneled, he said to them that "he was a poor juror for the defendant." Held, that for this ground the new trial should have been granted. *Long v. S.* 10 App. 186. A juror on his *voir dire* stated he had heard a person in whom he had confidence make a statement of the case, based not upon his own knowledge, but upon hearsay, and thereupon he, the juror, had formed a conclusion provided the statement was true, but had formed no conclusion as to whether or not it was true. Held, not a disqualifying conclusion. *Bolding v. S.* 23 App. 172. A juror stated on his *voir dire* that he had formed an opinion in the case, that it would take evidence to remove; that his opinion was based upon hearsay; that he did not value hearsay evidence much; that he could render an impartial verdict upon the law as given by the court, and the testimony of the witnesses. Held, competent. *Steagald v. S.* 22 App. 464. The mere fact that a proposed juror heard the trial of a co-defendant of the accused for the same murder, and approved the verdict of conviction, does not disqualify him as a juror. *Pierson v. S.* 21 App. 14. A proposed juror stated on his *voir dire* that he heard the evidence in part on a *habeas corpus* trial, and at that time formed an opinion as to the guilt or innocence of the defendant, but that the opinion so formed would not now influence his verdict, but that he could render an impartial verdict according to the law and the evidence. Held, competent. *Johnson v. S.* 21 App. 368.

14. *That he cannot read and write.* This subdivision disqualifies from jury service a person who, though able to read, is unable to write. *Rainey v. S.* 20 App. 473. The requirement of ability to write is not satisfied by the ability of a proposed juror to write his name and nothing more. The requirement contemplates that he shall be able to express his ideas in writing. *Johnson v. S.* 21 App. 368. The ability to read and write has reference to the English language, and ability to read and write a foreign language does not satisfy the requirement. *Wright v. S.* 12 App. 163. This inability to read and write the English language is a ground for challenge, unless it be made to appear that the requisite number of jurors who can read and write that language cannot be found in the county of the forum, and a trial court is not authorized to dispense by general order with this test of the qualification of jurors. *Garcia v. S.* 12 App. 335; see, also, *Nolen v. S.* 9 App. 419.

15. *Other causes of challenge.* Inability to speak and understand the English language is a good cause for challenge. *Etheridge v. S.* 8 App. 133; *McCampbell v. S.* 9 App. 124; *Lyle v. S.* 41 Tex. 172. That a juror had served as such four days during the preceding six months was held to be no cause for challenge. *Thompson v. S.* 19 App. 593. That a proposed juror is exempt from jury service is not a cause for challenge. *Kennedy v. S.* 19 App. 618. Nor is a week's service of the juror at the pending term. *Garcia v. S.* 5 App. 337; *Tuttle v. S.* 6 App. 556; *Myers v. S.* 7 App. 640. But, that the proposed juror has served for one week in the district court within six months preceding, or in the county court within three months preceding, is good cause for challenge. *Welsh v. S.* 3 App. 414. Chapter 1, of Title 57, of the Revised Statutes, unless otherwise provided, relates to the qualification and exemption of jurors as well in criminal as in civil trials. *Dunn v. S.* 7 App. 600. That a juror had been peremptorily challenged by defendant on a former trial of the cause, is not good challenge for cause, unless it appear that such juror has been prejudiced against defendant by reason of such former challenge. *Wilson v. S.* 3 App. 64.

§2283—ART. 637.—Other evidence may be heard.—Upon a challenge for cause the examination is not confined to the answers of the juror, but other evidence may be heard in support of or against the challenge. [O. C. 577.]

See *Shaw v. S.* 27 Tex. 750.

§2284—ART. 638.—Juror shall not be asked certain questions.—In examining a juror he shall not be asked a question the answer to which may show that he has been convicted of an offense which disqualifies him, or that he stands charged by indictment or other legal accusation with theft or any felony. [O. C. 577.]

See *Sewell v. S.* 15 App. 56.

**§2285—ART. 639.—No juror shall be impaneled, when.—**No juror shall be impaneled when it appears that he is subject either to the third, fourth or fifth clause of challenge in article 636, although both parties may consent. [Added in revising.]

Only such jurors as are mentioned in subdivisions 3, 4 and 5, of Art. 636, *ante*, §2280, are *ipso facto* incompetent. All other grounds of challenge may be waived, and the court cannot deprive the parties of the right of waiver. *Greer v. S.* 14 App. 179; see, also, *Sewell v. S.* 15 App. 56.

**§2286—ART. 640.—Names of persons summoned shall be called in their order.—**In selecting the jury from the persons summoned, the names of such persons shall be called in the order in which they appear upon the list furnished the defendant, and each juror shall be tried and passed upon separately, and a person who has been summoned, but who is not present, may, upon his appearance before the jury is completed, be tried as to his qualifications and impaneled as a juror, unless challenged; but no cause shall be unreasonably delayed on account of the absence of such person. [O. C. 556-558.]

**§2287—Decisions under preceding article.—**Each juror shall be tried and passed upon separately. *Caldwell v. S.* 12 App. 302. When the names of the special *venire* were being called for the purpose of selecting the jury, five of the parties, whose names appeared upon the list, failed to appear, and the court refused to have them brought into the jury box to be passed upon as their names were called in the order in which they stood on the list furnished the defendant, though the defendant requested it. Said five persons were out as jurors in another felony case. The court ordered talesman summoned, the *venire* having been exhausted without calling in the five absent persons aforesaid. Held, error. The impanneling of the jury should have been postponed until said five persons had been discharged from the other jury. *Thurston v. S.* 18 App. 26. The names of the persons summoned as jurors shall be called in the order in which they appear on the list furnished the defendant. They must be called one at a time, *seriatim*, and be tested and passed upon, first by the state and then by the defendant. *Taylor v. S.* 3 App. 170; *Wasson v. S. Id.* 474; *Garza v. S. Id.* 286; *Robles v. S.* 5 App. 346; *Drake v. S. Id.* 649; *Clark v. S.* 8 App. 350. If the defendant desires to examine the proposed juror as to his qualifications, it is not objectionable practice to require him to make such examination before requiring the state to pass upon the juror. *Hardin v. S.* 4 App. 355; *Grisson v. S. Id.* 374; *Ray v. S. Id.* 450. When the name of one C. was reached on the list, the sheriff informed the court that C. had not been summoned. Over objection of the defendant the court proceeded to complete the panel out of the remaining *veniremen*. Held, that this action of the court was without authority of law, and in derogation of valuable rights of the defendant. The court should have suspended the proceedings until C. was brought in, or a new *venire* should have been ordered, and a jury organized *de novo*. *Osborne v. S.* 23 App. 431.

**§2288—ART. 641.—Judge shall decide qualifications of juror, etc.—**The court is the judge, after proper examination, of the qualifications of a juror, and shall decide all challenges without delay and without argument thereupon. [O. C. 579.]

**§2289—ART. 642.—Oath to be administered to each juror.—**As each juror is selected for the trial of the case, the following oath shall be administered to him by the court, or under its direction: "You solemnly swear that in the case of the State of Texas against (A. B.), the defendant, you will a true verdict render, according to the law and the evidence, so help you God." [O. C. 563.]

See Willson's Cr. Forms, 705.

**§2290—Decisions as to the oath.—**The oath prescribed by the preceding article should be administered to each juror separately as he is selected, but an objection that this requirement was not observed comes too late when made for the first time in a motion for a new trial. *Caldwell v. S.* 12 App. 302; *Ellison v. S. Id.* 557. The court has no authority to excuse a juror after the oath has been administered to him as a juror. *Ellison v. S.* 12 App. 557; *Hill v. S.* 10 App. 618. Nor can a peremptory challenge to a juror be entertained after he has been sworn. *Drake v. S.* 5 App. 649; *McMillan v. S.* 7 App. 142. But, it seems, the court has discretion to entertain a challenge for cause after the juror has been impaneled. *Drake v. S.* 5 App. 649; *Baker v. S.* 3 App. 532; *Horbach v. S.* 43 Tex. 242; *Mitchell v. S. Id.* 512; *Evans v. S.* 6 App. 513. On appeal, if the record fails to show that the jury were sworn, or if it shows that any other than the statutory oath was administered to them, the conviction will be set aside. It is sufficient, however, if the record recites that the jury were "duly sworn,"

or "were lawfully sworn to try said cause." *Nels v. S.* 2 Tex. 280; *Arthur v. S.* 3 Tex. 403; *Baird v. S.* 38 Tex. 599; *Faith v. S.* 32 Tex. 373; *Cotton v. S.* *Id.* 614; *Martin v. S.* 40 Tex. 19; *Bawcom v. S.* 41 Tex. 189; *Howard v. S.* 8 App. 612; *Berry v. S.* 10 App. 315; *Kelley v. S.* 13 App. 158; *Dresch v. S.* 14 App. 175; *McHenry v. S.* *Id.* 209; *Curiel v. S.* 20 App. 130. The oath prescribed by the preceding article is required to be administered to jurors in all criminal cases, and supersedes any other oath. Any other oath than that is, in contemplation of law, no oath. *Leer v. S.* 2 App. 495; *Chambliss v. S.* *Id.* 396; *Clampitt v. S.* 3 App. 639; *Tickle v. S.* 6 App. 623; *Preston v. S.* 8 App. 30; *Holland v. S.* 14 App. 182. It is not essential that the oath administered to the jury should be set out in the judgment entry. If a wrong oath was administered, the fact may be shown on appeal by a bill of exception. *Preston v. S.* 8 App. 30. But if the oath be set out in the judgment entry, and as set out it is not the oath prescribed, the judgment will be reversed. *Holland v. S.* 14 App. 182. An attorney at law, who was a deputy district clerk, administered the oath to the jury. Held, that he was competent to administer the oath, it not appearing that he was an attorney in the case. *Thompson v. S.* 19 App. 593.

**§2291—ART. 643.—Court may adjourn persons summoned, etc., but jurors, when sworn, shall not separate, unless, etc.**—The court may adjourn persons summoned as jurors in a capital case to any day of the term, but when jurors have been sworn in a case, those who have been so sworn shall be kept together and not permitted to separate until a verdict has been rendered, or the jury finally discharged, unless by permission of the court, with the consent of the state and the defendant, and in charge of an officer. [O. C. 605.]

See, *post*, Arts. 687 and 777, and notes thereto as to separation of jury.

**§2292—ART. 644.—Persons not selected shall be discharged.**—When a jury of twelve men has been completed, the other persons who may be in attendance under a summons to appear as jurors in the case shall be discharged from further attendance therein. [Added in revising.]

**§2293—Formation of jury—Practice—Other decisions.**—The verdict will be illegal if there be more than *twelve* men on the jury. If the last man sworn can be pointed out during the trial, he may be discharged. *Bullard v. S.* 33 Tex. 504; *Davis v. S.* 9 App. 634. On appeal, the record must show that the jury was a legal one, but a general recital to that effect will be sufficient without naming any one of the jury, but if the record undertakes to name the members of the jury, and names more or less than the legal number, it will be fatal to the conviction. *Marks v. S.* 10 App. 334; *Gerard v. S.* *Id.* 690; *Rich v. S.* 1 App. 206; *Huebner v. S.* 3 App. 458; *Morton v. S.* *Id.* 510. Irregularities in the organization of a trial jury should not be tolerated, but, if permitted by the trial court, the error, to be revised on appeal, must be promptly excepted to at the very time, and it is too late to object thereto for the first time on motion for new trial. If not objected to at the proper time, and a jury is selected without objection, the defendant will not be heard to complain afterwards, but will be held to have waived all such objections. *McMahon v. S.* 17 App. 321; *Davis v. S.* 19 App. 201; *Caldwell v. S.* 12 App. 302. An acceptance of the jury by the defendant is a waiver by him of the right to question its organization, on motion for new trial or in arrest of judgment, or upon appeal. *Buie v. S.* 1 App. 452; *Yanez v. S.* 6 App. 429. Rulings in organizing a trial jury will not be revised unless they infringe some provision of law, or prejudiced the rights of the defendant. *Heacock v. S.* 13 App. 97; *Cock v. S.* 8 App. 659; *Gardenhire v. S.* 6 App. 147; *Ray v. S.* 4 App. 450. Driving a defendant to a peremptory challenge of an incompetent juror is not cause for reversal, when he fails to exhaust his challenges. The objectionable juror, to constitute reversible error, must be forced upon the defendant, and serve as a juror on the trial. The sole inquiry upon appeal is not whether the court erred in the process of impanelling the jury, but whether the defendant was tried by a fair and impartial jury. The mere fact that the defendant exhausted his challenges signifies nothing, unless it be shown that thereafter an obnoxious juror was forced upon him, or that in some manner he suffered prejudice. *Henning v. S.* 24 App. 315; *Krebs v. S.* 8 App. 1; *Grissom v. S.* *Id.* 386; *Tooney v. S.* *Id.* 452; *Hollis v. S.* *Id.* 620; *McKinney v. S.* *Id.* 626; *Cock v. S.* *Id.* 659; *Rothschild v. S.* 7 App. 519; *Myers v. S.* *Id.* 640; *Sharp v. S.* 6 App. 630; *Bejarano v. S.* *Id.* 265; *Tuttle v. S.* *Id.* 556; *Johnson v. S.* 27 Tex. 758; *Burrell v. S.* 18 Tex. 713; *Lum v. S.* 11 App. 483; *Loggins v. S.* 12 App. 65; *Massey v. S.* 10 App. 646. But if one objectionable juror is forced upon the defendant after he has exhausted his peremptory challenges, he will be entitled to have the action of the court revised not only as to that particular juror, but as to any juror against whom objection was urged which should have been sustained. *Holt v. S.* 9 App. 671; *Loggins v. S.* 12 App. 65.

## CH. 4.—OF THE FORMATION OF THE JURY IN CASES LESS THAN CAPITAL.

ART.	SEC.	ART.	SEC.
645. Duty of clerk when parties have announced ready for trial.	2294	652. In felonies not capital, number of challenges.	2301
646. Same subject.	2295	653. In misdemeanors.	2302
647. When court shall direct other jurors to be summoned.	2296	654. Manner of making peremptory challenges.	2303
648. Challenge for cause to be made, when.	2297	655. Lists shall be returned to clerk, when.	2304
649. When number is reduced, etc., by challenge, others to be drawn, etc.	2298	656. When jury is left incomplete, court shall direct, etc.	2305
650. Causes for challenge same as in capital cases, except, etc.	2299	657. Oath to be administered to jurors.	2306
651. Peremptory challenge to be made, when.	2300	658. When there are no regular jurors, court shall order jurors to be summoned.	2307
		659. Array may be challenged as in capital cases.	2308

§2294—ART. 645.—**Duty of clerk when parties are ready for trial.**—When the parties have announced ready for trial in a criminal action less than capital, the clerk shall write the names of all the regular jurors entered of record for that week on separate slips of paper, as near the same size and appearance as may be, and shall place the slips in a box and mix them well. [Act Aug. 1, 1876, p. 82, §21.]

It is an improper practice for the clerk to prepare the lists before the parties have announced ready for trial, but such irregularity to be availed of must be promptly excepted to. *McMahon v. S.* 17 App. 321.

§2295—ART. 646.—**Same subject.**—The clerk shall draw from the box, in presence of the court, the names of twenty-four jurors, if in the district court, or so many as there may be if there be a less number in the box; and the names of twelve jurors, if in the county court, or so many as there may be if there be a less number in the box, and write the names as drawn upon two slips of paper, and deliver one slip to the attorney for the state and the other to the defendant or his attorney [Act Aug. 1, 1876, p. 82, §22.]

See *Davis v. S.* 9 App. 634. More than twenty-four names cannot be drawn from the box. *Burfey v. S.* 3 App. 519; *Jones v. S.* *Id.* 575.

§2296—ART. 647.—**When other jurors to be summoned.**—When there are not as many as twelve names drawn from the box, if in the district court, or, if in the county court, as many as six, the court shall direct the sheriff to summon such number of qualified persons as the court may deem necessary to complete the panel, and the names of the persons thus summoned shall be placed in the box and drawn and entered upon the slips as provided in the preceding articles. [Added in revising.]

*Davis v. S.* 9 App. 634. Regular jurors should be made available if practicable, without resorting to talesmen. *West v. S.* 7 App. 150.

§2297—ART. 648.—**Challenge for cause to be made, when.**—When as many as twelve or more jurors, if in the district court, or six or more if in the county court, are drawn and the lists of their names delivered to the parties, if either party desire to challenge any juror for cause, the challenge shall now be made, and the proceedings in such case shall be the same as in capital cases. [Added in revising.]

As to challenges for cause, see, *ante*, §§2281, 2282; *post*, §2299.

§2298—ART. 649.—**When number is reduced, etc., by challenge, others to be drawn, etc.**—If the number of jurors be reduced by challenge for cause to less than twelve in the district court, or six in the county court, the court shall order other jurors to be drawn or summoned, as the

case may be, and placed upon the lists in place of those who have been set aside for cause. [Added in revising.]

Defendant may be required to pass upon those in the panel before filling it with talesmen. *Speiden v. S.* 3 App. 156; *West v. S.* 7 App. 150.

**§2299—ART. 650.—Causes for challenge same as in capital cases, except, etc.**—The challenges for cause in all criminal actions are the same as provided in capital cases in article 636, except cause 11 in said article, which is applicable to capital cases only. [Added in revising.]

*Greer v. S.* 14 App. 179. For challenges for cause, see, *ante*, §§2281, 2282.

**§2300—ART. 651.—Peremptory challenge to be made, when.**—When a juror has been challenged and set aside for cause, his name shall be erased from the lists furnished the parties, and when there are twelve names remaining on the lists not subject to challenge for cause, if in the district court, or six names if in the county court, the parties shall proceed to make their peremptory challenges if they desire to make any. [Added in revising.]

**§2301—ART. 652.—In felonies not capital, number of challenges.**—In prosecutions for felonies not capital the defendant shall be entitled to ten peremptory challenges and the state to five, and where more defendants than one are tried together, each defendant shall be entitled to six peremptory challenges and the state to three for each defendant. [O. C. 573.]

**§2302—ART. 653.—In misdemeanors.**—In misdemeanors tried in the district court the state and defendant shall be each entitled to five peremptory challenges; if tried in the county court the state and defendant shall be each entitled to three peremptory challenges; and if there are more defendants than one tried together, each defendant shall be entitled to three peremptory challenges in either court. [O. C. 574.]

**§2303—ART. 654.—Manner of making peremptory challenge.**—The manner of making a peremptory challenge shall be as follows: The party desiring to challenge a juror or jurors peremptorily shall erase the name or names of such juror or jurors from the list furnished him by the clerk, and the party may erase any number of names not exceeding the number of peremptory challenges allowed him by law. [Act Aug. 1, 1876, p. 82.]

Defendant is not entitled to a list of those challenged peremptorily by the state, before passing upon the jury. *Phillips v. S.* 6 App. 44. And he may consent himself, or by counsel, to impanneling the jury in some mode other than that prescribed by law. *Grant v. S.* 3 App. 1.

**§2304—ART. 655.—Lists shall be returned to clerk, when.**—When the parties have made their peremptory challenges as provided in the preceding article, or when they decline to make any, they shall deliver their lists to the clerk, and the clerk shall, if the case be in the district court, call off the first twelve names on the lists that have not been erased, and if the case be in the county court he shall call off the first six names on the lists that have not been erased, and the persons whose names are called shall be sworn as jurors to try the case. [Act Aug. 1, 1876, p. 82.]

A juror already accepted cannot be challenged peremptorily by the party accepting him. *McMillan v. S.* 7 App. 142; *Horbach v. S.* 43 Tex. 260; *contra*, *Hubotter v. S.* 32 Tex. 479.

**§2305—ART. 656.—When jury is left incomplete, court shall direct, etc.**—When by peremptory challenges the jury is left incomplete, the court shall direct such number of other jurors to be drawn or summoned, as the case may be, as the court may consider sufficient to complete the jury, and the same proceedings shall be had in selecting and impanneling such other jurors as are had in the first instance. [Added in revising.]

See, *ante*, §2298.

§2306—ART. 657.—**Oath to be administered to jurors.**—When the jury has been selected the following oath shall be administered to them by the court, or under its direction:

“You, and each of you, solemnly swear, that in the case of the State of Texas against (A. B.), the defendant, you will a true verdict render according to the law and the evidence, so help you God.” [O. C. 563.]

See, *ante*, §§2289, 2290. The oath is to be administered to the jury *en masse*, and not to each juror separately as in capital cases. *Ellison v. S.* 12 App. 557.

§2307—ART. 658.—**When there are no regular jurors, court shall order jurors to be summoned.**—When from any cause there are no regular jurors for the week from whom to select a jury, the court shall order the sheriff to summon forthwith such number of qualified persons as it may deem sufficient, and from those summoned a jury shall be formed as provided in the preceding articles of this chapter. [Added in revising.]

See, *ante*, §§2246-2248. *Elkins v. S.* 1 App. 539, and *Shackleford v. S.* 2 App. 385, were decided prior to the adoption of the Revised Code, and are not now applicable in so far as they require the appointment of jury commissioners.

§2308—ART. 659.—**Array may be challenged as in capital cases.**—The array of jurors may be challenged by either party for the causes and in the manner provided in capital cases, and the proceedings in such case shall be the same. [Added in revising.]

See, *ante*, §§2264-2271.

# THIS BELONGS ON PAGE 191.\*

§2322a—ART. 669a.—**Defendant's right to sever on trial.**—Where two or more defendants are prosecuted for an offense growing out of the same transaction, by separate indictments, either defendant may file his affidavit in writing that one or more parties are indicted for an offense growing out of the same transaction for which he is indicted, and that the evidence of such party or parties is material for the defense of the affiant, and that the affiant verily believes that there is not sufficient evidence against the party or parties whose evidence is desired to secure his or their conviction; such party or parties for whose evidence said affidavit is made shall first be tried; and in the event that two or more defendants make such affidavit and cannot agree as to their order of trial, then the presiding judge shall direct the order in which the defendants shall be tried; *provided*, that the making of such affidavit does not without other sufficient cause operate as a continuance to either party. [Act of March 21, 1887, p. 33.]

(\*) It was originally properly prepared by the author but lost by the typesetter and so overlooked in the final paging. It is placed here because it cannot go on page 191.

## CH. 5.—OF THE TRIAL BEFORE THE JURY.

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§2309—ART. 660.—**Order of proceeding in trial.**—A jury having been impaneled in any criminal action, the cause shall proceed to trial in the following order:

1. The indictment or information shall be read to the jury by the district or county attorney.

2. The special pleas, if any, shall be read by the defendant's counsel, and if the plea of not guilty is also relied upon, it shall also be so stated.

3. The district attorney, or the counsel prosecuting in his absence, shall state to the jury the nature of the accusation and the facts which are expected to be proved by the state in support thereof.

4. The testimony on the part of the state shall be introduced.

5. The nature of the defenses relied upon shall be stated by the counsel of the defendant, and what are the facts expected to be proved in their support.

6. The testimony on the part of the defendant shall be offered.

7. Rebutting testimony may be offered on the part of the state and of the defendant. [O. C. 580.]

§2310—**Decisions under preceding article.**—The failure to read the indictment or information to the jury is an omission from which it must be apprehended that injury resulted to the defendant, and is reversible error, where it is made to appear affirmatively in the record on appeal. *Wilkins v. S. 15 App. 420.* It is not required that the fact that the indictment or information was read to the jury, shall be recited in the judgment entry as is directed with regard to the defendant's plea. The proper practice, however, is to make the judgment entry, immediately preceding the plea, set forth such fact. Nevertheless, such fact may be sufficiently authenticated in any part of the record, as in the charge of the court to the jury. *White v. S. 18 App. 57.* Subdivision 3, of the preceding article is merely directory, and its disregard is not cause for reversal unless there be cause to apprehend that such disregard resulted injuriously to the rights of the defendant. In the conduct of trials, however, the directions prescribed by the statute should be strictly followed, and especially when those directions are insisted upon by the defendant. The legislative will should be observed and rigidly adhered to by the courts in matters of practice, as well as in all other respects. *Holsey v. S. 24 App. 35.*

§2311—ART. 661.—**Testimony allowed at any time before argument.**—The court shall allow testimony to be introduced at any time before the argument of a cause is concluded, if it appear that it is necessary to a due administration of justice. [O. C. 581.]

§2312—**Decisions under preceding article.**—When essential to the due administration of justice, it is within the discretion of the trial judge to receive evidence at any stage of the trial before the conclusion of argument, and the exercise of such discretion will not be revised on appeal unless it plainly appears to have been abused. *Nolen v. S. 14 App. 474; Donahoe v. S. 12 App. 297; Cook v. S. 11 App. 19; George v. S. Id. 95; Bostick v. S. Id. 126; Gross v. S. Id. 364; Hewitt v. S. 10 App. 601; Moore v. S. 7 App. 14; Goins v. S. 41 Tex. 334; Bittick v. S. 40 Tex. 117; Kemp v. S. 38 Tex. 110; Harris v. S. 44 Tex. 146; Jones v. S. 3 App. 150; Lister v. S. Id. 17; Reardon v. S. 4 App. 602; Phillips v. S. 6 App. 44; Noftsinger v. S. 7 App. 301; Walling v. S. Id. 625.* But no testimony is allowable after argument is begun, unless essential to justice. *Thomas v. S. 1 App. 289.* The preceding article was the practice before its adoption. *Nutt v. S. 19 Tex. 340.*

§2313—ART. 662.—**Witnesses placed under rule.**—At the request of either party the witnesses on both sides may be sworn and placed in the custody of an officer and removed out of the court room to some place where they cannot hear the testimony as delivered by any other witness in the cause. This is termed placing witnesses under rule. [O. C. 582.]

§2314—ART. 663.—**—kept separate, or, etc.**—When witnesses are placed under rule, those summoned for the prosecution may be kept separate from those summoned for the defense; or they may all be kept together as the court shall direct. [O. C. 583.]

§2315—ART. 664.—**—part of the witnesses may be.**—The party requesting the witnesses to be placed under rule may designate such as he desires placed under rule, and those not so designated will be exempt from the rule, or the party may have all the witnesses in the case placed under rule. [Added in revising.]

**§2316—ART. 665.**—**shall be attended by an officer.**—Witnesses when under rule shall be attended by an officer, and all their reasonable wants provided for, unless the court in its discretion direct that they be allowed to go at large; but in no case where the witnesses are under rule shall they be allowed to hear the testimony in the case, or any part thereof. [Added in revising.]

**§2317—ART. 666.**—**instructed by the court, etc.**—Witnesses when placed under rule shall be instructed by the court that they are not to converse with each other, or with any other person about the case, except by permission of the court, and that they are not to read any report of, or comment upon, the testimony in the case while under rule, and the officer who attends the witnesses shall report to the court at once any violation of its instructions, and the party violating the same shall be punished for contempt of court. [Added in revising.]

**§2318—Placing witnesses under rule—Decisions as to.**—On any trial, at the request of either party, the witnesses may be placed under the rule, and those summoned for the prosecution may be kept separate from those summoned for the defense, if the court sees proper to so direct; and they may be placed in the custody of an officer or be allowed to go at large, under a like discretion. The trial judge is invested with a wide discretion in all matters relating to this procedure, and such discretion will not be revised on appeal unless it has been abused, but the right to have witnesses placed under the rule is a right given by law, and it should not be denied or substantially abridged at the arbitrary discretion of the judge. *McMillan v. S. 7 App. 142*; *Walling v. S. Id. 625*; *Shields v. S. 8 App. 427*; *Estep v. S. 9 App. 366*; *Avery v. S. 10 App. 199*; *Johnson v. S. Id. 571*; *Hoy v. S. 11 App. 32*; *Cross v. S. Id. 84*; *Powell v. S. 13 App. 244*; *Walker v. S. 17 App. 16*; *Kennedy v. S. 19 App. 618*; *Bond v. S. 20 App. 421*; *Goins v. S. 41 Tex. 334*; *Sherwood v. S. 42 Tex. 498*. The rule is provided simply to prevent the testimony of one witness from influencing another, and not to prevent counsel from conferring with the witnesses, with consent of the court. *Jones v. S. 3 App. 150*; *McMillan v. S. 7 App. 142*. But attorneys should not be allowed unlimited license to converse with the witnesses, but an officer should be present at such conferences. *Brown v. S. 3 App. 294*. And a witness should not be called from the stand and conferred with by counsel. *Williams v. S. 35 Tex. 355*. The trial judge is authorized to prescribe the conditions under which a conference with a witness under the rule may be had. *Holt v. S. 9 App. 571*. It is within the discretion of the court to permit the state's counsel to confer with a witness who is under the rule, and such action of the court will not be revised, except where an abuse of such discretion is apparent. *Dubose v. S. 13 App. 418*. The practice of permitting counsel to confer with witnesses under the rule is condemned, but will not be cause for reversal, unless it be manifest that the court has abused the discretion confided to it. *Kennedy v. S. 19 App. 618*. A witness cannot be contradicted by the testimony of an attorney who conferred with him while under the rule. *Brown v. S. 3 App. 294*.

Ordinarily, expert witnesses, witnesses who are attorneys in the case, and those called to testify to a witness' reputation for truth and veracity, are exempt from the rule. *Johnson v. S. 10 App. 571*; *Powell v. S. 13 App. 244*; *Spear v. S. 16 App. 98*; *Leache v. S. 22 App. 279*. Witnesses who violate the rule, and the officer in charge of them, should be punished as for contempt of court. *Cross v. S. 11 App. 84*.

The admissibility of witnesses who have violated the rule, or who have not been placed under the rule, is within the sound discretion of the court, and such discretion will be presumed to have been correctly exercised until the contrary appears. *Sherwood v. S. 42 Tex. 498*. It is within the discretion of the court to permit a witness who had been under the rule, and who had been discharged, and had been at large, to be recalled to explain his testimony. *Goins v. S. 41 Tex. 334*. But on appeal the refusal of the trial court to permit such witness to be recalled will not be revised, unless it be shown that the fact sought to be proved was not known to the party calling him at the previous examination, or why such fact was not then elicited. *Roach v. S. 41 Tex. 462*. Certain witnesses were excused from the rule by consent of parties. When they were called to testify, objection was made by defendant that he had consented to excuse them from the rule only on condition that they remain out of the court room. This condition was not heard by the court, nor admitted by the state. Held, that it was not apparent that the court had erred in permitting the witnesses to testify. *Davis v. S. 6 App. 196*.

After the enforcement of the rule has been requested, the proper practice is to not relax it without the consent of the parties before the conclusion of the testimony in the case, but to enforce it, notwithstanding the particular witness may have been examined. The discretion of the judge is not an arbitrary one. *Heath v. S. 7 App. 464*.

**§2319—ART. 667.**—**Order of argument.**—When a criminal cause is to be argued, the order of argument may be regulated by the presiding judge; but in all cases the state's counsel shall have the right to make the concluding address to the jury. [O. C. 585.]

§2320—ART. 668.— in prosecutions for felony.—In prosecutions for felony the court shall never restrict the argument to a less number of addresses than two on each side. [O. C. 586.]

§2321—Argument, decisions as to.—The trial judge is expressly empowered to regulate the order of argument, but the state's counsel is entitled to the concluding address. In his opening argument the state's counsel should fairly develop his case and give the law he relies on; and the trial court should see that he does so. But counsel for the defendant must anticipate the line of argument to which the evidence suggests the state's counsel may resort in his conclusion. *Cross v. S.* 11 App. 84. If the state's counsel should fail to fairly develop his case until in his concluding argument, the trial judge, in his discretion, would be authorized to allow the defendant's counsel to again address the jury, and then to allow the state's counsel to close the argument. *Morales v. S.* 1 App. 494; *Cross v. S.* 11 App. 84.

Rules 36, 38, 39, 40 and 41, for the government of argument in the district court, should be strictly enforced. *Laubach v. S.* 12 App. 583. The argument should be restricted to a discussion of the facts in the case, and the conclusions legitimately deducible from the law applicable to them. *Thompson v. S.* 43 Tex. 268. Counsel are entitled to employ only legitimate argument. Vituperation of parties and witnesses should not be indulged in or permitted. Nor should the jury be menaced with the terrors of popular opinion, or with the dangers to be apprehended from a verdict adverse to the views of the advocate. The weight and credibility of the evidence are the matters proper for the consideration of the jury, regardless of imaginary consequences prognosticated by counsel. *Crawford v. S.* 15 App. 601; *Sterling v. S.* *Id.* 249; *Hunnicut v. S.* 18 App. 498; *Ricks v. S.* 19 App. 308. Public opinion, being subordinate to the law, should have nothing whatever to do with trials in courts of justice, and should not be invoked in appeals to the jury. *Kennedy v. S.* 19 App. 618; *Grosse v. S.* 11 App. 364. Nor should counsel in argument express his opinion as to the guilt or the innocence of the defendant. *Kennedy v. S.* 19 App. 618; *Young v. S.* *Id.* 536; *Pierson v. S.* 18 App. 524. Appeals to partizan feeling or to race prejudice are reprehensible, and should be promptly suppressed. *Lester v. S.* 2 App. 432. It is error for counsel in argument to state his personal knowledge of facts, and especially when such facts are not in evidence. He must keep within the record, confining his discussion to facts in proof. *Tilley v. S.* 24 App. 224; *Orman v. S.* *Id.* 495. The statement by the state's counsel in his closing argument that good men had contributed to the employment of counsel to prosecute the defendant, and that he could have proved certain facts with regard to which the court excluded evidence, had not the defendant objected, was held to be an abuse of the privilege of argument, which not only called for the condemnation of the trial judge, but which was such error as required a reversal of the conviction. *Clark v. S.* 23 App. 260. See an instance of the use of improper and reprehensible remarks, held to be sufficient reason to cause a reversal of the judgment. *Stone v. S.* 22 App. 185. Where there has been a former conviction in the case and a new trial has been awarded, such former conviction shall be regarded as no presumption of guilt, nor shall it be allowed in the argument. *Post*, Art. 783. The right secured to one accused of crime by this provision is a substantial one, and he is entitled to have it enforced. See instances of violation of said rule. *Moore v. S.* 21 App. 666; *Hatch v. S.* 8 App. 416. Zeal in behalf of their client, or desire for success, should never induce counsel to permit themselves to endeavor to obtain a verdict by arguments based upon any other than the facts in the case, and the conclusions legitimately deducible from the law applicable to them. *Thompson v. S.* 43 Tex. 268; *Hatch v. S.* 8 App. 416. Prosecuting counsel has the right to deduce from the facts legitimately in evidence, a motive on the part of the accused to commit the crime for which he is on trial, and to urge it upon the jury. *McInturf v. S.* 20 App. 335. Where a fact is in evidence, it is a proper subject for comment in argument. *Leonard v. S.* 20 App. 442; *Ashlock v. S.* 16 App. 13.

Counsel for the state, when commenting upon the evidence in his closing address, was interrupted by the defendant in person with the statement that if he had the absent witnesses he could show different. Said counsel, in reply to defendant's remark, stated to the jury that the brother of the absent witnesses told him that said witnesses, if present, would testify against the defendant. Held, that such statement was unwarranted by the law or the facts of the case, and was the assertion of a fact not in evidence, and was prejudicial to the defendant. *Laubach v. S.* 12 App. 583. An attorney appointed by the court to assist the prosecuting attorney, stated in his argument that he appeared not as hired counsel but upon the suggestion of the court, the state's attorney being worn out. Held, that such remarks were calculated to impress the jury with the belief that the trial judge believed the defendant guilty and desired his conviction; and it was the duty of the court to stop the counsel and instruct the jury that such was not the purpose of the appointment. *Brunet v. S.* 12 App. 521. C. and T. were jointly indicted for theft. They severed and C. was on trial. Counsel for the state in argument said, "They have severed and C. is put on trial, and you are told he was only a hired hand. They hope thus to clear this man and then he is to swear his confederate clear. I tell you this is the trick. Good men in this county, and the best men in Gonzales county, desire the conviction of this man and his partner." Held, that such remarks were improper, and that it was the duty of the court to have promptly suppressed them, and to have informed the jury that they should not be influenced by the wishes of good or bad men, but that they should try the defendant by the law and the evidence. *Conn v. S.* 11 App. 390. Incorrect reasoning by prosecuting counsel, nor his unwarranted assumption or assertion of controverted facts, will not suffice for the reversal of a conviction. *Davis v. S.* 15 App. 594. Prosecuting

counsel should not be permitted to assert, in argument to the jury, that if an absent witness had been introduced he would have testified to certain facts, when adverse counsel had not invited such assertion. *Green v. S.* 17 App. 395. In a trial for theft of hogs, prosecuting counsel asserted in his argument that "The defendant and Moore, with whom he is charged as principal, stole the hogs and divided them." Held, that the statement was warranted by the evidence, and was within the rules governing arguments. *Reynolds v. S.* 17 App. 413. Where the defendant's wife must have known important facts favorable to the defendant, if such facts had existed, and it was within the power of the defendant to introduce her as a witness, but he failed to do so, it was held not beyond the limit of proper argument for the prosecuting counsel to refer to and comment upon these facts, it being not within the power of the state to introduce her as a witness against him. *Mercer v. S.* 17 App. 452. In view of the facts that the character of the defendant was not put in issue by the evidence, and that the trial court rejected evidence to the effect that the defendant was once arrested for robbery, it was a palpable abuse of the privilege of argument on the part of counsel for the state to discuss the one and advert to the other. *Stephens v. S.* 20 App. 255. In prosecuting for rape, and other high crimes which arouse public indignation, and fire the minds of a community with a desire for vengeance against the guilty party, the court and counsel should especially be scrupulously cautious to accord to the defendant a fair and impartial trial, as free as possible from excitement or prejudice. There should be no clap-trap or sharp practice made use of by counsel for the state. No improper means should be resorted to to prejudice the minds of the jury against the defendant in the remotest degree. No testimony should be offered on the part of the prosecution that is known to the prosecution to be not relevant and legal. No remarks should be made by counsel for the state which are not fully warranted by the evidence. Matters not in evidence should not even be alluded to in argument, when such matters might possibly prejudice the defendant. *Bryson v. S.* 20 App. 566; *Gazley v. S.* 17 App. 267.

It is the duty of the court to check all assaults on the character, motives or conduct of counsel, and to enforce decorum of argument by fine and imprisonment, if necessary. *Shackelford v. S.* 43 Tex. 138. On a trial for murder, the audience applauded the opening address of counsel for the state. Counsel for defendant were permitted to comment upon the occurrence. In reply counsel for the state, alluding to the demonstration made by the audience, said: "It was a spontaneous outburst of approval by the audience of this cause, after they had heard it truthfully represented by the state." Held, the court should have taken prompt and decisive action on the occasion, and should have endeavored by its condemnation of the proceeding, and its admonition to the jury, to prevent any prejudice to the defendant by such reprehensible conduct, and the remarks of counsel for the state alluding to the conduct of the audience should have been reproved by the court. *Cartwright v. S.* 16 App. 473.

When counsel transcend the limits of legitimate argument to the jury, it is the right of opposing counsel to object, and to invoke the intervention of the court; but, though no objection be interposed, the purity of public justice demands that the court should suppress such abuses of the privilege of counsel. *Crawford v. S.* 15 App. 501. When an advocate grossly abuses his privilege to the manifest injury of the defendant, it is the duty of the court to stop him *instantly*. But a defendant, whose own outrageous conduct provoked such impropriety, is not entitled to complain of it. *Eanes v. S.* 10 App. 420.

A conviction will not be set aside because of alleged improper remarks made by counsel for the state in argument, unless it appear: 1, That the remarks were improper, and, 2, that they were of a material character, and such as, under the circumstances, were calculated to injuriously affect the defendant's rights. *House v. S.* 19 App. 227; *Pierson v. S.* 18 App. 524; *Bass v. S.* 16 App. 62; *Sutton v. S.* *Id.* 490; *Langford v. S.* 17 App. 445; *Young v. S.* 19 App. 536; *McConnell v. S.* 22 App. 354. And, it seems, a conviction will not be set aside for this cause, unless the defendant requested and was refused an instruction directing the jury to disregard the unauthorized statements of counsel for the state. *Young v. S.* 19 App. 536; *Kennedy v. S.* 19 App. 618. Objections to remarks made in argument, to be availed of on appeal, must be reserved by exception at the time, and they come too late when made for the first time after the conclusion of the trial, unless it be made clearly to appear that the defendant suffered injury therefrom. *Mason v. S.* 15 App. 534; *Jackson v. S.* 18 App. 586.

If counsel for the defendant provokes improper remarks to be made by counsel for the state, the defendant will not be heard to complain of such remarks. *Baker v. S.* 4 App. 223; *Williams v. S.* 24 App. 33; *House v. S.* 19 App. 227; *Pierson v. S.* 18 App. 525; *Pierson v. S.* 21 App. 14; *Smith v. S.* *Id.* 277.

Counsel for defendant cannot read in argument a statement of facts used on a former appeal of the case, and the opinion of the appellate court, in order to demonstrate the insufficiency of the evidence adduced on the trial. *Dempsey v. S.* 3 App. 429. The extent to which counsel may read from books, as part of his argument to the jury, is a matter confided largely to the discretion of the trial judge, and his action will not be revised on appeal unless that discretion has been clearly abused to the prejudice of the defendant. *Smith v. S.* 21 App. 277; *Collins v. S.* 20 App. 399; *Lott v. S.* 18 App. 627; *Cross v. S.* 11 App. 184; *Foster v. S.* 8 App. 248; *Harrison v. S.* *Id.* 183; *Dempsey v. S.* 3 App. 430; *Hines v. S.* *Id.* 596; *Hudson v. S.* 6 App. 565; *Wade v. DeWitt*, 30 Tex. 398. See an instance in which it was held that this discretion was abused by the trial judge. *Lott v. S.* 18 App. 627.

In regard to the latitude allowable to the argument of counsel, the trial judge is vested with a large discretion, which will only be revised when obviously abused. *Bingham v. S.* 6 App. 169; *Hudson v. S.* *Id.* 565; *Foster v. S.* 8 App. 248; *Cross v. S.* 11 App. 84. And how-

ever reprehensible, as a question of practice, may be a ruling of the court in a dispute over privilege of counsel in argument, if such ruling inures to the benefit of the defendant, he cannot be heard to complain. *White v. S. 10 App. 381.*

It is error to charge the jury to not consider the arguments in a case. Legitimate argument is proper for the consideration of the jury. *Laubach v. S. 12 App. 583.*

It is very proper that the jury should be retired from the court-room during argument upon questions as to the admissibility of evidence, or questions of law, with which the jury can have no concern. *Allison v. S. 14 App. 402.*

**§2322—ART. 669.—Defendant's right to sever on trial.**—When two or more defendants are jointly prosecuted, they may sever in the trial upon the request of either. [O. C. 587.] (See p. 185.)

Amended by act of March 16, 1874, p. 28; again amended by act of Feb. 12, 1883, p. 9. Severance of defendants jointly prosecuted is now a matter of right. *Willey v. S. 22 App. 408.*

**§2323 — ART. 670. — Order in which they will be tried, etc. —** When a severance is claimed, the defendants may agree upon the order in which they are to be tried, but in case of their failure to agree, the court shall direct the order of trial. [Added in revising, and amended by act of Feb. 12, 1883, p. 9.]

For entry of severance, see Willson's Cr. Forms, 707.

**§2324—Articles 669 and 670 before being amended, and decisions thereunder.**—The preceding articles, before being amended, were as follows:

**ART. 669.**—Where two or more defendants are jointly prosecuted, they may sever in the trial at the request of either, and if the defendant upon whose application the severance is allowed shall file his affidavit in writing, stating that a severance is requested for the purpose of obtaining the evidence of one or more of the persons jointly indicted with him; that such evidence is material to his defense, and that he verily believes that there is no evidence against the person or persons whose evidence is desired, such person or persons shall be first tried.

**ART. 670.**—Where a severance is claimed, but no affidavit is filed as provided in the preceding article, the attorney representing the state shall be entitled to elect which defendant shall be first tried.

For decisions made under said former provisions, see the following: *Allison v. S. 14 App. 402*; *Myers v. S. 7 App. 640*; *Rucker v. S. Id. 549*; *Slawson v. S. Id. 63*; *Reed v. S. 11 App. 509*; *Conn v. S. Id. 390*; *Anderson v. S. 8 App. 542*; *Berry v. S. 4 App. 492*; *Boothe v. S. Id. 202*; *Krebs v. S. 3 App. 348*; *Bybee v. S. 36 Tex. 366*. The foregoing decisions may be applicable in some respects to articles 669 and 670 as amended.

**§2325 — ART. 671. — May dismiss as to one who may be witness.**—The attorney representing the state may at any time, under the rules provided in article 38, dismiss a prosecution as to one or more defendants jointly indicted with others, and the person so discharged may be introduced as a witness by either party. [O. C. 588.]

See, *ante*, §§1491, 2223. Where there is a severance, and one defendant is placed on trial, the trial may be suspended to allow the state's attorney to dismiss the prosecution as to the defendant not on trial, for the purpose of using him as a witness. *Johnson v. S. 33 Tex. 570.*

**§2326 — ART. 672. — Where there is no evidence against a defendant jointly prosecuted.**—When it is apparent that there is no evidence against a defendant in any case where he is jointly prosecuted with others, the jury may be directed to find a verdict as to such defendant, and if they acquit he may be introduced as a witness in the case. [O. C. 589.]

**§2327—Decisions under preceding article.**—If, upon a joint trial, there be no evidence tending to implicate one of the defendants, the court should require the jury to pass upon his case before the other defendant opens his defense. In such case the jury should be instructed to consider the case as to the defendants as wholly disconnected, and to return a general verdict as to the defendant whose case is thus submitted to them. *Lyles v. S. 41 Tex. 172*; *Bybee v. S. 36 Tex. 366*; *Jones v. S. 13 Tex. 168.*

**§2328 — ART. 673. — Where it appears the court has no jurisdiction.**—Where it appears in the course of a trial that the court has no jurisdiction of the offense, or that the facts charged in the indictment do not constitute an offense, the jury shall be discharged. [O. C. 590.]

**§2329—ART. 674.—In such case court may commit, when.**—If the want of jurisdiction arises from the fact that the defendant is not liable to prosecution in the county where the indictment was presented, the court may,

in cases of felony, order the defendant into custody for a reasonable length of time to await a warrant for his arrest from the proper county; or, if the offense be bailable, may require the defendant to enter into recognizance to answer before the proper court, in which case a certified copy of the recognizance shall be transmitted forthwith to the clerk of the proper court, to be enforced by that court in case of forfeiture as in other cases. [O. C. 591.]

See, also, *ante*, §§2146, 2147, 2148, 2149.

**§2330—ART. 675.—Defendant shall be discharged in all cases, when.**—In all cases where it appears that the facts charged in the indictment or information do not constitute an offense, and in all cases of misdemeanor where it appears that the court has no jurisdiction of the same, and the jury is discharged as provided in article 673, the defendant shall also be discharged; but such discharge shall be no bar in any case to a prosecution before the proper court for any offense against the law. [O. C. 590-592.]

See, also, *ante*, §§214, 52147, 2148.

**§2331—ART. 676.—The jury are judges of fact.**—The jury are the exclusive judges of the facts in every criminal cause, but not of the law in any case. They are bound to receive the law from the court and be governed thereby. [O. C. 593.]

See, *post*, Art. 728.

**§2332—ART. 677.—Charge of court to the jury.**—After the argument of any criminal cause has been concluded, the judge shall deliver to the jury a written charge, in which he shall distinctly set forth the law applicable to the case; but he shall not express any opinion as to the weight of evidence, nor shall he sum up the testimony. This charge shall be given in all cases of felony, whether asked or not. [O. C. 594.]

**§2333—ART. 678.—Charge shall not discuss the facts, etc.**—It is beyond the province of a judge sitting in criminal causes to discuss the facts or use any argument in his charge calculated to rouse the sympathy or excite the passion of a jury. It is his duty to state plainly the law of the case. [O. C. 595.]

**§2234—Charge must be written.**—In felony cases the charge must be in writing. *Post*, Art. 682. And the omission to give a written charge in a felony case is material error to the prejudice of the defendant's rights. *West v. S. 2 App. 209; Melton v. S. 12 App. 488; Williams v. S. 18 App. 409.*

**§2335—"The law applicable to the case"—Meaning of.**—By the words, "the law applicable to the case" is meant the case made by the *allegations* and the *evidence*, the offense charged against the defendant, and for which he is on trial, and the evidence adduced on the trial. *Kouns v. S. 3 App. 13; Lister v. S. Id. 17; Cooper v. S. 22 App. 419; Serio v. S. Id. 633; Parker v. S. 22 App. 105; Davis v. S. 2 App. 588; Holden v. S. 1 App. 235; Priestmuth v. S. Id. 481; Stewart v. S. 15 App. 598.*

**§2336—Charge must conform to and be limited by the allegations.**—The charge must conform to and be limited by the allegations. To go outside of and beyond them, in submitting other issues, is not only calculated to mislead the jury, but also calculated to injure the rights of the defendant by making them depend upon matters he could not be prepared to meet, because he was not notified that they would be urged against him. Thus, where the defendant was charged with murder committed by means of poison, it was held error to instruct the jury as to murder committed with intent to rob. There being no such allegation in the indictment. *Tooney v. S. 5 App. 163.*

Where, under an indictment charging murder, the defendant had been convicted of manslaughter, and a new trial was granted him, it was held error on a second trial to instruct as to murder, as he was not on trial for that offense. *Parker v. S. 22 App. 105; Smith v. S. Id. 316.*

Where one species of aggravated assault is alleged, it is error to charge in relation to another species not alleged. *Ferguson v. S. 4 App. 156; Kouns v. S. 3 App. 13; Coney v. S. 43 Tex. 414; Stanfield v. S. Id. 167; McGee v. S. 5 App. 492; Anderson v. S. 16 App. 132.*

Where one species of rape is alleged, it is error to charge as to another species not alleged. *Cooper v. S. 22 App. 419; Serio v. S. Id. 633; see, also, Taylor v. S. 24 App. 299.*

Where one species of burglary is alleged, it is error to charge as to another not alleged. *Bravo v. S. 20 App. 188; Buntain v. S. 15 App. 485; Mace v. S. 9 App. 110; Sullivan v. S. 13 App. 462; Weeks v. S. Id. 466.* Or to charge as to a species about which there is no evidence. *Neiderlueck v. S. 23 App. 38; see, also, Melton v. S. 24 App. 287.*

Where the offense charged was conveying into a jail articles useful to aid prisoners in escaping, it was held error to instruct as to the law against aiding a prisoner to escape from an officer. *Mason v. S. 7 App. 623.*

Instructions are erroneous which warrant the jury to convict on proof of acts not alleged. *Powell v. S. 12 App. 238; Jones v. S. 22 App. 680.*

Allegations descriptive of the offense are material, and a charge which authorizes a conviction without proof of such allegations is erroneous. *Coleman v. S. 21 App. 520; Willis v. S. 24 App. 487.*

**§2337—Must be applicable to and limited by the evidence.**—The charge should give the statutory definition of the offense for which the defendant is on trial, or failing to do this, should explain the nature and ingredients of such offense. *Smith v. S. 1 App. 517; Cady v. S. 4 App. 238; Gose v. S. 6 App. 121; Lindley v. S. 8 App. 445; Hilliard v. S. 38 Tex. 358; Johnson v. S. 13 App. 378.*

The charge is to be tested with reference to the evidence. It is sufficient if it distinctly sets forth the law applicable to the evidence, which it must do. *Brown v. S. 6 App. 2-6; Smith v. S. 8 App. 141; Reynolds v. S. 8 App. 412; Thum v. S. 24 App. 667.* The object and purpose of the charge is to enable the jury to deduce the proper conclusion from the evidence before them, and to accomplish this purpose it should be confined and adapted to the facts in proof. *Berry v. S. 8 App. 515.* It is no objection to the charge of the court that it supposes the state of facts which the evidence showed really to exist, and deduced the legal conclusion applicable to such a state of facts. That is precisely what every charge should do. That is the purpose and design of giving instructions to the jury; it is to inform them respecting the law applicable to the particular case in hand, and the more exactly the charge is adapted to the very case, the more likely will the jury be to arrive at a correct conclusion in the application of the law to the fact. Instructions beyond what the facts call for can never subserve any beneficial purpose, and may mislead. The charge should be framed, and is to be considered with reference to the facts of the case. *O'Connell v. S. 18 Tex. 363; Hudson v. S. 40 Tex. 12; Berry v. S. 8 App. 515; Boddy v. S. 14 App. 528.* The charge should give the law applicable to the case, that is, applicable to the allegations and the facts proved, and nothing more, and it is appropriate only when there is some evidence to support it. *Schultz v. S. 5 App. 390; Drake v. S. Id. 649; Teague v. S. 4 App. 147; Sims v. S. Id. 144; Smith v. S. 7 App. 414; Warren v. S. 29 Tex. 369; Seal v. S. 28 Tex. 491; Holtzelaw v. S. 26 Tex. 682.* It is measurable by the evidence and need not transcend the legitimate deductions therefrom, and it is not incumbent on the judge to give in charge the law applicable to a deduction which the jury could not reasonably draw from the evidence. *Williams v. S. 11 App. 63; Lum v. S. Id. 483; Smith v. S. 15 App. 139; Pugh v. S. 2 App. 539.* The charge should be confined to the issues raised by the evidence. *Mayfield v. S. 23 App. 645; Boddy v. S. 14 App. 528; Johnson v. S. 13 App. 192.*

In charging the jury the judge should instruct hypothetically upon whatever state of facts there is evidence tending to prove. It is error for him to submit to the jury a fact or state of facts of which there is no evidence, or to give an instruction with reference to a state of facts of which there is no evidence. In order to justify instructions, predicated upon a supposed state of facts, it is not necessary that the judge should be entirely satisfied of such facts. If there is evidence from which the jury may infer such facts to be true, it is the duty of the judge to declare the law thereon; and it is not error for him to do so even where the evidence is very slight. *Reynolds v. S. 14 App. 427.* It would be error to charge upon a hypothetical state of case not presented by the evidence. *Taylor v. S. 17 App. 46.*

The charge is controlled absolutely by the evidence adduced on the trial. Whether or not it tends sufficiently to the establishment of a defense, or a mitigation of the offense, as to reasonably demand a charge, are questions primarily committed to the sound discretion of the trial judge. If its force is deemed very weak, trivial, light, and its application remote, the court should not charge upon it. If, however, it is so pertinent and forcible that it might in reason be expected to influence the jury in reaching a verdict, the court should so charge as to furnish them with the appropriate rule of law with reference to it. *Elam v. S. 16 App. 34.*

A charge which has no application to any evidence adduced on the trial, is erroneous and calculated to confuse the jury and mislead them, and it is radical error for the court to assume and charge upon a theory not raised or indicated by the evidence. *Foster v. S. 8 App. 248; Ross v. S. 10 App. 455; Jernigan v. S. Id. 546; Conn v. S. 11 App. 390; Taylor v. S. 13 App. 184; Hardin v. S. Id. 192; Stewart v. S. 15 App. 598; Bramlette v. S. 21 App. 611; Rosborough v. S. Id. 672; Smith v. S. 22 App. 316; McConnell v. S. Id. 354; Boren v. S. 23 App. 28; Neiderluck v. S. Id. 38; Allen v. S. 24 App. 216; Orman v. S. Id. 495.*

Where the offense charged is one of different degrees, it is not indispensable that the court should instruct as to the several degrees. It is only when the evidence renders it necessary that the law as to the several degrees should be explained. If from the evidence there is a doubt as to which of two or more degrees of the offense the defendant may be guilty, the law as to such degrees should be given in charge; but where there is no evidence tending to establish a particular grade of the offense, that grade should not be instructed upon. It is not proper, unless the evidence demands it, to give in charge all the provisions of the Code relating to an offense in all its degrees, without reference to the facts proved. Such a charge is reprobated. *Browning v. S. 1 App. 96; Holden v. S. Id. 226; Washington v. S. Id. 647; Collins v. S. 6 App. 72; Gatlin v. S. 5 App. 531; Lopez v. S. 42 Tex. 299; Anderson v. S. 15 App. 447; Gomez v. S. Id. 327; Darnell v. S. Id. 70; Smith v. S. Id. 139; Benevides v. S. 14*

App. 378; Taylor v. S. *Id.* 340; Neyland v. S. 13 App. 536; Evans v. S. *Id.* 225; Hubby v. S. 8 App. 597; Berry v. S. *Id.* 515; Hill v. S. 11 App. 456; Eanes v. S. 10 App. 421; Roberts v. S. 5 App. 141; Grissom v. S. 4 App. 374; Halbert v. S. 3 App. 656; Boyett v. S. 2 App. 93; Jones v. S. 40 Tex. 188; Hudson v. S. *Id.* 12; Meyers v. S. 33 Tex. 525; Daniels v. S. 24 Tex. 389; Granger v. S. 24 App. 45; Heard v. S. *Id.* 103; Brooks v. S. *Id.* 274; Henning v. S. *Id.* 315; Thum v. S. *Id.* 667; *ante*, §§986, 1030, 1070.

Unless the issue of limitation be raised by the evidence it is unnecessary that the charge should instruct in relation thereto. Cohen v. S. 20 App. 224; Moore v. S. *Id.* 275; Hoy v. S. 11 App. 32; Vincent v. S. 10 App. 331. But when the evidence raises such issue the court should instruct upon it. Wimberly v. S. 22 App. 506. See, *ante*, §1693.

The charge is always sufficient if it distinctly sets forth the law applicable to the case; and it is only necessary to give such instructions as are applicable to every legitimate deduction to be drawn from the facts in proof. Thum v. S. 24 App. 667; Evans v. S. 13 App. 225; Eanes v. S. 10 App. 421; Williams v. S. *Id.* 528; Smith v. S. 8 App. 141; Hulto v. S. 7 App. 44; Smith v. S. *Id.* 414; Bronson v. S. 2 App. 46; Merritt v. S. *Id.* 177; Rogers v. S. 1 App. 187; Bishop v. S. 43 Tex. 390; Maria v. S. 28 Tex. 698; Johnson v. S. 27 Tex. 758. A charge is not tested by the strict rules applicable to indictments. All that is required of a charge is that it shall present the law of the case substantially and correctly in a way that the jury will understand and not be confused and misled by it. Ashlock v. S. 16 App. 13.

§2338—**In felony must give all the law in the case.**—In a *felony* case it is the imperative duty of the court, without being requested to do so, to give in charge to the jury *all* the law applicable to the case. This requirement relates to every phase or theory of the case fairly presented by the evidence. A defendant is entitled to have a distinct and affirmative presentation to the jury by the charge of the court of the issues which arise upon the evidence, to the end that the jury shall not ignore his defenses, but may be guided to the proper verdict if they find his evidence true; and however improbable his evidence may seem to the trial court, it is his right to have its truth or falsity determined by the jury, without being forestalled by the charge of the court. A charge which presents a defense negatively is objectionable. White v. S. 18 App. 57; Burkhard v. S. *Id.* 599; Irvine v. S. 20 App. 12; Jackson v. S. 15 App. 84. Every theory of the case presented by the evidence, whether strongly or weakly supported thereby, demands instructions to the jury directly and pertinently applied thereto, and this rule applies to every theory within the scope of the indictment, which the evidence tends to establish, whether favorable to the state or the defendant. Odle v. S. 13 App. 612; Rutherford v. S. 15 App. 236. For other decisions declaring and illustrating the rules above stated, see the following: Boren v. S. 23 App. 28; White v. S. *Id.* 154; Liskoski v. S. *Id.* 165; Roberts v. S. *Id.* 176; Bond v. S. *Id.* 180; Wheelis v. S. *Id.* 238; Moseley v. S. *Id.* 409; Arrillano v. S. 24 App. 43; Gentry v. S. *Id.* 80; Guest v. S. *Id.* 235; Tillery v. S. *Id.* 251; Williams v. S. *Id.* 342; Roy v. S. *Id.* 369; Thompson v. S. *Id.* 383; McDaniel v. S. *Id.* 552; Willis v. S. *Id.* 584-587; Criswell v. S. *Id.* 606; Curtis v. S. 22 App. 227; McConnell v. S. *Id.* 354; Warren v. S. *Id.* 383; Bell v. S. 21 App. 270; Leggett v. S. *Id.* 382; Paulin v. S. *Id.* 436; Pierce v. S. *Id.* 540; Niland v. S. 19 App. 166; Gartman v. S. 16 App. 215; Benavides v. S. 14 App. 378; Lee v. S. *Id.* 266; Hackett v. S. 13 App. 406; Bennett v. S. 12 App. 15; Snowden v. S. *Id.* 105; Granger v. S. 11 App. 454; Ainsworth v. S. *Id.* 339; Knox v. S. *Id.* 148; Scott v. S. 10 App. 112; Ellison v. S. *Id.* 361; McGrew v. S. *Id.* 539; Whaley v. S. 9 App. 305; Reed v. S. *Id.* 317; Henry v. S. *Id.* 358; Greta v. S. *Id.* 429; Sims v. S. *Id.* 586; Richardson v. S. *Id.* 612; Riojas v. S. 8 App. 49; Reynolds v. S. *Id.* 412; Diggs v. S. 7 App. 359; Robinson v. S. 5 App. 519; Curry v. S. 4 App. 574; West v. S. 2 App. 209; Gibbs v. S. 1 App. 12; Farrer v. S. 42 Tex. 265; Cave v. S. 41 Tex. 182; Marshall v. S. 40 Tex. 200; Pefferling v. S. *Id.* 486; Brown v. S. 38 Tex. 482; Ake v. S. 30 Tex. 466.

As to matters of common knowledge, of which jurors are supposed to possess competent knowledge, the court is not required to instruct. Flournoy v. S. 16 Tex. 31.

It is not essential, though proper, that the charge should instruct the jury in the forms of verdicts which may be rendered in the case; but when such an instruction is given it should embrace every verdict which might be rendered in the case. Williams v. S. 24 App. 637.

Though the defendant may prove his good character, it is not necessary that the charge should instruct upon that issue. Pharr v. S. 9 App. 129. And it is error to instruct in regard to it, when there is no evidence raising the issue. Gose v. S. 6 App. 121; Hardin v. S. 4 App. 355.

§2339—**Must not be on the weight of evidence, etc.**—A charge must not assume any fact as proved against the defendant, no matter how strong the evidence may be. White v. S. 13 Tex. 133; Long v. S. 1 App. 486; Brown v. S. 3 App. 294; Webb v. S. 8 App. 115; Babb v. S. *Id.* 173; Baker v. S. 6 App. 344; Bergstrom v. S. 36 Tex. 336; Pippin v. S. *Id.* 696. But it is not error to use the form, "if it be proved so and so, then you will find," etc. McGaffey v. S. 4 Tex. 156.

When the defendant is on trial for an offense of degrees, the charge should not assume or intimate that the defendant is guilty of any particular degree instructed upon. Haynes v. S. 2 App. 84; Williams v. S. *Id.* 271.

Trial judges are strictly prohibited from expressing any opinion as to the weight of evidence, and from summing up the testimony or discussing the facts. The spirit of this provision may be violated without express comment on the evidence or positive discussion of the facts in proof. The charge should be framed so guardedly as to preclude the jury from drawing from it any inference of the opinion entertained by the judge upon the evidence. A trial judge is not only excused, but expressly and pointedly prohibited from charging on the weight of evidence, and he should exercise great caution in so framing his instructions as to not vio-



late this prohibition. The province of the court is ordinarily limited to passing upon the legality and competency of the evidence, and the jury are to judge of its weight. The charge should not intimate that any evidence before the jury is unworthy of belief. Even the appearance of an intimation as to the effect of testimony must be avoided. *Parish v. S. 45 Tex. 52; Foster v. S. 1 App. 363; Johnson v. S. Id. 610; Chapman v. S. Id. 728; Massey v. S. Id. 564; Alderson v. S. 2 App. 10; Leveritt v. S. 3 App. 214; Rice v. S. Id. 451; Fisher v. S. 4 App. 181; Stuckey v. S. 7 App. 174; Maddox v. S. 12 App. 429; McWhorter v. S. 11 App. 584.*

A charge is unexceptionable only when it states plainly and succinctly the law of the case, without expressing or intimating any opinion as to the weight of evidence, or the credibility of the witnesses, or of statements made by the defendant. The judge should not convey to the jury by any word in the charge, or in any other manner, what his impressions are as to any part of the testimony. He should not sum up or comment upon the evidence. *Gibbs v. S. 1 App. 13; Hannah v. S. Id. 579; Merritt v. S. 2 App. 177; Grantz v. S. Id. 164; Butler v. S. 3 App. 48; Rice v. S. Id. 451; Brown v. S. Id. 295; Stuckey v. S. 7 App. 174; Pharr v. S. Id. 472; Hodde v. S. 8 App. 382; Renfro v. S. 9 App. 229; Stephens v. S. 10 App. 120.*

A charge which is, in effect, a philosophic disquisition upon the force and nature of a particular species of evidence, amounts to an invasion of the province of the jury, and is error. *Walker v. S. 13 App. 618; Harrison v. S. 8 App. 183; Bouldin v. S. Id. 332; Hodde v. S. Id. 382; Walker v. S. 42 Tex. 361; Alonzo v. S. 15 App. 378.*

It is not error to charge upon the identical evidence given on the trial, but such a charge is commendable if it refrain from assuming facts, or commenting on the weight of the evidence, and from leading the jury to infer what the opinion of the judge is as to the facts. *Stephenson v. S. 4 App. 591.* And sometimes the judge is better understood if he calls attention in the charge to a particular fact controverted, for the purpose of impressing upon the jury the rules of law which should govern them in arriving at the truth, or, if a fact is not controverted, for the proper application of the law thereto. *Jones v. S. 13 Tex. 168; Cocker v. S. 31 Tex. 498; Barker v. S. 36 Tex. 201; Marshall v. S. 40 Tex. 200; Douglass v. S. 8 App. 520; Darnell v. S. 43 Tex. 147.*

It is error to instruct the jury to convict if they believe certain inculpatory evidence to be true, ignoring other evidence of an exculpatory or extenuating nature. *Howard v. S. 18 App. 348; McFarlin v. S. 41 Tex. 23.*

A reference to the indictment for a specification of the offense, or some of its descriptive ingredients, is not objectionable. *Tincher v. S. 19 Tex. 156.*

Where the legal custody of a prisoner upon a charge of felony was an issue, it was not charging upon the weight of evidence to instruct the jury that the indictment and *capias* against said party adduced in evidence were sufficient to prove such legal custody, and that it was upon a charge of felony. *Broxton v. S. 9 App. 97.* So a charge as to the title to property sufficient to sustain an indictment for arson, is not a charge on the weight of evidence. *Jones v. S. 5 App. 130.* So it is the province of the court ordinarily, and not of the jury, to construe and determine the legal effect of a writing. *Smith v. S. 24 App. 1.*

It is not improper, where on a former trial the defendant has been acquitted of a higher grade of the offense of which he is charged, for the court to so inform the jury, and to instruct them that they should not consider such high grade of offense. *Pharr v. S. 10 App. 485.* But the jury should not be informed that on a former trial the defendant was convicted of any grade of the offense. *West v. S. 7 App. 150.*

For instances of charges held to be on the weight of evidence, and, therefore, erroneous, see the following cases: *Burrell v. S. 18 Tex. 713; Clark v. S. 31 Tex. 574; Walker v. S. 37 Tex. 366; Martinez v. S. 41 Tex. 164; Morrison v. S. Id. 516; Carter v. S. 20 Tex. 339; Ring v. S. 42 Tex. 282; Walker v. S. Id. 360; Skidmore v. S. 43 Tex. 93; Smith v. S. Id. 103; Sheffield v. S. Id. 378; Bishop v. S. Id. 391; Harris v. S. 1 App. 74; Searcy v. S. Id. 440; Long v. S. Id. 466; Massey v. S. Id. 563; Rice v. S. 3 App. 451; Luckhart v. S. Id. 567; Baker v. S. 6 App. 344; Haskew v. S. 7 App. 107; Grant v. S. 2 App. 164; Merritt v. S. Id. 177; Stephens v. S. 10 App. 120; Maddox v. S. 12 App. 429; Hall v. S. 13 App. 269; Alonzo v. S. 15 App. 378; Payne v. S. 21 App. 184; Harwell v. S. 22 App. 251; Wyers v. S. Id. 258; Warren v. S. Id. 383; Willey v. S. Id. 408; Jones v. S. Id. 680; Alexander v. S. 24 App. 126; Stockman v. S. Id. 387.*

**§2340—Conflicting evidence—Impeached witnesses—Charges as to.**—It is not error to instruct the jury that they are the exclusive judges of the degree of credit to be given to the witnesses and of the weight of the evidence. And when there is a conflict in the evidence, it is not error to instruct the jury, that they should reconcile such conflict if they can, but if that is impossible, then they must decide which of the testimony is entitled to the greater credibility. It is always proper in cases of conflicting evidence to give such instructions, and in some cases it would be material error to omit them. It is not error to instruct the jury "to give the evidence such credit as they believe it entitled to, and that the presumption is that all the witnesses testified correctly." Nor is it improper to tell the jury that they might consider the age, intelligence, interest in the case, apparent prejudice of witnesses, and other circumstances in evidence in determining their credibility. *Ridens v. S. 41 Tex. 199; Morgan v. S. 44 Tex. 511; Brown v. S. 2 App. 115; Mason v. S. Id. 192; Allison v. S. 14 App. 402; see post, Art. 728.*

But it is error to instruct the jury that they must discard from their consideration any part or the whole of the testimony of any witness that they may regard as improbable or untrue, and find their verdict on such evidence as they may regard as true and worthy of credit. *Bishop v. S. 43 Tex. 440; Kelly v. S. 1 App. 628; Chester v. S. Id. 702; Butler v. S. 3 App.*

48; *Leverett v. S. Id.* 213; *Johnson v. S.* 9 App. 558; *Litman v. S. Id.* 461. An instruction is erroneous which allows the jury arbitrarily to believe or disbelieve any witness or set of witnesses; the jury should be left free to weigh the evidence. *Jackson v. S.* 7 App. 363; *Williams v. S.* 10 App. 8; *Wilbanks v. S. Id.* 642; *Johnson v. S.* 9 App. 558.

The court must not in the charge undertake to decide conflicts of evidence. That is the exclusive province of the jury. *Wasson v. S.* 3 App. 474.

§2341.—**Confessions and admissions—Charge upon.**—A jury should not be told that a defendant's admissions against himself are to be taken as true. *Grant v. S.* 2 App. 164. Nor that his explanation, when found with stolen property, if reasonable, is a circumstance in his favor, otherwise against him. *Merritt v. S.* 2 App. 177. Nor in the case of a confession, that if some of the facts confessed were found to be true by other evidence, the jury might consider them all true. *Warren v. S.* 29 Tex. 369. Nor that "voluntary confessions are the strongest and most satisfactory evidence." *Harris v. S.* 1 App. 74. Confessions, like other facts, are to be estimated and weighed by the jury. *Morrison v. S.* 41 Tex. 520. It is error to instruct the jury that a material allegation of the indictment is admitted by counsel for the defendant. No such admissions by a defendant's counsel are evidence against him, and are not a proper matter for the consideration of the jury. *Clayton v. S.* 4 App. 515.

A charge submitting a confession as evidence, if the defendant made statements which were otherwise found to be true, is erroneous, when there is no evidence that such statements were made. *Gentry v. S.* 24 App. 80.

See further, as to confessions, *post*, Arts. 749, 750, and notes thereto.

§2342.—**Circumstantial evidence—Charge as to.**—Where the guilt of the accused is dependent wholly upon circumstantial evidence, it is the duty of the court, in its charge, to apply the law applicable to such evidence, whether requested to do so or not, and a failure to do so is fundamental error, and will require a reversal of the conviction, although the error be not excepted to. *Burrill v. S.* 18 Tex. 713; *Cave v. S.* 41 Tex. 182; *Harrison v. S.* 6 App. 42; *Hunt v. S.* 7 App. 212; *Smith v. S. Id.* 382; *Struckman v. S. Id.* 581; *Ward v. S.* 10 App. 293; *Ray v. S.* 13 App. 51; *Wyers v. S. Id.* 57; *Harris v. S.* 309; *Thomas v. S. Id.* 493; *Flores v. S. Id.* 665; *Montgomery v. S. Id.* 669; *Cook v. S.* 14 App. 96; *Lee v. S. Id.* 266; *Dovalina v. S. Id.* 312; *Faulkner v. S.* 15 App. 115; *Garcia v. S. Id.* 120; *Howell v. S.* 16 App. 93; *Allen v. S. Id.* 237; *Keunada v. S. Id.* 258; *Cooper v. S. Id.* 341; *Conner v. S.* 17 App. 1; *Schindler v. S. Id.* 408; *Mathews v. S. Id.* 472; *Dupree v. S. Id.* 591; *Vaughn v. S. Id.* 562; *Murphy v. S. Id.* 645; *Black v. S.* 18 App. 124; *Sullivan v. S. Id.* 623; *White v. S. Id.* 57; *Wright v. S. Id.* 358; *Counts v. S.* 19 App. 450; *Riley v. S.* 20 App. 100; *Jackson v. S. Id.* 190; *Norwood v. S. Id.* 306; *Parker v. S. Id.* 451; *Ranurez v. S. Id.* 133; *Jack v. S. Id.* 656; *Crowell v. S.* 24 App. 404; *Fuller v. S. Id.* 596; *Guajardo v. S. Id.* 603.

It is only when the inculpatory evidence is wholly circumstantial that the trial court is required to, or should, instruct upon that character of evidence. *Tooney v. S.* 8 App. 452; *Hardin v. S. Id.* 653; *Dubose v. S.* 13 App. 418; *Wooldridge v. S. Id.* 443; *Hunnleutt v. S.* 18 App. 498; *Hart v. S.* 15 App. 202; *Buntain v. S. Id.* 575; *Wheeler v. S. Id.* 607; *Sharp v. S.* 17 App. 486; *House v. S.* 19 App. 227; *Jack v. S.* 20 App. 656; *Mackay v. S. Id.* 603; *Eckert v. S.* 9 App. 105; *Smith v. S.* 21 App. 277; *Ledbetter v. S. Id.* 344; *Ayres v. S. Id.* 399; *McCandless v. S. Id.* 411; *Jones v. S.* 23 App. 501; *Heard v. S.* 24 App. 103; *Carr v. S. Id.* 562.

No particular or definite form of language in which the court shall instruct the jury upon the character of circumstantial evidence is prescribed; but if the ideas conveyed by the charge are correct, and are so expressed as to be comprehended by the jury, it is sufficient. But the form of charge used in *Webster's case* (see *Henderson v. S.* 14 Tex. 514; *Willson's Cr. Forms*, 714), is sufficient and cannot be improved upon. *Hubby v. S.* 8 App. 597; *Rye v. S. Id.* 153; *Simms v. S. Id.* 230; *Hardin v. S. Id.* 653; *Taylor v. S.* 9 App. 100.

A charge upon circumstantial evidence should be so framed as to guard the jury from basing their findings upon mere surmises. *Myers v. S.* 6 App. 1.

See the following additional cases for charges upon circumstantial evidence held to be sufficient: *Cave v. S.* 41 Tex. 182; *Campbell v. S.* 10 App. 560; *Johnson v. S.* 18 App. 385; *Crutchfield v. S.* 7 App. 65; *Irvin v. S. Id.* 109; *Smith v. S.* 8 App. 141; *Bouldin v. S. Id.* 332; *Early v. S.* 9 App. 476.

And the following cases in which they were held to be erroneous and insufficient: *Harrison v. S.* 9 App. 407; *Post v. S.* 10 App. 579; *Bryant v. S.* 16 App. 144; *Conner v. S.* 17 App. 1; *Ninnon v. S.* 17 App. 650.

§2343.—**Alibi—Charge on.**—Where there is evidence tending to prove an *alibi*, the charge should explain the nature and character of an *alibi*. *Deggs v. S.* 7 App. 359; *McGrew v. S.* 10 App. 539; *Long v. S.* 11 App. 381; *Granger v. S. Id.* 454; *Powell v. S.* 13 App. 244; *Ninnon v. S.* 17 App. 650; *Hunnleutt v. S.* 18 App. 498; *Ayres v. S.* 21 App. 399.

But the failure to give such charge is not reversible error unless excepted to at the trial, or unless a special instruction upon the issue be requested and refused. *Davis v. S.* 14 App. 645; *McAfee v. S.* 17 App. 131; *Clark v. S.* 18 App. 467.

For charges upon *alibi* held to be sufficient, see *Walker v. S.* 6 App. 576; *Boothe v. S.* 4 App. 202; *Means v. S.* 10 App. 539; *Thornton v. S.* 20 App. 519. For approved forms of such charge, see *Willson's Cr. Forms*, 712, 713.

For charges upon *alibi* held erroneous, see *Walker v. S.* 42 Tex. 361; *Walker v. S.* 37 Tex. 367; *Humphries v. S.* 18 App. 302.

§2344.—**Extraneous matter in evidence—Charge upon.**—Where evidence of an extraneous crime has been admitted for the purpose of showing the intent of the defendant in the com-

mission of the act alleged against him, it is the duty of the trial court, in charging the jury, to explain the purpose for which such evidence was admitted, and to limit its consideration and effect to this purpose alone. *McCall v. S.* 14 App. 353; *Long v. S.* 11 App. 381. See a charge in such case held sufficient: *Tyler v. S.* 13 App. 205; *Davis v. S.* 23 App. 210; *Wheeler v. S.* 23 App. 598; *Cravey v. S.* *Id.* 677; *Littlefield v. S.* 24 App. 167; *Burks v. S.* *Id.* 332.

Where evidence of a particular nature is admitted but for one purpose, as to impeach a witness, the court should instruct the jury that they are authorized to consider it for that purpose only. *Branch v. S.* 15 App. 96; *Barron v. S.* 23 App. 462; *Tucker v. S.* *Id.* 512.

Whenever extraneous matter is admitted in evidence for a specific purpose incidental to, but which is not admissible directly to prove the main issue, and which might tend, if not explained, to exercise a wrong, undue or improper influence upon the jury as to the main issue, injurious and prejudicial to the rights of the defendant, then it becomes the imperative duty of the court, in its charge to the jury, to so limit and restrict such evidence that such unwarrantable results cannot ensue, and a failure to do so will be radical error. *Davidson v. S.* 22 App. 372; *Washington v. S.* 23 App. 336; *Maines v. S.* *Id.* 568.

**§2345—Accomplice testimony—Charge upon.**—When there is evidence implicating a state's witness as a *particeps criminis*, and the testimony of such witness is materially prejudicial to the defendant, it is incumbent on the trial court, whether asked or not, to give in charge to the jury the law governing accomplice testimony. *Winn v. S.* 15 App. 169; *Burke v. S.* *Id.* 156; *Dunn v. S.* *Id.* 560; *Howell v. S.* 16 App. 93; *Coffelt v. S.* 19 App. 436; *Fuller v. S.* *Id.* 380; *Kelly v. S.* 1 App. 628; *Hoyle v. S.* 4 App. 239; *Butler v. S.* 7 App. 635; *Barrera v. S.* 42 Tex. 260; *Tisdale v. S.* 17 App. 444; *Mercer v. S.* *Id.* 452; *Carroll v. S.* 3 App. 117; *Thomas v. S.* 43 Tex. 658.

The language of article 741, *post*, in conjunction with a definition of the term "accomplice," as used in said article, is ordinarily a sufficient charge upon the subject. *Simms v. S.* 8 App. 230. It is error to restrict the meaning of the word "accomplice" to the definition given of it in article 79 of the Penal Code. As used in article 741, *post*, it embraces all persons who are in any way implicated in the offense, whether as principals, accomplices, or accessories or otherwise, and the jury should be so instructed. *Timbrook v. S.* 18 App. 1; *Ortiz v. S.* *Id.* 282; *House v. S.* 16 App. 25; *Howell v. S.* *Id.* 93; *Zollicoffer v. S.* *Id.* 312; *Smith v. S.* 13 App. 507; *Phillips v. S.* 17 App. 167; *Harrison v. S.* *Id.* 442; *Irvin v. S.* 1 App. 301; *Kelley v. S.* *Id.* 628; *Williams v. S.* 42 Tex. 392; *Barrera v. S.* 42 Tex. 263; *Roach v. S.* 4 App. 46; *Davis v. S.* 2 App. 588; *Jones v. S.* 3 App. 575; *Crowell v. S.* 24 App. 404.

Where there is no evidence implicating a witness as an accomplice, the court should not charge the law applicable to accomplice testimony. *Kerrigan v. S.* 21 App. 487; *Pitner v. S.* 23 App. 366.

The meaning of the term "corroborating evidence" is plain, and no definition thereof need be attempted in the charge. *Hozier v. S.* 6 App. 501.

While in some cases it may be proper for the court to assume that a particular witness is an accomplice, and so instruct the jury, ordinarily the better and safer practice is to submit the question to the jury, taking care to instruct clearly and fully as to what will constitute an accomplice under article 741, *post*. *Zollicoffer v. S.* 16 App. 312.

For an approved form of a charge upon accomplice testimony, see *Willson's Cr. Forms*, 714a. See, also, an approved charge in *Avery v. S.* 10 App. 199. For erroneous charges, see *Crowell v. S.* 24 App. 404; *Spears v. S.* *Id.* 537.

For the statutory provision and decisions thereunder as to accomplice testimony, see, *post*, §§2449-2455.

**§2346—Presumption of innocence and reasonable doubt.**—Every person accused of crime is presumed to be innocent until his guilt is established by legal evidence, and in case of reasonable doubt as to his guilt, he is entitled to be acquitted. And in all cases of felony the jury should be so instructed. See, *ante*, §§28-33; *post*, §§2425-2429.

**§2347—Particular offenses and defenses—Charges as to.**—For decisions relating to particular offenses and defenses, see "charge of the court" under appropriate heads.

**§2348—Penalty—Charge as to.**—If the charge incorrectly instructs as to the penalty of the offense, it is fundamental error for which the conviction will be set aside, although the error be not excepted to, and although it may be an error enuring to the benefit of the defendant. *Buford v. S.* 44 Tex. 525; *Searcy v. S.* 1 App. 514; *Garnett v. S.* *Id.* 605; *Robinson v. S.* 2 App. 390; *Hamilton v. S.* *Id.* 494; *Collins v. S.* 5 App. 38; *Jones v. S.* 7 App. 338; *Allen v. S.* *Id.* 298; *Veal v. S.* 8 App. 474; *Spears v. S.* *Id.* 467; *Rodriguez v. S.* *Id.* 129; *Bouldin v. S.* *Id.* 624; *Wilson v. S.* 14 App. 524; *Turner v. S.* 17 App. 587; *Howard v. S.* 18 App. 348; *Gardenhire v. S.* *Id.* 566; *Cohen v. S.* 11 App. 337; *Bostick v. S.* 22 App. 136; *Wright v. S.* 23 App. 313; *Myers v. S.* 9 App. 157; *Key v. S.* 12 App. 508.

When alternate penalties are attached to an offense the court must instruct thereon. *Cesure v. S.* 1 App. 19; *Lewis v. S.* *Id.* 323; *Ringo v. S.* 2 App. 291.

For statutes and other decisions as to punishments, see Penal Code, Title 2, Chap. 2; *ante*, §§40, 41, 42. See, also, the several offenses.

**§2349—Form, etc., of the charge—Decisions as to.**—No general charge applicable to any particular offense can be devised. *Atkinson v. S.* 20 Tex. 522. Substantial accuracy only is required. *Alexander v. S.* 12 Tex. 540; *Ashlock v. S.* 16 App. 13.

Instructions should not be presented in the form of abstract propositions, but should be constructed upon the evidence in the particular case on trial. *Burrill v. S.* 18 Tex. 713; *Marshall v. S.* 40 Tex. 200; *Lopez v. S.* 42 Tex. 298; *Sutton v. S.* 41 Tex. 513; *Lindsay v. S.* 1

App. 327; *Miles v. S.* *Id.* 510; *Pugh v. S.* 2 App. 539; *Richardson v. S.* 7 App. 486; *Francis v. S.* *Id.* 501; *Davis v. S.* 10 App. 31.

A proper charge should suppose a state of facts shown to exist, and deduce the legal conclusions applicable to such facts. *O'Connell v. S.* 18 Tex. 343. It should not extend, beyond a plain statement of the law of the case, into philosophic dissertations upon the nature of evidence, the proper process of reasoning upon the facts, or the precautionary considerations to be borne in mind in coming to a proper conclusion. *Brown v. S.* 23 Tex. 195; *Harrison v. S.* 8 App. 183; *Hodde v. S.* *Id.* 383; *Walker v. S.* 13 App. 618; *Sisk v. S.* 9 App. 246.

It should not attempt novel expositions of the law, in cases in which the principles have been fully settled. *Hunt v. S.* 7 App. 212.

The charge should be so adapted to the pleadings and evidence, that a jury cannot misunderstand its meaning and application. *Reardon v. S.* 4 App. 602; *Kendall v. S.* 8 App. 569. It may be defective, though in the language of the statute, if it fails to apply the law to the facts. *Francis v. S.* 7 App. 501.

It should not be argumentative, but such a charge is not necessarily bad, where not calculated to arouse the sympathies or excite the passions of the jury. *Brown v. S.* 23 Tex. 195; *Stuckey v. S.* 7 App. 174; *Cesure v. S.* 1 App. 19.

Frequent repetition of any principle of law involved in a case should be avoided. *Irvine v. S.* 20 App. 12. It should not give undue prominence to immaterial facts or immaterial considerations. *Long v. S.* 1 App. 710.

Defenses should be presented by the charge distinctly, fully and in an affirmative, not merely a negative form. *Irvine v. S.* 20 App. 12; *White v. S.* 18 App. 57; *Reynolds v. S.* 8 App. 412; *Thompson v. S.* 24 App. 383; *Greta v. S.* 9 App. 429; *Ainsworth v. S.* 11 App. 339; *Jackson v. S.* 15 App. 84.

The better practice is to remind the jury in the charge that their findings must be predicated alone upon the evidence adduced on the trial. *Miles v. S.* 14 App. 436.

The charge should always contain the instruction that if the jury do not believe the defendant guilty, they should acquit him. *Steagald v. S.* 22 App. 464.

Paragraphs of a charge should be complete, and those relating to the same subject should be so arranged in the charge and connected, that they can be readily understood by the jury as bearing upon the same subject, and to be considered together with reference to such subject. *Tillery v. S.* 24 App. 251; *Smith v. S.* 19 App. 95; *Nolan v. S.* 8 App. 585.

**§2350—Charge must be construed, how.**—In determining the sufficiency of a charge it must be considered and construed as a whole, and not by isolated parts or paragraphs. If as a whole it is correct and sufficient, it meets the demands of the law. *Hart v. S.* 21 App. 163; *Davis v. S.* 19 App. 201; *Hildreth v. S.* *Id.* 195; *Lewis v. S.* 18 App. 401; *Elam v. S.* 16 App. 34; *Smith v. S.* 21 App. 316; *Hodges v. S.* 22 App. 415; *Heard v. S.* 24 App. 193; *McCleave-land v. S.* *Id.* 202; *Logan v. S.* 17 App. 50; *Hardin v. S.* 8 App. 633; *Street v. S.* 7 App. 5; *Boothe v. S.* 4 App. 202; *Hudson v. S.* 10 App. 215; *Browning v. S.* 1 App. 96; *Johnson v. S.* 27 Tex. 758; *Jordan v. S.* 10 Tex. 479; *Ross v. S.* 29 Tex. 499; *Gatlin v. S.* 8 App. 531; *Thrasher v. S.* 3 App. 281; *Brownlee v. S.* 13 App. 255.

In construing a charge regard must be had to the connection and interdependence of its several clauses. *Harrison v. S.* 8 App. 653. And its language must be interpreted with reference to the evidence which elicited it. *Peck v. S.* 9 App. 70.

**§2351—Charge may be corrected, etc., when.**—A charge may be corrected before it is read. *Boothe v. S.* 4 App. 202; *Baker v. S.* 7 App. 612. That it miscalls the name of a co-defendant not on trial, in its introductory part, is immaterial. *Crutchfield v. S.* 7 App. 379. So, it is immaterial if it misstates the year of the offense. *McCoy v. S.* 7 App. 65. But after the charge has been read and filed it constitutes part of the record in the cause, and its alteration or amendment then, without the consent of the defendant, is such error as will necessitate a reversal of the conviction. *Granger v. S.* 11 App. 454.

**§2352—Lost charge may be substituted.**—When a charge has been lost or destroyed it may be supplied in the trial court in the same manner as any other lost or destroyed record may be supplied. *Lunsford v. S.* 1 App. 448; *Rogers v. S.* 43 Tex. 407. But the substitution cannot be made after appeal taken. See, upon the subject of substitution, *McMillan v. S.* 18 App. 375; *Strong v. S.* 18 App. 19; *Gillespie v. S.* 16 App. 641; *Turner v. S.* 16 App. 318; *Harwood v. S.* *Id.* 416; *ante*, §§2005, 2006. See Article 849, *post*, recently amended, which permits the substitution to be made after an appeal has been taken.

**§2353—ART. 679.—Either party may ask written instructions.**—After or before the charge of the court to the jury the counsel on both sides may present written instructions and ask that they be given to the jury. The court shall either give or refuse these charges, with or without modification, and certify thereto; and when the court shall modify a charge it shall be done in writing, and in such manner as to clearly show what the modification is. [O. C. 596.]

**§2254—Requested instructions—Decisions as to.**—A requested instruction should be presented in the very language desired. *Helbron v. S.* 2 App. 537. The trial court is not bound to modify or qualify an illegal or erroneously requested instruction. *Lawrence v. S.* 20 App. 536.

It is not error to refuse a special instruction, although the same is correct, if the charge given to the jury presents correctly the law controlling the subject matter of such special instruction. When the charge given to the jury embraces all of the law of the case substantially, special instructions are properly refused. *Holmes v. S.* 20 App. 509; *Bond v. S. Id.* 427; *Collins v. S. Id.* 399; *Moore v. S. Id.* 233; *Hawkins v. S.* 17 App. 593; *Johnson v. S. Id.* 565; *Reynolds v. S. Id.* 413; *Conner v. S. Id.* 1; *Sewell v. S.* 15 App. 56; *Allison v. S.* 14 App. 402; *Bohannon v. S. Id.* 271; *Brownlee v. S.* 13 App. 255; *Early v. S.* 9 App. 476; *Brown v. S. Id.* 81; *Heard v. S. Id.* 1; *Hunter v. S.* 8 App. 75; *Cordova v. S.* 6 App. 445; *Phillips v. S. Id.* 44; *Proffit v. S.* 5 App. 51; *Henderson v. S. Id.* 134; *Robinson v. S.* 15 Tex. 311; *Shuetz v. S.* 13 Tex. 401; *Henderson v. S.* 12 Tex. 525; *Teague v. S.* 4 App. 147; *Day v. S.* 21 App. 213; *Smith v. S. Id.* 277; *Bradberry v. S.* 22 App. 273; *Rummel v. S. Id.* 558; *Pless v. S.* 23 App. 73; *McVey v. S. Id.* 659; *Carr v. S.* 24 App. 562.

If the requested instruction be upon the weight of the evidence, or unwarranted by the evidence, or otherwise incorrect or improper, it should be refused. *Payne v. S.* 21 App. 184; *Chester v. S.* 1 App. 702; *Priesmuth v. S. Id.* 480; *McMahon v. S. Id.* 102; *Robertson v. S. Id.* 312; *Bejarano v. S.* 6 App. 265; *Hatch v. S. Id.* 334; *Mayfield v. S.* 44 Tex. 59; *Ramey v. S.* 14 Tex. 409; *Needham v. S.* 19 Tex. 332; *Irvin v. S.* 7 App. 109; *Brown v. S.* 9 App. 81; *Taylor v. S.* 14 App. 340; *Allison v. S. Id.* 402; *Clark v. S.* 23 App. 260; *Sparks v. S. Id.* 447; *McVey v. S. Id.* 659; *Alexander v. S.* 24 App. 126; *Anderson v. S. Id.* 705.

If in the mind of the trial judge it be doubtful whether or not a requested instruction should be given, and such instruction be abstractly correct, the doubt should be resolved in favor of the defendant, and such instruction, if asked by the defendant, should be given. *Henderson v. S.* 5 App. 134; *Summers v. S. Id.* 365; *Pocket v. S. Id.* 552. It is the better practice to give every instruction asked by the defendant, unless it is manifestly not the law of the case, no matter if it has already been given in the main charge. *Banks v. S.* 7 App. 591. But it is not error to refuse to repeat an instruction already given. *Pocket v. S.* 5 App. 552.

It is the duty of the court to give charges asked, with or without modification, or to refuse them. When they are modified the modification must be in writing. *McMahon v. S.* 1 App. 102; *Jones v. S.* 22 App. 680; *Sparks v. S.* 23 App. 447.

If requested instructions are "given" or "refused" they must be authenticated by the judge's signature; and where nothing indicates that they were refused, it will be presumed, on appeal, that they were given. *Carr v. S.* 5 App. 153; *Johnson v. S.* 7 App. 210; *Seal v. S.* 28 Tex. 491; *Jeffries v. S.* 9 App. 598.

If a requested instruction be given, it should be signed by the judge, filed and read to the jury. If refused it should be certified as refused and filed, and the jury should not be allowed to take a refused charge with them in their retirement. *Irvine v. S.* 18 App. 51; *Hildreth v. S.* 19 App. 195. It is no reason for refusing a special instruction that it was not filed before it was presented. *Lawrence v. S.* 11 App. 306.

Refusal of an instruction which directs the attention of the court to a proper issue, with proper modifications demanded by the evidence, is error. *White v. S.* 10 App. 381. Requested instructions, when correct in principle and applicable to the case, and when not embraced in the general charge, should be given. See the following cases for instances in which it was held error to refuse requested instructions: *Black v. S.* 1 App. 369; *Ross v. S.* 9 App. 476; *Dreyer v. S.* 11 App. 454; *Gabrielski v. S.* 13 App. 428; *Evans v. S.* 15 App. 31; *Stanley v. S.* 16 App. 392; *Payne v. S.* 17 App. 40; *Johnson v. S.* 19 App. 545; *Clayton v. S.* 21 App. 343; *Gamel v. S. Id.* 357; *Liggett v. S. Id.* 382; *Farmer v. S. Id.* 423; *Wyers v. S. Id.* 448; *McGee v. S. Id.* 670; *Tucker v. S.* 699; *Shultz v. S.* 22 App. 16; *Smith v. S. Id.* 196; *Harwell v. S. Id.* 251; *Williams v. S. Id.* 332; *Willey v. S. Id.* 408; *White v. S.* 23 App. 156; *Wheells v. S. Id.* 238; *Moseley v. S. Id.* 409; *Barron v. S. Id.* 462; *Guest v. S.* 24 App. 235; *Willis v. S. Id.* 584-587.

**§2355 — ART. 680. — Charges shall be certified by judge.**—The general charge given by the court, as well as those given or refused at the request of either party, shall be certified by the judge and filed among the papers in the cause, and shall constitute a part of the record of the cause. [O. C. 595.]

**§2356—Decisions under preceding article.**—The general charge and special instructions given or refused at the request of either party, must be certified by the judge. The official signature of the judge is all the certificate or authentication required. *Jeffries v. S.* 9 App. 598; *Roberts v. S.* 5 App. 141; *Carr v. S. Id.* 153; *Henderson v. S. Id.* 134; *Williams v. S.* 18 App. 409; *Hildreth v. S.* 19 App. 195.

The main charge, as well as all requested charges given or refused, must be filed by the clerk of the trial court, and the filing must be authenticated by the official signature of the clerk. The proper practice is to require the clerk to place his file mark on the charge as soon as it is read, and before it is delivered to the jury. In a felony case, on appeal, the conviction will be set aside, unless the transcript contains a charge duly authenticated by the signature of the judge and the file mark of the clerk. *Haynie v. S.* 3 App. 223; *Parchman v. S. Id.* 225; *Krebs v. S. Id.* 348; *Richards v. S. Id.* 423; *Clampitt v. S. Id.* 638; *Thompson v. S.* 4 App. 44; *Hunt v. S. Id.* 53; *Long v. S. Id.* 81; *Doyle v. S. Id.* 253; *Richarte v. S.* 5 App. 359; *Hill v. S. Id.* 559; *Williams v. S.* 18 App. 409.

But where the record showed that the charge was authenticated by the official signature of the judge, and had been filed by the clerk, but not filed until one day after the trial, it was

held that the objection that it had not been filed at the proper time could not be entertained when presented for the first time on appeal. *Lowe v. S.* 11 App. 253.

The file marking may be entered *nunc pro tunc*, even at a subsequent term, but not after an appeal has been taken, and it is immaterial that the order to file *nunc pro tunc* is made by the successor in office of the judge before whom the trial was had. *Nettles v. S.* 4 App. 337; *Hill v. S.* *Id.* 559.

An agreement of counsel, in the transcript, as to what the charge was, will not be considered on appeal. *Lockett v. S.* 40 Tex. 4. Nor will a paper purporting to be the charge, but which is not signed by the judge or otherwise authenticated. *Wheelock v. S.* 15 Tex. 253; *Smith v. S.* 1 App. 408; *Lindsay v. S.* *Id.* 584; *West v. S.* 2 App. 209; *Hubbard v. S.* *Id.* 508.

That the charge bears the file mark in another case is not material. *Austin v. S.* 42 Tex. 355.

On appeal the file mark should appear in the body of the record, and not in the margin merely. *Smith v. S.* 1 App. 408.

It was held in one case that where the judgment recited that the jury received the charge of the court, the mere absence from the record of the charge would not be cause for reversal, but it would be presumed that the clerk, in making up the transcript, had omitted the charge. *Tullis v. S.* 41 Tex. 598. This decision does not appear to be in harmony with more recent decisions cited above.

**§2357—ART. 681.—No charge in misdemeanor, except, etc.—**In criminal actions for misdemeanor the court is not required to charge the jury, except at the request of the counsel on either side; but when so requested shall give or refuse such charges, with or without modification, as are asked in writing. [O. C. 598.]

**§2358—ART. 682.—No verbal charge, except, etc.—**No verbal charge shall be given in any case whatever, except in cases of misdemeanor, and then only by consent of the parties. [Added in revising.]

**§2359—Decisions under two preceding articles.—**In misdemeanors the court is not absolutely required to charge the jury. A charge is only required to be given when requested by either party. And when a charge is requested it must be in writing, and in no case can a verbal charge be given except by consent of the parties. Nor can a requested charge be modified verbally over the objection of the defendant. *Killman v. S.* 2 App. 222; *Goode v. S.* *Id.* 520; *Chamberlain v. S.* *Id.* 451; *Hobbs v. S.* 7 App. 117; *Howard v. S.* 8 App. 612; *Jordan v. S.* 5 App. 422; *Trippett v. S.* *Id.* 595; *Williams v. S.* *Id.* 615.

It is error to refuse an appropriate instruction when properly requested. *Ross v. S.* 9 App. 275. And when charges are requested they must be given with or without modification, or must be refused. *Melton v. S.* 12 App. 488.

Reading law to the jury is a *verbal* and not a *written* charge, and is reversible error if excepted to at the time. *Wilson v. S.* 15 App. 150; *Carr v. S.* 41 Tex. 543. But in *Hobbs v. S.* 7 App. 117, it was held that the judge may read from the statutes such portions thereof as are necessary to inform the jury of the nature, definition and punishment of the offense. It will be seen that this last cited decision is in conflict with the two decisions before cited. It, in effect, overrules *Carr v. S.* *supra*, and is itself, in effect, overruled by *Wilson v. S.* *supra*.

It will be presumed on appeal that a verbal charge, given on the trial, was correct, unless it be made to appear otherwise by a bill of exceptions thereto taken at the trial. But such presumption does not obtain with reference to a written charge appearing in the record. *Newton v. S.* 3 App. 245.

If the record shows no written charge, it will be presumed, in the absence of anything to the contrary, that no charge was given, or that a verbal charge was given by consent of the parties. *Carr v. S.* 5 App. 153.

If a verbal charge be given over the objection of the defendant, it will not be ground for reversal, unless it be excepted to at the time, and the error be presented by bill of exception. It is too late to complain of the error in a motion for a new trial. *Vanwey v. S.* 41 Tex. 639; *Franklin v. S.* 2 App. 8; *Goode v. S.* *Id.* 520; *Lawrence v. S.* 7 App. 192.

**§2360—ART. 683.—Judge shall read to jury, what.—**When charges are asked the judge shall read to the jury only such as he gives. [O. C. 600.] *Irvine v. S.* 18 App. 51.

**§2361—ART. 684.—Jury may take charge with them.—**The jury may take with them, in their retirement, the charges given by the court after the same have been filed, but they shall not be permitted to take with them any charge, or portion of a charge, that has been asked of the court and which the court has refused to give. [O. C. 601.]

*Irvine v. S.* 18 App. 51; *post.* §2380.

**§2362—ART. 685.—Judgment will be reversed on appeal, when, etc.—**Whenever it appears by the record in any criminal action, upon appeal

of the defendant, that any of the requirements of the eight preceding articles have been disregarded, the judgment shall be reversed; *provided*, the error is excepted to at the time of the trial. [O. C. 602.]

§2363—**Decisions under preceding article.**—If the error, however immaterial it may be, is promptly excepted to, and presented by a proper bill of exception on appeal, the statute is mandatory that the conviction shall be set aside, without inquiry as to the effect of such error upon the jury. *Marshall v. S. 40 Tex. 200; Bishop v. S. 43 Tex. 390; Heath v. S. 7 App. 465; Spears v. S. 8 App. 465; Fury v. S. Id. 471; Harrison v. S. Id. 183; Bouldin v. S. Id. 332; Tueller v. S. Id. 501; Johnson v. S. 1 App. 609; Mace v. S. 9 App. 110; Vincent v. S. Id. 303; Whaley v. S. Id. 305; McGrew v. S. 10 App. 539; Buntain v. S. 15 App. 485; Goode v. S. 16 App. 411; White v. S. 17 App. 188; Niland v. S. 19 App. 166; Bravo v. S. 20 App. 188; Clanton v. S. Id. 615; Paulin v. S. 21 App. 436; McCandless v. S. Id. 411; Leache v. S. 22 App. 279; McConnell v. S. Id. 354; Jackson v. S. Id. 442; Jones v. Id. 680; Levine v. S. Id. 683; Gentry v. S. 24 App. 80; Behrens v. S. 14 App. 121.*

If the error be not excepted to at the proper time, the next point at which it should be objected to is in a motion for a new trial. But, when the objection is presented for the first time in a motion for a new trial, it is subject to another and a very different rule than when it is presented by proper bill of exception, which rule is, that if under all the circumstances as exhibited in the record the error was "calculated to injure the rights of the defendant," the conviction will be set aside; otherwise, the error will be deemed immaterial, and the conviction will not be disturbed because of it. If the objection be still further delayed, and for the first time presented on appeal, the conviction will not be disturbed because of the error, unless it be an error of a fundamental nature; that is, if the error be a material misdirection of the law applicable to the case, or be a failure to give in charge the law required by the evidence in the case, and such affirmative error, or such error of omission, is calculated, under all the circumstances of the case, to injure the rights of the defendant, the conviction will be set aside. *Bishop v. S. 43 Tex. 309; Tueller v. S. 8 App. 501; Mace v. S. 9 App. 110; Vincent v. S. Id. 303; Whaley v. S. Id. 305; Henry v. S. Id. 358; Scott v. S. 10 App. 112; Erwin v. S. Id. 700; Williams v. Id. 8; St. Clair v. S. 11 App. 297; Holmes v. S. Id. 223; Gardner v. S. Id. 265; Hill v. S. Id. 379; McWhorter v. S. Id. 584; Powell v. S. 12 App. 238; Randle v. S. Id. 250; Maddox v. S. Id. 429; Gonzales v. S. Id. 657; Ray v. S. 13 App. 682; Wyers v. S. Id. 57; Caruthers v. S. Id. 339; Thomas v. S. Id. 493; Flores v. S. Id. 665; Montgomery v. S. Id. 669; McNair v. S. 14 App. 78; Cook v. S. Id. 96; Davis v. S. Id. 645; Moore v. S. 15 App. 1; Smith v. S. Id. 139; Burke v. S. Id. 156; Gilley v. S. Id. 287; Mason v. S. Id. 534; Elam v. S. 16 App. 34; Lellard v. S. 17 App. 114; Fonville v. S. Id. 368; Greeney v. S. Id. 395; Langford v. S. Id. 445; Lewis v. S. 18 App. 401; Miller v. S. Id. 34; White v. Id. 57; Black v. S. Id. 124; Nairn v. S. Id. 260; Wilson v. S. Id. 270; Howard v. S. Id. 348; Mendiola v. S. Id. 462; Clark v. S. Id. 467; Gardenhire v. S. Id. 565; Smith v. S. 19 App. 95; Arto v. S. Id. 126; Hil-dreth v. S. Id. 195; White v. S. Id. 343; Counts v. S. Id. 450; Riley v. S. 20 App. 100; Ramirez v. S. Id. 133; Cunningham v. S. Id. 162; Jackson v. S. Id. 190; Collins v. S. Id. 197; Shubert v. S. Id. 320; Crist v. S. 21 App. 361; Ayres v. S. Id. 399; Pierce v. S. Id. 540; Washington v. S. 22 App. 26; Parker v. S. Id. 105; Bostic v. S. Id. 136; Curtis v. S. Id. 227; Davidson v. S. Id. 372; Williams v. S. Id. 497; Taylor v. S. Id. 529; Leach v. S. Id. 279; Smith v. S. Id. 316; Washington v. S. 23 App. 336; Maines v. S. Id. 568; Liskowski v. S. Id. 165; Roberts v. S. Id. 170; Steber v. S. Id. 176; Bond v. S. Id. 180; Davis v. S. Id. 210; Cravey v. S. Id. 677; White v. S. Id. 154; Pitner v. S. Id. 366; Tucker v. S. Id. 512; Williams v. S. 24 App. 17; Tillery v. S. Id. 251; Burks v. S. Id. 342; Crowell v. S. Id. 404; McDaniel v. S. Id. 552; Willis v. S. Id. 584; Fuller v. S. Id. 596; Guajardo v. S. Id. 603.*

In misdemeanors, as a general rule, an error in the charge will not be revised unless it is excepted to at the trial, and presented by proper bill of exception, and, furthermore, if the defendant desires further instructions, he must present them in writing, and if they be refused, he must promptly except to such refusal, and present this action of the court by proper bill of exception, or the matter will not be considered on appeal. *O'Connell v. S. 18 Tex. 343; Jackson v. S. 25 Tex. Sup. 229; Mooring v. S. 42 Tex. 85; Browning v. S. 1 App. 96; Foster v. S. Id. 363; Porter v. S. Id. 477; Goode v. S. 2 App. 520; Campbell v. S. Id. 187; Franklin v. S. Id. 8; Campbell v. S. 3 App. 33; Forrest v. S. Id. 232; Work v. S. Id. 233; Brown v. S. Id. 401; Richards v. S. Id. 423; Hobbs v. S. 7 App. 117; Winn v. S. 11 App. 304; Loyd v. S. 19 App. 321; Sparks v. S. 23 App. 447.*

But if the error in the charge be a fundamental one, the conviction will be set aside, although such error was not excepted to. *Loyd v. S. 19 App. 321; Haynes v. S. 2 App. 84; Allen v. S. 7 App. 298; Veal v. S. 8 App. 474; Marks v. S. 10 App. 334.*

The action of the court in refusing a requested instruction will not be revised on appeal in the absence of a bill of exception reserved thereto, unless such action constitutes fundamental error. *Shubert v. S. 20 App. 320.*

In the absence of a statement of facts or a bill of exception, there is nothing to be considered on appeal but the sufficiency of the indictment, and the correctness of the charge of the court when viewed with reference to the indictment. If the charge under any state of proof would be correct under the indictment, it will be presumed that there was evidence warranting it. It is only when the charge is not warranted by the indictment, or by any state of facts that could have been proved, that it will be revised in the absence of a statement of facts or bill of exception. *Banks v. S. 24 App. 559; Nairn v. S. 18 App. 260; White v. S.*

9 App. 41; *Early v. S. Id.* 476; *Brown v. S.* 16 App. 197; *Henderson v. S.* 20 App. 320; *Banks v. S.* 24 App. 559.

The refusal of a requested instruction cannot be revised, no matter how correct, in the abstract, such instruction may be in the absence of a statement of facts. *Mitchell v. S.* 2 App. 404; *Brookes v. S.* 3 App. 227. Ordinarily, when a charge redounds to the benefit of the defendant, he cannot be heard to complain of it, however erroneous it may be. *McClelland v. S.* 24 App. 202.

**§2364—ART. 686.—Bill of exceptions.**—On the trial of any criminal action the defendant, by himself or counsel, may tender his bill of exceptions to any decision, opinion, order or charge of the court or other proceedings in the case, and the judge shall sign such bill of exceptions, under the rules prescribed in civil suits, in order that such decision, opinion, order or charge may be revised upon appeal. [O. C. 603.]

See Willson's Cr. Forms, 723-731; see Sayles' Civ. Stat., Arts. 1358-1367 and notes; also, Rules for District Court, 53-60, 2 App. 665.

**§2365—When exception relating to charge must be reserved.**—Bills of exception relating to the charge of the court may be taken at any time before the trial is concluded, and the trial is not concluded until the verdict is returned into court and received. It is not required that the defendant shall specifically except to the charge as given, or to the action of the court refusing a requested instruction, at the very time that the one is given, or the other refused, but such exception may be made after the jury has retired from the box. All that is required is that general exception be taken at the time, with a request for time to prepare a bill containing the specific objections, and a preparation and presentment of such bill to the judge before the verdict is returned, in order that the court may have the opportunity to correct its charge, if it so desires. *Phillips v. S.* 19 App. 158; *McCall v. S.* 14 App. 453.

**§2366—Bill of exception must be prepared and certified, when.**—A bill of exception for any purpose, to be considered on appeal, must be prepared and presented to the judge during the term of the court at which the same is taken, and within ten days after the conclusion of the trial, and a trial is concluded by the judgment overruling a motion for new trial or in arrest of judgment, or when no such motion is made, when the verdict is received. *Harrison v. S.* 16 App. 325; *Morris v. S.* 17 App. 660; *Shubert v. S.* 20 App. 320; *Stewart v. S.* 24 App. 418; *Cummins v. S.* 12 App. 121. The limitation of ten days applies to the time of presentation to the judge, and not to the time of filing. *Golden v. S.* 22 App. 1; *Clement v. S. Id.* 23.

But if the trial court, by order entered of record, allows a statement of facts to be prepared and filed within ten days after the adjournment of the court, exceptions to evidence admitted over defendant's objections may be embodied in it, and will be considered on appeal. *Keeton v. S.* 10 App. 686.

**§2367—Time should be allowed to prepare bill.**—Reasonable requests for time to prepare a bill of exceptions should always be granted, and the refusal of such request is error, but is not reversible error, unless it be made to appear that injury probably resulted to the defendant from such refusal. *Rosborough v. S.* 21 App. 672; *Smith v. S.* 19 App. 95; *Kennedy v. S. Id.* 618; *Brown v. S.* 13 App. 59; *Sager v. S.* 11 App. 110; *Knox v. S. Id.* 148; *Powers v. S.* 23 App. 42.

**§2368—Bill of exception must show, what.**—The allegations of a bill of exceptions should be full and explicit, so that the matters presented for revision may be comprehensible without recourse to inference. Inferences will not be indulged to supply omissions in a bill of exceptions. The bill must be so full and certain in its statements, that in and of itself it will disclose all that is necessary to manifest the supposed error. It must sufficiently set out the proceedings and attendant circumstances below, to enable the appellate court to know certainly that error was committed. *Eldridge v. S.* 12 App. 208; *Davis v. S.* 14 App. 645; *Walker v. S.* 9 App. 200; *White v. S. Id.* 41; *Yanez v. S.* 6 App. 429; *Wright v. S.* 10 App. 476; *Balinger v. S.* 11 App. 323; *Pierson v. S.* 18 App. 524; *Smith v. S.* 19 App. 95; *Cooper v. S.* 22 App. 419; *Buchanan v. S.* 24 App. 195; *Woodson v. S. Id.* 153; *Henning v. S. Id.* 315; *Gilliland v. S. Id.* 524.

A bill of exception which assails generally the entire charge of the court, specifying no particular error, is not entitled to any consideration. *Williams v. S.* 22 App. 497; *Smith v. S. Id.* 316; *Hennessey v. S.* 23 App. 340.

**§2369—Bill must be authenticated, and how.**—An unauthenticated bill of exception amounts to nothing, and will not be considered. *Hill v. S.* 10 App. 673. A bill of exceptions must be authenticated in one of two ways: 1. By the official signature of the judge who tried the case. 2. By bystanders in the manner provided by the statute. For the rules governing bills of exception in civil cases, and which are in the main applicable in criminal cases, see Sayles' Civ. Stat., Arts. 1358-1367 and notes; Rules for District Court, 53-60, 2 App. 665; see, also, *McDow v. S.* 10 App. 98; *Owens v. S.* 4 App. 153.

Affidavits will not suffice to authenticate the recitals in a bill of exception which are qualified or disputed by the trial judge in his note of explanation thereto. If the court refuses a full and fair bill of exception, the defendant is authorized to resort to bystanders. *Lindley v. S.* 11 App. 283.



A trial judge should refuse to sign a bill of exceptions which, in his opinion, does not truthfully recite proceedings. He should not sign a bill, and by way of explanation contradict its recitals. *Tyson v. S. 14 App. 388.*

A paper purporting to be a bill of exception signed by bystanders will not be recognized and considered as part of the record, unless it has the statutory requisites of a bill so signed. The recital that "the judge having refused to sign this it is signed by the undersigned bystanders," with three names subscribed thereto, does not authenticate it. *Knight v. S. 7 App. 206; Sayles' Civ. Stat., Art. 1367; Houston v. Jones, 4 Tex. 170; Hardie v. Campbell 63 Tex. 292.*

When a bill of exception contradicts the record as to a specific fact, the bill will be held to control and to state the fact truly. *Gaines v. Salmon, 16 Tex. 311; Smith v. S. 4 App. 626; Harris v. S. 1 App. 74.*

The judge's authentication of a bill does not establish the validity of its grounds of exception, but merely certifies its presentation to him and his disposition of it. *Hennessey v. S. 23 App. 340; Smith v. S. 4 App. 626.*

A recital in the judgment that the defendant excepted, will not answer as a bill of exceptions, and will not be considered, nor will an attorney's "protest" not signed by the judge. *Caldwell v. S. 2 App. 53; Wakefield v. S. 3 App. 39; Davis v. S. 40 Tex. 478.*

If the judge certifies that the bill was not "allowed," but orders it made part of the record, it will be considered on appeal as sufficiently authenticated by his signature. *Bell v. S. 2 App. 215.*

On signing a bill of exception, the judge may, in his discretion, very properly explain the rulings excepted to. *Bejarano v. S. 6 App. 265.*

**§2370—Bill of exception, when necessary.**—When matters of fact are involved in a ruling of the court complained of, they must be authenticated by proper bill of exception, and merely setting them out as grounds for new trial, or assigning them as errors, will not suffice. *Marshall v. S. 5 App. 273; McDaniel v. S. Id. 475; Hicks v. S. Id. 488; Samschen v. S. 8 App. 45.*

A bill of exceptions is necessary in the following instances: Refusing application for continuance or postponement of a cause. *Ante, §2157.* Action of the court with reference to change of venue. *Ante, §2212.* When the defendant was not served with a copy of the indictment. *Ante, §2098.* Objections relating to the formation of a jury. *Ante, §§2293, 2294.* Objections relating to the argument of counsel. *Ante, §2321.* Objections relating to the charge of the court. *Ante, §§2363, 2364.* Objections to the admission or rejection of evidence. *See, post, §2516.*

In short, any ruling or action of the court which is not manifest of record, or which cannot be fully understood and intelligibly passed upon, without a statement of the facts bearing upon it, must, in order to be revised, be presented by a proper bill of exception setting forth fully and clearly such facts. *Escareno v. S. 16 App. 85; Callahan v. S. 30 Tex. 488.*

But it is not essential to the validity of a plea of former jeopardy, that a record of the proceedings on the former trial has been perpetuated by a bill of exceptions. *Pizano v. S. 20 App. 139.*

**§2371—ART. 687.—Jury in felony case shall not separate until, unless, etc.**—After the jury has been sworn and impaneled to try any case of felony, they shall not be permitted to separate until they have returned a verdict, unless by permission of the court, with the consent of the attorney representing the state, and the defendant, and in charge of an officer. [O. C. 695.]

*See, post, Art. 777 and notes thereto.*

**§2372—Separation of jury in felony case—Decisions as to.**—Separation of the jury in a felony case is not allowable even by consent of the parties, unless the jurors are in charge of an officer. *Porter v. S. 1 App. 394; Grissom v. S. 4 App. 374.* And the defendant's counsel cannot give such consent, but it must be given by the defendant himself. *Brown v. S. 38 Tex. 482.* A general dispersion of the jury, though unavoidable, will vitiate the verdict. *Early v. S. 1 App. 248.*

A mere separation of the jury is not cause for a new trial, even in a capital case. Such separation may be explained, and unless it be shown that probable injustice to the defendant was occasioned thereby, it will not be good ground for setting aside the conviction. *Jones v. S. 13 Tex. 168; Jack v. S. 26 Tex. 1; Nelson v. S. 32 Tex. 71; Wakefield v. S. 41 Tex. 556; Jenkins v. S. Id. 128; Soria v. S. 2 App. 297; Cox v. S. 7 App. 1; West v. S. Id. 150; Russell v. S. 11 App. 288; Ogle v. S. 16 App. 361; but see Walker v. S. 37 Tex. 366.*

For instances of separation held sufficient to vitiate a verdict, see *Wright v. S. 17 App. 152; Wilson v. S. 18 App. 576; Warren v. S. 9 App. 619; Walker v. S. 37 Tex. 367; Defriend v. S. 22 App. 570.*

The law which forbids the separation of the jury should be carefully observed and enforced by the court and officers. *Marnack v. S. 7 App. 269.*

The defendant may waive the right to have the jury kept together, but he must do so in person, and not by his counsel. *Sterling v. S. 15 App. 249; ante, §§1469, 1470.*

**§2373—ART. 688.—In misdemeanor case jury may separate.**—In case of misdemeanor, the court may, at its discretion, permit the jury to

separate before verdict, after giving them proper instructions in regard to their conduct as jurors in the case while so separated. [Added in revising.]

See Cannon v. S. 3 Tex. 31.

**§2374—ART. 689.—Sheriff shall provide jury with, etc.**—It is the duty of the sheriff to provide a suitable room for the deliberation of the jury, in all criminal cases, and to supply them with such necessary food and lodging as he can obtain; but no spirituous, vinous or malt liquor of any kind shall be furnished them. [O. C. 606.]

See Warren v. S. 9 App. 619; Wright v. S. 17 App. 152.

The mere drinking of liquor by the jury will not, of itself, vitiate the verdict. It must be shown that probably the verdict was influenced by such misconduct. But the drinking of a considerable quantity of intoxicating liquor will be presumed to have influenced the verdict. Jack v. S. 26 Tex. 1; Webb v. S. 5 App. 596; Tuttle v. S. 6 App. 556; March v. S. 44 Tex. 64; Allen v. S. 17 App. 637; Davis v. S. 3 App. 91; *post*, Art. 776 and notes thereto.

**§2375—ART. 690.—No person shall be with jury, or permitted to converse with them, except, etc.**—No person shall be permitted to be with a jury while they are deliberating upon a case, nor shall any person be permitted to converse with a juror after he has been impaneled, except in the presence and by the permission of the court, or except in a case of misdemeanor where the jury have been permitted by the court to separate, and in no case shall any person be permitted to converse with the juror about the case on trial. [O. C. 607.]

**§2376—Decisions as to conversing, etc.**—A mere statement by one juror to another, after retirement for deliberation, in reference to the character of the defendant, will not vitiate the verdict. Austin v. S. 42 Tex. 355.

But if the finding was influenced by the statement of a juror as to the character of a witness for the defense, it will vitiate the verdict. Anschicks v. S. 6 App. 524.

The refusal of a juror to talk with an outside party is not "conversing." Johnson v. S. 27 Tex. 758.

A conversation must be calculated to impress upon the mind of the juror a view of the case different from that made by the evidence, or to injure the defendant, or it will not vitiate the verdict. March v. S. 44 Tex. 64; Nance v. S. 21 App. 457.

But a separation or conversation with other persons by a juror, with permission of the court, over the objection of the defendant, is reversible error *per se*, without reference to the question of probable injury to the defendant. Defriend v. S. 22 App. 570.

See further, *post*, Art. 776 and notes thereto.

**§2377—ART. 691.— Punishment for violation of preceding article.**—Any juror or other person violating the preceding article shall be punished for contempt of court by fine not exceeding one hundred dollars. [Added in revising.]

See Martin v. S. 9 App. 293.

**§2378—ART. 692.—Officer shall attend jury.**—In order to supply all the reasonable wants of the jury, and for the purpose of keeping them together and preventing intercourse with any other person, the sheriff shall see that they are constantly attended by a proper officer, who shall always remain sufficiently near the jury to answer to any call made upon him by them, but shall not be with them while they are discussing the case; nor shall such officer at any time, while the case is on trial before them, converse about the case with any of them, nor in the presence of any of them. [O. C. 608, 609.]

The presence of a bailiff with the jury, while they are deliberating, will not vitiate the verdict, unless it appear that the fairness of the trial was affected thereby. Martin v. S. 9 App. 293; Slaughter v. S. 24 Tex. 410; Dansby v. S. 34 Tex. 392; see, also, Hunnicutt v. S. 18 App. 499.

**§2379—ART. 693.—Jury shall take all papers in the case.**—The jury may take with them, on retiring to consider of their verdict, all the original papers in the cause and any papers used as evidence. [O. C. 610.]

The preceding article is permissive merely, and not mandatory. That the jury did not take with them the indictment is immaterial. Schultz v. S. 15 App. 258. The jury is entitled to take with them all evidence in the case. Heard v. S. 9 App. 1. They may take with them the charges given, but no others. *Ante*, § 2362; Irvine v. S. 18 App. 51.

**§2380—ART. 694.—Foreman appointed.**—The jury in all cases shall appoint one of their body foreman, in order that their deliberations may be conducted with regularity and order. [O. C. 611.]

**§2381—ART. 695.—Jury may communicate with the court.**—When the jury wish to communicate with the court they shall make their wish known to the sheriff, who shall inform the court thereof, and they may be brought before the court, and through their foreman shall state to the court, either verbally or in writing, what they desire to communicate. [O. C. 612, 613.]

See, *post*, Art. 698.

**§2382—ART. 696.—Jury may ask further instruction.**—The jury, after having retired, may ask further instruction of the judge touching any matter of law. For this purpose the jury shall appear before the judge, in open court, in a body, and through their foreman shall state to the court, either verbally or in writing, the particular point of law upon which they desire further instruction, and the court shall give such instruction in writing; but no instruction shall be given, except upon the particular point on which it is asked. [O. C. 614.]

See, *post*, Art. 698.

**§2383—Decisions under preceding article.**—The court cannot give additional instructions at the instance of the state, the jury not having requested such instructions. *Myers v. S. 8 App. 321.*

If the jury desire further instructions, they should be brought into court in a body, and, after notice to the defendant or his counsel, and in case of felony, in the presence of the defendant, should be instructed only upon the points requested by them. The instructions should be in direct response to the questions asked, and must not invade the province of the jury. *Taylor v. S. 42 Tex. 504; Newman v. S. 43 Tex. 525; Wharton v. S. 45 Tex. 2; Chamberlain v. S. 2 App. 451; Garza v. S. 3 App. 287; Hannah v. S. 7 App. 610; Post v. S. 10 App. 598; Shipp v. S. 11 App. 46; Granger v. S. Id. 454; McDonald v. S. 15 App. 493; Mapes v. S. 13 App. 85.*

When the jury request further instructions, and the subject matter thereof be proper, the court has no option but to give them. If the subject matter be improper, the court should so inform the jury. All instructions or responses so given by the court to the jury must be in writing. *Conn v. S. 11 App. 390.*

When such additional instructions are given, they are to be considered in connection with the charge already given. *Swift v. S. 8 App. 614.*

After the jury has retired the court cannot, of its own motion, withdraw an instruction given at the request of the defendant, and give additional instructions. *Goss v. S. 40 Tex. 520; Garza v. S. 3 App. 286.*

If instructions given at the instance of a defendant are lost, the judge cannot repeat them orally to the jury, even in a misdemeanor case, in the absence of the defendant. *Chamberlain v. S. 2 App. 451.*

**§2384—ART. 697.—Jury may have witness re-examined, when.**—If the jury disagree as to the statement of any particular witness, they may, upon applying to the court, have such witness again brought upon the stand, and he shall be directed by the judge to detail his testimony to the particular point of disagreement, and no other, and he shall be further instructed to make his statement in the language used upon his examination as nearly as he can. [O. C. 615.]

**§2385—Decisions under preceding article.**—The witness must not be re-examined upon the point, and the following rules must be observed: 1. The jury should indicate the particular statement about which they disagree. 2. The witness should be directed to repeat his testimony upon the particular point, and no other. 3. The court may instruct the witness to repeat his testimony upon the point in the very language employed on the original examination, as nearly as he can. *Campbell v. S. 42 Tex. 591.*

If the witness changes his statement to the prejudice of the defendant, it is material error. *Tarver v. S. 43 Tex. 564; Edmondson v. S. 7 App. 116.*

Mere difference of counsel as to the evidence of a witness does not necessitate his recall, and its advisability is left to the discretion of the judge, subject to revision only for abuse. Proper practice in such case is for the judge to inform the jury that if they shall disagree as to the testimony in question, the witness will be recalled at their instance. *Lester v. S. 3 App. 17.*

The defendant must be present in a felony case when a witness repeats his statement to the jury. *Post*, Art. 698; *Barton v. S. 9 App. 261.* Defendant's counsel cannot waive the defendant's right to be present on such occasion. *Shipp v. S. 11 App. 46.*

Where it transpired during the argument that a witness who had testified had not been sworn, it was held not error to allow such witness to be recalled, sworn and re-examined. *Thomas v. S.* 1 App. 289.

See a case in which it was held that error was not committed in refusing to delay a case to procure a witness whom the defendant desired to recall for the purpose of having him repeat his statement. *Moore v. S.* 7 App. 14.

**§2386—ART. 698.—Defendant shall be present, when.—**In every case of felony the defendant shall be present in the court when any such proceeding is had, as mentioned in the three next preceding articles. His counsel shall also be called. In cases of misdemeanor the defendant need not be personally present. [O. C. 617.]

See *Shipp v. S.* 11 App. 46; *Granger v. S.* *Id.* 454; *Barton v. S.* 9 App. 261; *Mapes v. S.* 13 App. 85.

**§2387—ART. 699.—If a juror become sick after retirement.—**If, after the retirement of the jury, in a felony case, any one of them become so sick as to prevent the continuance of his duty, or any accident or circumstance occur to prevent their being kept together, the jury may be discharged. [O. C. 618.]

In such case the juror cannot be excused and his place supplied, but the entire jury must be discharged, and another jury impaneled. *Ellison v. S.* 12 App. 557; *Hill v. S.* 10 App. 618. The defendant may, however, waive the rights thus secured to him, but must do so in person. A waiver by his counsel will not bind him. *Sterling v. S.* 15 App. 249; *ante*, §§1469, 1470.

**§2388—ART. 700.—In misdemeanor case in district court.—**In a misdemeanor case, in the district court, if nine of the jury can be kept together they shall not be discharged; but if more than three of the twelve are discharged the entire jury must be discharged. [Const. Art. 5, §13; Act Aug. 1, 1876, p. 82, §19.]

See, *post*, Art. 707.

**§2389—ART. 701.—Disagreement of jury.—**The jury may be discharged after the cause is submitted to them, when they cannot agree, and both parties consent to their discharge, or where they have been kept together for such time as to render it altogether improbable they can agree; in this latter case the court, in its discretion, may discharge them. [O. C. 619.]

**§2390—Decisions under preceding article.—**After a felony case has been submitted the jury cannot be discharged, unless there is no probability of their agreement, unless for one of the causes specified in Article 699, *ante*, or unless it be with the consent of the defendant, or by the final adjournment of the court. See, upon this subject, *Powell v. S.* 17 App. 345; *Schindler v. S.* *Id.* 408; *Varnes v. S.* 20 App. 107; *Pizano v. S.* *Id.* 139; *Brady v. S.* 21 App. 659; *Ellison v. S.* 12 App. 557; *Hill v. S.* 10 App. 618; *Early v. S.* 1 App. 248; *ante*, §1452.

**§2391—ART. 702.—Final adjournment discharges jury.—**A final adjournment of the court, before the jury have agreed upon a verdict, discharges them. [O. C. 620.]

**§2392—ART. 703.—If no verdict, cause may be again tried, etc.—**When a jury has been discharged, as provided in the four next preceding articles, without having rendered a verdict, the cause may be again tried at the same or another term. [O. C. 621.]

After a mistrial the case stands as if there had been none; and if the defendant is not ready for another trial he must apply for a continuance. *Jones v. S.* 13 App. 575.

**§2393—ART. 704.—Court may proceed with other business.—**The court may, during the retirement of the jury, proceed to any other business and adjourn from time to time, but shall be deemed open for all purposes connected with the case before the jury. [O. C. 622.]

Subject to statutory restrictions, the order and regulation of business in the trial courts is under their discretionary control, and not revisable on appeal when no prejudice to the defendant is shown. It was held not error to proceed with a trial for theft during the postponement of a trial for rape for one day in order to complete a jury. *Shehane v. S.* 13 App. 533; see, also, *Jones v. S.* 8 App. 648.

## CH. 6.—OF THE VERDICT.

ART.	SEC.	ART.	SEC.
705. Definition of verdict.	2394	713. Where offense of different degrees is charged.	2409
706. In felony case twelve jurors must concur, and verdict must be signed, etc.	2395	Decisions under preceding article.	2410
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§2394—ART. 705.—**Definition of verdict.**—A "verdict" is a declaration by a jury of their decision of the issues submitted to them in the case, and it must be in writing and concurred in by each member of the jury. [Added in revising.]

The requisites of a verdict are: 1. It must declare the decision of the jury of the issues submitted to them. 2. It must be in writing. 3. It must be concurred in by each member of the jury. *Woodridge v. S. 13 App. 443; Buster v. S. 42 Tex. 315.* The verdict must be in writing, but it need not be written upon the indictment. *Schultz v. S. 15 App. 258.* And it need not be signed by the foreman, though such is the uniform and proper practice. *Morton v. S. 3 App. 510; Williams v. S. 5 App. 615.*

§2395—ART. 706.—**In felony case twelve jurors must concur, etc.**—Not less than twelve jurors can render and return a verdict in a felony case, and the verdict shall be signed by the foreman. [Added in revising.]

Under a former law nine jurors could render a verdict in a felony case, under certain circumstances. *Ray v. S. 4 App. 450; Gindrat v. S. 3 App. 573.* But such is not now the law. *Ellison v. S. 12 App. 557.* Prior to the enactment of the preceding article, the verdict need not have been signed by the foreman, though that was held to be the better practice. *Morton v. S. 3 App. 510; Williams v. S. 5 App. 615; see, also, Const. Art. 5, §13; ante, §1434.*

§2396—ART. 707.—**When nine jurors may render verdict, etc.**—In cases of misdemeanor, in the district court, where one or more of the jurors have been discharged from serving after the cause has been submitted to them, if there be as many as nine of the jurors remaining, those remaining may render and return a verdict, but in such case the verdict must be signed by each one of the jurors rendering it. [Act Aug. 1, 1876, p. 12, §19.]

See, *ante*, §2388; Const. Art. 5, §13.

§2397—ART. 708.—**Six jurors in county court.**—In the county court, in all criminal actions, the jury consists of six men, and the verdict must be concurred in by each of them. [Added in revising.]

See Const. Art. 5, §17; *ante*, §1434; *Still v. S. 14 App. 59.*

§2398—ART. 709.—**When jury have agreed, etc.**—When the jury have agreed upon a verdict they shall be brought into court by the proper officer, and if, when asked, they answer that they have agreed, the verdict shall be read aloud by the clerk, and if in proper form and no juror dissents therefrom, and neither party requests to have the jury polled, the verdict shall be entered upon the minutes of the court. [O. C. 623.]

§2399—**Receiving, etc., verdict—Decisions as to.**—A verdict may be received on Sunday. *Shearman v. S. 1 App. 215; McKinney v. S. 8 App. 626; Walker v. S. 13 App. 618; Powers v. S. 23 App. 42.*

During recess of the court for dinner a verdict was returned to the judge, who received it without formally re-opening court. Held, that the court was open for all purposes connected with the case before the jury, and a formal re-opening of the court for the purpose of receiving the verdict was not necessary. *Templeton v. S.* 5 App. 398.

In a felony case the defendant must be present when the verdict is received, but the presence of his counsel is not essential. *Beaumont v. S.* 1 App. 533; *Summers v. S.* 5 App. 365; *Richardson v. S.* 7 App. 486; *Mapes v. S.* 13 App. 85. The presence of the defendant is not essential, however, at the time the clerk performs the ministerial act of entering the judgment. *Powers v. S.* 23 App. 42. In a misdemeanor case his presence is not essential. *Gage v. S.* 9 App. 259; *Mapes v. S.* 13 App. 85.

It is not essential that the verdict should be "filed," but only that it be entered upon the minutes. *Williams v. S.* 7 App. 163.

**§2400—ART. 710.—Polling the jury.**—It is the right either of the state or of the defendant to have the jury polled, which is done by calling separately the name of each juror, and asking him if it is his verdict. If all, when asked, answer in the affirmative, the verdict shall be entered upon the minutes; but if any juror answer in the negative, the jury shall retire again to consider of their verdict. [O. C. 624.]

See Willson's Cr. Forms, 756, 757.

**§2401—Decisions as to polling the jury.**—In polling a jury, it is not intended that the jurors shall be interrogated further than to ask each of them the direct question: "Is that your verdict?" If he answers in the affirmative, his answer is conclusive, and further inquiry is not permissible. *Bean v. S.* 17 App. 60.

A verdict is good although a juror may hesitate or explain when it is delivered, provided he does not retract. See instances: *Henderson v. S.* 12 Tex. 525; *Jack v. S.* 26 Tex. 1.

An entry that the verdict was returned into court by the "grand jury duly impaneled to try said cause" was held not vitiated by the word "grand." *Stewart v. S.* 4 App. 519.

**§2402—ART. 711.—Defendant must be present, when.**—In cases of felony the defendant must be present when the verdict is read, unless he escape after the commencement of the trial of the cause; but in cases of misdemeanor it may be received and read in his absence. [O. C. 625.]

See, ante, §2399.

**§2403—ART. 712.—Verdict must be general.**—The verdict in every criminal action must be general; when there are special pleas, upon which the jury are to find, they must say in their verdict that the matters alleged in such pleas are true or untrue; where the plea is not guilty, they must find that the defendant is either "guilty" or "not guilty;" and, in addition thereto, they shall assess the punishment in all cases where the same is not absolutely fixed by law to some particular penalty. [O. C. 626.]

**§2404—Special plea—Verdict upon.**—When the defendant has pleaded former conviction or acquittal, as well as not guilty, and such plea under the evidence has been submitted to the jury, as well as the plea of not guilty, the verdict must expressly find whether the special plea is true or untrue, and if it fails to do so, the conviction, on appeal, will be set aside. *Davis v. S.* 42 Tex. 494; *Denton v. S.* 44 Tex. 446; *Taylor v. S.* 4 App. 29; *Brown v. S.* 7 App. 619; *McCampbell v. S.* 9 App. 124; *Pickens v. S.* Id. 270; *White v. S.* Id. 390; *Smith v. S.* 18 App. 329; *Burks v. S.* 24 App. 326; ante, §2122. In a misdemeanor case, where a jury has been waived, and the cause has been submitted to the judge, an express finding on the special plea is not required. *Taylor v. S.* 4 App. 29.

**§2405—"Guilty"—Verdict of essential to a conviction.**—A judgment of conviction can be based only upon a verdict of *guilty*. To find the defendant *guilty* is not sufficient. *Wilson v. S.* 12 App. 481; *Taylor v. S.* 5 App. 569. Nor is it permissible to explain by evidence that the jury intended to find the defendant guilty, and that the word "guilty" was intended for the word "guilty." *Harwell v. S.* 22 App. 251. But omitting to cross the letter "t" in the word "guilty" does not vitiate the verdict. *Pertain v. S.* 22 App. 100; *Walker v. S.* 13 App. 618. And to find the defendant "gilty" is sufficient. *Walker v. S.* 13 App. 618; *Koontz v. S.* 41 Tex. 570. So to find him "guily" is sufficient. *Curry v. S.* 7 App. 91.

A verdict which finds the defendant "guilty as charged in the indictment" is sufficient without naming the offense, and is the proper form for a verdict of guilty, except in murder, or when the intention is to find for a lower degree. *Henderson v. S.* 5 App. 134; *Nettles v. S.* Id. 386.

A verdict finding the defendant "guilty of the crime" was held sufficient in a case of horse theft. *Lindsay v. S.* 1 App. 327. And ordinarily, except in a murder case, a verdict finding the defendant guilty, and assessing the punishment, will be sufficient. *McMillan v. S.* 7 App. 100; *McCoy v. S.* Id. 379; *Hutto v. S.* Id. 44.

But a verdict: "We, the jury, find the defendant guilty of felony, and assess the penalty at two years in the state penitentiary," did not determine that defendant was guilty of the theft

of property of the value of twenty dollars or over, that being the offense of which he was charged. *Miles v. S.* 3 App. 59. So a verdict: "We, the jury, find the defendant guilty of a misdemeanor in driving from the county of Lampasas one cow brute, and assess his fine at \$18," was held insufficient. *Senterfit v. S.* 41 Tex. 187. So a verdict: "We, the jury, find the defendant guilty of a misdemeanor, and assess his punishment at one hundred dollars," was held wholly insufficient. *Howell v. S.* 10 App. 298. So on an indictment for the theft of two hogs, a verdict finding the defendant guilty "of theft of property of the sum of twelve dollars," was held insufficient. *Collins v. S.* 6 App. 647.

But where the indictment charged theft of property of the value of twenty dollars, a verdict that finds the defendant "guilty as charged in the indictment" is a sufficient finding that he is guilty of theft of property of the value of \$20. *Cohea v. S.* 11 App. 153; see, also, *Lawrence v. S.* 20 App. 536.

Where the offense charged was robbery, a verdict: "We, the jury, find the defendant guilty of agreeing to the commission of the offense, and is liable as a principal offender, and assess the punishment at seven years in the state penitentiary," was held insufficient. *Ring v. S.* 42 Tex. 282.

When an indictment charges an offense, which includes other offenses, and all the offenses covered by the indictment are submitted to the jury by the charge of the court, a general verdict of guilty, assessing a punishment applicable to either of the offenses is uncertain and will not support a judgment. Thus, where the indictment charged theft of cattle, and also driving cattle from their accustomed range, and both offenses were submitted to the jury, a general verdict of "guilty as charged in the indictment," assessing a punishment applicable to either offense, was held insufficient, and did not authorize the judgment for theft of cattle. *Guest v. S.* 24 App. 530; see, also, in this connection, *Miller v. S.* 16 App. 417.

But under an indictment for theft of a horse, the offense of driving the animal from its accustomed range was also submitted to the jury, and they returned a general verdict of guilty, assessing the punishment at two years' confinement in the penitentiary. Held, that the verdict was sufficient to support a judgment for the last named offense. *Foster v. S.* 21 App. 80. So, where the indictment charged theft of cattle, but the charge of the court submitted to the jury only the offense of driving the animals from their range, and the jury returned a general verdict of guilty, assessing the punishment at a fine of one dollar, the verdict was held sufficient. *Marshall v. S.* 4 App. 549. So, where an information charged an aggravated assault, and a general verdict of guilty was returned, assessing the punishment at a fine of \$100, the verdict was held sufficient, inasmuch as that was the offense charged, and no minor offense was submitted by the court to the jury. *Franks v. S.* 4 App. 431. See, in this connection, *Dreyer v. S.* 11 App. 631. But a conviction for receiving or concealing stolen property cannot now be had under an indictment charging theft. *Ante.* §1264. Where an indictment charged burglary and theft in a single count, and the charge of the court was confined to the issue of burglary, a general verdict of guilty was held to authorize a judgment for burglary. *Turner v. S.* 22 App. 42.

A general verdict of guilty responds sufficiently to an indictment which contains two counts, even if one of the counts be bad, inasmuch as the verdict will be applied to the good count. *Boren v. S.* 23 App. 28.

The verdict must declare that the jury find the defendant guilty. An omission of the word "find" vitiates the verdict, and such omission cannot be supplied in the judgment. *Shaw v. S.* 2 App. 487.

When there is but one defendant on trial, the verdict need not designate him by name. It is sufficient to refer to him as "the defendant." *George v. S.* 17 App. 513; *Williams v. S.* 5 App. 226. And so where several defendants are on trial, under the same plea, and the finding of the jury be the same as to all of them, it will be sufficient to refer to them as "the defendants." If, however, they should find a verdict as to one, or more, differing from the verdict as to another, or others on trial, it would be necessary to name in the verdict each defendant to whom a finding applies, so as to render certain the finding of the jury as to each defendant. *Williams v. S.* 5 App. 226; see, also, *Plumley v. S.* 8 App. 529, for a sufficient identification of the defendant by the record.

"Guilty of aggravated assault and battery" was held good, although the indictment did not charge a "battery," and none was proved. *Bittick v. S.* 40 Tex. 117.

Under an indictment charging an assault with intent to murder, a verdict of guilty of assault with "attempt" to murder was held sufficient. *Hart v. S.* 38 Tex. 382.

The indictment charged the theft of a "horse (a stallion)," the verdict found the defendant guilty of the theft of "a horse (a gelding), as charged in the indictment." Held, that the verdict was not responsive to, and did not support the indictment. *Persons v. S.* 3 App. 240.

Guilty of "burglariously and theft" was held unintelligible and bad. *Haney v. S.* 2 App. 287. For forms of verdicts, see *Willson's Cr. Form*, 732-743.

§2406—Punishment—Assessment of.—A verdict assessing the punishment at confinement in the state "penitentiary" was held bad. *Keeler v. S.* 4 App. 527. But confinement in the state "prison" was held good. *McCoy v. S.* 7 App. 379. "State prison" is equivalent to "state penitentiary." *Moore v. S.* 7 App. 14; *Harris v. S.* 8 App. 90.

A verdict which assessed the punishment at "ten years in the penitentiary" was held good, the word "confinement" being unnecessary. *Jones v. S.* 7 App. 163; *Lindsay v. S.* 1 App. 327; *Taylor v. S.* 14 App. 340. So, "punishment at life time in the penitentiary" was held sufficient. *Carroll v. S.* 24 App. 313.

When the punishment prescribed by the law is fine and imprisonment in the county jail, or such imprisonment without fine, a verdict assessing a fine, without imprisonment also, is insufficient. *Fowler v. S.* 9 App. 149; *Johnson v. S.* 18 App. 7; *Sager v. S.* 11 App. 110.

When a verdict assessed a "find" against the defendant, it was held sufficient, the context showing that the word "find" was intended for the word "fine." *Bland v. S.* 4 App. 15.

Where the verdict assessed the punishment at "twelve months" imprisonment, the law fixing it at "one year," the verdict was sustained. *Mitchell v. S.* 2 App. 404. A verdict assessing the punishment at "2 years in the state penitentiary," was held sufficient. *Hoy v. S.* 11 App. 32. So was a verdict assessing the punishment at five years *confinement* in the penitentiary. *McMillan v. S.* 7 App. 100. So, verdict assessing the punishment at two years in the penitentiary" was held sufficient. *Reynolds v. S.* 17 App. 413.

"Confinement in the penitentiary," or it seems "in the penitentiary," means "imprisonment at hard labor in the state penitentiary." *Williams v. S.* 5 App. 226; *Jones v. S.* 7 App. 103.

In the case of joint defendants on trial, the verdict must assess the punishment against each. *Flynn v. S.* 8 App. 398, overruling *Bennett v. S.* 30 Tex. 521, and citing *Allen v. S.* 34 Tex. 230.

**§2407—Same—Excessive verdict.**—A verdict cannot be held excessive if the punishment assessed is within the statutory limits, unless in a clear case of the abuse of the discretion which the law has confided to juries. *Teague v. S.* 4 App. 147; *Davis v. S. Id.* 456; *Johnson v. S.* 5 App. 423; *Drake v. S. Id.* 649; *Jones v. S.* 14 App. 85; *Chiles v. S.* 2 App. 37; *Davis v. S.* 15 App. 594.

For statute and decisions as to verdicts in murder cases, see *ante*, §§1050, 1051.

**§2408—Rules for construing verdicts.**—Verdicts are to have a reasonable intendment and to be given a reasonable construction. They are not to be avoided unless from necessity originating in doubt of their import, or immateriality of the issue found, or of their manifest tendency to work injustice, or their failure to contain that which some express provision of the statute requires they should contain. *Walker v. S.* 13 App. 618; *McMillan v. S.* 7 App. 100; *Bland v. S.* 4 App. 15; *Williams v. S.* 5 App. 226; *Pertain v. S.* 24 App. 100.

Technical objections to the want of form in wording will be disregarded. *Lindsay v. S.* 1 App. 327. And so will technical and unsubstantial objections. *Reynolds v. S.* 17 App. 413.

Incorrect orthography or ungrammatical language will not vitiate a verdict, when the meaning of the words and language used is not uncertain. *Wooldridge v. S.* 13 App. 443; *Walker v. S. Id.* 618; *Reynolds v. S.* 17 App. 413; *Hoy v. S.* 11 App. 32; *Taylor v. S.* 5 App. 569; *Krebs v. S.* 3 App. 348; *Koontz v. S.* 41 Tex. 570; *Pertain v. S.* 22 App. 100.

The rule of *idem sonans* obtains in the construction of verdicts, which is, that if words may be sounded alike without doing violence to the power of the letters found in the variant orthography, then the words are *idem sonans*, and the variance is immaterial. *Walker v. S.* 13 App. 618; *Wooldridge v. S. Id.* 443; *Henry v. S.* 7 App. 388.

A verdict must be sufficient in itself, and its defects cannot be aided and cured by inference from other parts of the record, except that the charge of the court may be looked to to identify the offense as found by the jury. *Slaughter v. S.* 24 Tex. 410; *Marshall v. S.* 4 App. 549; *Hulto v. S.* 7 App. 44; *Henderson v. S.* 5 App. 134; *Chester v. S.* 1 App. 703; *Vincent v. S.* 10 App. 330.

It must be responsive to the charge of the court and sufficiently certain to identify the transaction with that alleged in the indictment, and to bar another prosecution. *Senterfit v. S.* 41 Tex. 186; *Lindsay v. S.* 1 App. 327; *Vincent v. S.* 10 App. 330.

When the verdict as set forth in the judgment was insufficient, it was held, on appeal, that it was manifest that the insufficiency was the result of a clerical mistake, the verdict as actually rendered being elsewhere set forth in the record, and being sufficient. *McInturff v. S.* 20 App. 335. But see *Long v. S.* 1 App. 709.

In construing a verdict the object is to get at the meaning of the jury. *Chester v. S.* 1 App. 703. And a verdict is sufficient when it appears that the jury have clearly expressed an intention to find the defendant guilty of the crime charged in the indictment, and to assess his punishment within the terms of the law. *Williams v. S.* 5 App. 226.

When a verdict is so defective and uncertain that the court cannot know for what offense to pass judgment, it should not be received, or, having been received, should be set aside. *Guest v. S.* 24 App. 530.

**§2409—ART. 713.—Where offense of different degree is charged.**—Where a prosecution is for an offense consisting of different degrees, the jury may find the defendant not guilty of the higher degree (*naming it*), but guilty of any degree inferior to that charged in the indictment or information. [O. C. 630.]

**§2410—Decisions under preceding article.**—For statute and decisions in murder cases, see, *ante*, §§1050, 1051. In all felony cases which include degrees, except murder cases, a general verdict of guilty, affixing a punishment corresponding with the offense charged in the indictment, will support a judgment of conviction for that offense. *Nettles v. S.* 5 App. 386; *Henderson v. S. Id.* 134. See further under heads of the different offenses including degrees.

**§2411—ART. 714.—Offenses consisting of degrees.**—The following offenses include different degrees:



1. Murder, which includes all the lesser degrees of culpable homicide, and also an assault with intent to commit murder.

2. An assault with intent to commit any felony, which includes all assaults of an inferior degree.

3. Maiming, which includes disfiguring, wounding, aggravated assaults and battery, and simple assaults and batteries.

4. Arson, which includes every malicious burning made penal by law.

5. Burglary, which includes every species of house-breaking and theft, or other felony when charged in the indictment in connection with the burglary.

6. Theft, which includes swindling, embezzlement, and all unlawful acquisitions of personal property, punishable by the Penal Code.

7. Perjury, which includes all false-swearing made punishable by the Penal Code.

8. Bigamy, which includes adultery and fornication.

9. Adultery, which includes fornication.

10. Riot, which includes unlawful assembly.

11. Kidnapping or abduction, which includes false imprisonment.

12. Every offense against the person includes within it assaults with intent to commit said offense, when such attempt is a violation of the penal law.

13. Every offense includes within it an attempt to commit the offense, when such an attempt is made penal by law. [O. C. 631.]

For decisions applicable to this article, see under heads of the different offenses therein named.

**§2412—ART. 715.—Informal verdict may be corrected.**—If the jury find a verdict which is informal their attention shall be called to it, and, with their consent, the verdict may, under the direction of the court, be reduced to proper form. [O. C. 627.]

**§2413—Decisions under preceding article.**—The preceding article confers express authority upon the trial judge to call the attention of the trial jury to any informality in their verdict, and to have it, with their consent, reduced to proper form. In misdemeanor cases such correction of the verdict may be made in the absence of the defendant and of his counsel. *Gage v. S. 9 App. 259*. See, also, *May v. S. 6 App. 191*; *Robinson v. S. 23 App. 315*.

It is not only within the power, but it is the duty, of the trial judge to reject an informal or insufficient verdict, call the attention of the jury to the informality or insufficiency, and either have the same corrected with their consent, or send them out again to consider of their verdict. *Taylor v. S. 14 App. 340*; *Jones v. S. 7 App. 103*; *Alston v. S. 41 Tex. 39*; *Walker v. S. 13 App. 618*; *Guest v. S. 24 App. 530*; *Robinson v. S. 23 App. 315*.

An informal or illegal verdict will not operate as an acquittal, unless plainly so intended. *Robinson v. S. 23 App. 315*; *Alston v. S. 41 Tex. 39*.

**§2414 — ART. 716.—If jury refuse to have verdict corrected.**—If the jury refuse to have the verdict altered they shall again retire to their room to deliberate, unless it manifestly appear that the verdict is intended as an acquittal, and in that case the judgment shall be rendered accordingly, discharging the defendant. [O. C. 628.]

See, *ante*, §2413.

**§2415—ART. 717.—Where several defendants are tried jointly.**—Where several defendants are tried together, the jury may convict such of the defendants as they deem guilty and acquit others. [O. C. 632.]

No exception is made in any case to the operation of the preceding article. *Alonzo v. S. 15 App. 378*; see, also, *Flynn v. S. 8 App. 398*; *Allen v. S. 34 Tex. 230*; *Williams v. S. 5 App. 226*; *Burrill v. S. 18 Tex. 713*; *Willson's Cr. Forms, 736, 737*.

**§2416—ART. 718.—Same subject.**—Where the jury, on the trial of several defendants, agree to a verdict as to one or more, and cannot agree as to others, they may find a verdict as to those in regard to whom they agree, and judgment shall be rendered accordingly; and the case, as to the rest, may be tried by another jury. [O. C. 633.]

See *Willson's Cr. Forms, 738*.

§2417—ART. 719.—**In case of acquittal.**—In all cases of acquittal the defendant shall be immediately discharged from all further liability upon the charge for which he has been tried, and judgment upon the verdict accordingly shall be at once rendered and entered. [O. C. 635.]

See Willson's Cr. Forms, 747-753.

§2418—ART. 720.—**Judgment entered immediately.**—In every case of acquittal or conviction the proper judgment shall be entered immediately. [O. C. 634.]

A judgment of conviction cannot, in a felony case, be entered in the absence of the defendant, but may be in a misdemeanor case. *Mapes v. S.* 13 App. 85. But the presence of the defendant is not essential when the clerk performs the ministerial act of entering the judgment in the minutes. *Powers v. S.* 23 App. 42.

§2419 — ART. 721. — **When verdict of guilty in felony.**—When a verdict of guilty is rendered in any case of felony the defendant shall remain in custody to await the further action of the court thereon. [O. C. 634.]

§2420—ART. 722.—**Acquittal for insanity.**—When the defendant is acquitted on the ground of insanity the jury shall so state in their verdict. [O. C. 636.]

See Willson's Cr. Forms, 740.

The preceding article is merely directory, and though, in a proper case, the jury should be instructed in accordance therewith, the omission to so do, if without apparent injury to the defendant, will not be material error. *Massengale v. S.* 24 App. 181; see, as to "Insanity," *ante*, §§80-94. After conviction, *post*, Title 12, Chap. 1.

§2421—ART. 723.—**Verdict on plea of guilty by person insane.**—When a jury has been impaneled to assess the punishment upon a plea of "guilty," they shall say in their verdict what the punishment is which they assess; but where the jury are of opinion that a person pleading guilty is insane they shall so report to the court, and an issue as to that fact be tried before another jury, and if upon such trial it be found that the defendant is insane, such proceedings shall be had as are directed in title 12, chapter 2, of this Code. [O. C. 637.]

See Willson's Cr. Forms, 743.

§2422 — ART. 724.—**Conviction of lower is acquittal of higher offense.**—If a defendant, prosecuted for an offense which includes within it lesser degrees, be convicted of an offense lower than that for which he is indicted, and a new trial be granted him, or the judgment be arrested for any cause other than the want of jurisdiction, the verdict upon the first trial shall be considered an acquittal of the higher offense; but he may upon a second trial be convicted of the same offense of which he was before convicted, or any other inferior thereto. [O. C. 642.]

See, *ante*, §2122; see, also, *ante*, §1074.

## CH. 7.—OF EVIDENCE IN CRIMINAL ACTIONS.

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## I. GENERAL RULES.

§2423—ART. 725.—Rules of common law shall govern, except, etc.—The rules of evidence known to the common law of England, both in civil and criminal cases, shall govern in the trial of criminal actions in this state, except where they are in conflict with the provisions of this Code or of some statute of the state. [O. C. 638.]

See Sayles' Civ. Stat., Art. 2245. And see the notes to that article for an exhaustive collocation of the decisions in civil cases, upon the common law rules of evidence, the most of which are applicable in criminal cases, but they are too voluminous to be given in this work, which is limited to citations of decisions in criminal cases mainly. For criminal decisions, citing and illustrating the preceding article, see *Myers v. S.* 3 App. 8; *Morrill v. S.* 5 App. 447; *Jackson v. S.* 8 App. 60; *Johnson v. S.* 9 App. 249; *Stewart v. S.* *Id.* 321; *May v. S.* 15 App. 430; *Womack v. S.* 16 App. 178.

§2424 — ART. 726. — Rules of the statute law shall govern, when.—The rules of evidence prescribed by the statute law of this state, in civil suits, shall so far as applicable govern also in criminal actions, when not in conflict with the provisions of this Code or of the Penal Code. [O. C. 639.]

See Sayles' Civ. Stat., Title 38, Chap. 4, and notes; see, also, *Allison v. S.* 14 App. 402; *Johnson v. S.* 9 App. 249.

§2425—ART. 727.—Defendant presumed to be innocent—Reasonable doubt.—The defendant in a criminal case is presumed to be innocent until his guilt is established by legal evidence; and in case of reasonable doubt as to his guilt he is entitled to be acquitted. (O. C. 640.)

§2426—Presumption of innocence. [See, *ante*, §§28, 33, 110, 114, 1071, 2346.]

The language of this long-standing provision was advisedly selected to express the precise meaning of the law maker. Its entire context should be preserved, and attempts to paraphrase or supplement it in the charge to the jury, tend to beget perplexity and breed error. *Fury v. S.* 8 App. 471; *McPhail v. S.* 9 App. 164; *Coea v. S.* *Id.* 173.

The law indulges no supposition, but as a fact presumes the defendant innocent until his guilt is established by legal evidence. *Reid v. S.* 9 App. 472.

In arriving at the conclusion whether or not a conviction is sustained by the evidence, it must be borne in mind that the defendant must be presumed innocent of the crime until his guilt is satisfactorily established, and that he is entitled to acquittal if, from the evidence, they have a reasonable doubt of his guilt. *Gazley v. S.* 17 App. 267.

The presumption of innocence must be overcome by the evidence, and in doubtful cases is sufficient to turn the scale in favor of the defendant. *Hampton v. S.* 1 App. 652; *Perry v. S.* 44 Tex. 473; *Hull v. S.* 7 App. 593; *Shelton v. S.* 12 App. 513.

§2427—Reasonable doubt—Meaning of.—Reasonable doubt is that state of the case which, after full consideration of all the evidence, leaves the jury without an abiding conviction, to a moral certainty, of the truth of the accusation. *Chapman v. S.* 3 App. 67; *Billard v. S.* 30 Tex. 367.

But the doubt, to be a reasonable one, must not be merely speculative, imaginary, possible or conjectural; it must be a real doubt. *Gibbs v. S.* 1 App. 12; *Brown v. S.* *Id.* 154; *Pilkinton v. S.* 19 Tex. 214; *Billard v. S.* 30 Tex. 367.

A mere probability or strong suspicion of guilt will not warrant a conviction. The law demands that the evidence must be sufficient to satisfy the minds of the jurors, beyond a reasonable doubt, of the guilt of the defendant. *Pilkinton v. S.* 19 Tex. 214; *Conner v. S.* 34 Tex. 659; *Tollett v. S.* 44 Tex. 95; *Grant v. S.* 3 App. 1; *Barnell v. S.* 5 App. 113; *Hodde v. S.* 8 App. 383.

Neither a preponderance of evidence, nor any preponderant weight of evidence, warrants conviction, unless it satisfies the minds of jurors of the defendant's guilt to the exclusion of every reasonable doubt. *Billard v. S. 30 Tex. 367; Conner v. S. 34 Tex. 659; Griffith v. S. 9 App. 372; Jones v. S. 7 App. 457; Barnell v. S. 5 App. 113.*

If the evidence leaves the mind involved in reasonable doubt as to his guilt, that doubt inures to his benefit, and he is entitled to be acquitted. *Robertson v. S. 10 App. 602.*

Doubt of a fact upon which another fact depends necessarily involves doubt of the latter fact. *Poston v. S. 12 App. 403.*

The jury are not required to believe the defendant innocent, but they must acquit him upon any reasonable doubt of his guilt, even without actually believing him innocent. The law presuming him to be innocent, the state must by legal evidence satisfy the minds of the jury, beyond reasonable doubt, that he is guilty. *Munden v. S. 37 Tex. 353; McMillan v. S. 7 App. 142; Myers v. S. Id. 640; Smith v. S. 9 App. 150; Robertson v. S. Id. 209; Blocker v. S. Id. 279; Wallace v. S. Id. 299.*

§2428—Same—To what it extends, etc.—The reasonable doubt extends to the whole case and every material part of it, especially including the complicity of the defendant. *Perry v. S. 44 Tex. 473; Bray v. S. Id. 132; Walker v. S. 42 Tex. 360; Kay v. S. 40 Tex. 29; Munden v. S. 37 Tex. 353; Dorsey v. S. 34 Tex. 651; Camplin v. S. 1 App. 108; Parchman v. S. 2 App. 228; Lee v. S. Id. 338; Merritt v. S. Id. 177; Gillian v. S. 3 App. 132; Boothe v. S. 4 App. 202; Gonzales v. S. 5 App. 584; Ake v. S. 6 App. 398; McMillan v. S. 7 App. 142; Benevides v. S. 14 App. 378.*

It applies to the case as sought to be established by the state, and not to a defense, to inculpatory and not to exculpatory facts. *Rockhold v. S. 16 App. 577; Dyson v. S. 13 App. 402.*

In a proper case, it also applies to the degrees in murder. *Guagando v. S. 41 Tex. 626; Murray v. S. 1 App. 417; Blake v. S. 3 App. 581; White v. S. 23 App. 154; ante, §1071.*

It does not extend to the merely jurisdictional fact of venue. *Barrara v. S. 42 Tex. 260; McReynolds v. S. 4 App. 327; Deggs v. S. 7 App. 359; Achterberg v. S. 8 App. 463; Hoffman v. S. 12 App. 406; ante, §§1718, 1719.*

§2429—Same—Charge as to.—The rule as to reasonable doubt must be charged in every felony case, whether asked or not. *Ante, §1071.* But in misdemeanors it is not error to omit such instruction, unless the defendant requests it to be given. *May v. S. 6 App. 191; Treadway v. S. 1 App. 668; Goode v. S. 2 App. 520.*

The instruction as to reasonable doubt should be in the language of the statute, without any attempt at amplification or explanation. *Ante, §1071; Willson's Cr. Forms, 721; Walker v. S. 13 App. 618.*

In a prosecution for an offense of degrees, when the evidence requires it, the rule of reasonable doubt should be charged with respect to the degrees. *Ante, §1071; Willson's Cr. Forms, 722; McCall v. S. 14 App. 353.* But it is not always essential in such cases that such instruction should be given. *Hodges v. S. 6 App. 615.*

The rule as to reasonable doubt applies alone to criminative facts, and not to exculpatory facts, and the charge of the court should so restrict it. Exculpatory facts, to warrant acquittal, need not be established beyond a reasonable doubt. *Dyson v. S. 13 App. 402; Rockhold v. S. 16 App. 577; Morgan v. S. 16 App. 593.*

The doctrine of reasonable doubt given in charge with reference to the whole case, that is, with reference to the general issue of guilty or not guilty, is ordinarily sufficient, without applying it to each and every fact in proof. And it is not required that it shall be charged with regard to an affirmative independent defense. *McCall v. S. 14 App. 353; Barr v. S. 10 App. 507; Ashlock v. S. 16 App. 13; Webb v. S. 9 App. 490; King v. S. Id. 515; McCullough v. S. 23 App. 620.*

To instruct that the jury should acquit if they have a reasonable doubt as to the "guilt or innocence" of the defendant is error; but such error as usually would inure to the benefit of the defendant, and of which he could not ordinarily be heard to complain. *Patterson v. S. 12 App. 223; McNair v. S. 14 App. 78; Holland v. S. Id. 182; Thomas v. S. Id. 200; Hackett v. S. 13 App. 406.*

An instruction which in effect conditions an acquittal upon the belief of the jury that the defendant is innocent, instead of on the sufficiency of the evidence to establish his guilt, beyond a reasonable doubt, is erroneous. *Smith v. S. 9 App. 150; Robertson v. S. Id. 209; Blocker v. S. Id. 279; Wallace v. S. Id. 299.*

An instruction, that "if the jury had any reasonable doubt of the guilt of the defendant, such as naturally and fairly presented itself from the evidence which the jury believed, etc.," was held erroneous. The reasonable doubt is not limited to, nor is it necessary that it should arise from, the evidence which the jury believes. *Holmes v. S. 9 App. 313.*

"If the jury have a reasonable doubt arising from the facts," etc., is an erroneous charge, as the doubt may arise from a want of facts. *Massey v. S. 1 App. 563.*

The following charge was held erroneous: "If you can reasonably account for or explain the facts and circumstances in evidence before you in this case, in any way consistently with defendant's innocence, without resorting to unreasonable facts and theories, then you should do so and acquit. But if you cannot account for nor explain the facts and circumstances detailed before you in this case upon any reasonable ground consistently with defendant's innocence, then, if you cannot do this, you should convict." *Robertson v. S. 10 App. 602.*

An instruction, that "the defendant is entitled to all reasonable doubts" could not be complained of by the defendant, but is improper, because it opens up a field for speculation and doubt outside the facts of the case. *Reid v. S. 9 App. 472.*

**§2430—ART. 728.—Jury are the judges of the facts.**—The jury in all cases are the exclusive judges of the facts proved, and of the weight to be given to the testimony, except where it is provided by law that proof of any particular fact is to be taken as either conclusive or presumptive proof of the existence of another fact, or where the law directs that a certain degree of weight is to be attached to a certain species of evidence. [O. C. 643.]

See, *ante*, §§2331-2339, as to charge of the court upon the evidence.

**§2431—Decisions under preceding article.**—The jury are the exclusive judges of the credibility of the witnesses, and where the jury has decided upon conflicting evidence, the verdict will not ordinarily be disturbed on appeal. *Taylor v. S.* 17 App. 43; *Jack v. S.* 20 App. 656; *Doss v. S.* 21 App. 505; *Stout v. S.* 22 App. 339; *Brown v. S.* 24 App. 170; *Carr v. S.* *Id.* 562; *Douglass v. S.* 8 App. 520; *Bright v. S.* 10 App. 68; *Jones v. S.* 12 App. 156; *Lane v. S.* 19 App. 64; *Walker v. S.* 14 App. 609; *Brown v. S.* 8 App. 48; *Slaughter v. S.* 7 App. 123; *Givens v. S.* 6 Tex. 344; *Bachelor v. S.* 10 Tex. 258; *Jordan v. S.* *Id.* 479; *Higginbotham v. S.* 23 Tex. 574; *Seal v. S.* 28 Tex. 491; *Thompson v. S.* 36 Tex. 326.

But where there is no testimony to support the verdict: or, where the evidence is insufficient to rebut the presumption of innocence; or, where the verdict is contrary to the evidence, it will be set aside, though it is with reluctance that the court will disturb a verdict when there is any evidence to sustain it. Where, however, the verdict is manifestly wrong, and it is clear that injustice has been done the defendant, it will be set aside, though there is sufficient evidence to support it. *Walker v. S.* 14 App. 609; *March v. S.* 3 App. 335; *Lockhart v. S.* *Id.* 567; *Blake v. S.* *Id.* 581; *King v. S.* 4 App. 256; *Jones v. S.* *Id.* 436; *Templeton v. S.* 5 App. 398; *Gamble v. S.* *Id.* 421; *Johnson v. S.* *Id.* 423; *Barnell v. S.* *Id.* 113; *Tollett v. S.* 44 Tex. 95; *Jones v. S.* 7 App. 457; *post*, Art. 870. See, also, the following other decisions: *Ad-dison v. S.* 8 App. 40; *Baltzeager v. S.* 4 App. 532; *Reardon v. S.* *Id.* 602; *Ridout v. S.* 6 App. 249.

The proposition that "the witnesses being equal in credibility the greater number must prevail," is unsound. The jury may give credence to one witness against the positive testimony of two or more other witnesses. A mere numerical preponderance is unimportant. *Jones v. S.* 13 Tex. 168; *Cox v. S.* 32 Tex. 610; *Parrish v. S.* 45 Tex. 51; *Brown v. S.* 1 App. 154; *Blake v. S.* 3 App. 581; *Simpson v. S.* *Id.* 425.

But in cases involving the issue of the sanity of the defendant, the jury would be warranted in giving more credit to the opinion of the many than the few. *Webb v. S.* 5 App. 596.

The jury must, if possible, reconcile all conflicts of evidence, and if they cannot, they may credit such testimony as, in their opinion, is most entitled to belief. They are not bound to believe the testimony of a witness merely because he is uncontradicted, nor to disbelieve it because he has been impeached. It is their province to determine what testimony shall be believed and what shall be disregarded. *Brown v. S.* 2 App. 139; *Riley v. S.* 4 App. 538; *Taylor v. S.* 5 App. 1; *Jones v. S.* *Id.* 86; *Brady v. S.* *Id.* 343; *Satterwhite v. S.* 6 App. 609; *Coward v. S.* *Id.* 59; *Cordova v. S.* *Id.* 445; *Cooper v. S.* 7 App. 194.

But the jury is not at liberty to arbitrarily disregard uncontradicted, unimpeached, probable testimony. While it is the province of the jury to judge of the credibility of testimony, they must exercise judgment, and not will merely, in doing so. *Satterwhite v. S.* 6 App. 609; *Jones v. S.* 5 App. 86; *Fisher v. S.* 4 App. 181; *Chester v. S.* 1 App. 702; *Conner v. S.* 34 Tex. 659.

The jury are the exclusive judges of the facts proved, and of the weight to be given to the testimony, *except* where the law has otherwise provided. *Jones v. S.* 5 App. 86.

It is the province of the court, and not the jury, to determine the competency of evidence, and the jury are not the judges of the law in any case, but must receive the law from the court, and must find the facts alone from the evidence, under the instructions received from the court. *Fore v. S.* 5 App. 251; *Johnson v. S.* *Id.* 423; *Taylor v. S.* 3 App. 387; *Nels v. S.* 2 Tex. 280; *Wharton v. S.* 45 Tex. 2; *Walker v. S.* 37 Tex. 366.

Affirmative is more reliable than negative evidence, and should have more weight. *Winkfield v. S.* 41 Tex. 148; *Walker v. S.* 42 Tex. 360; *Willis v. Lewis*, 28 Tex. 185; *Coles v. Perry*, 7 Tex. 109; *Cunningham v. S.* 5 Tex. 440; *McReynolds v. S.* 4 App. 327.

When a jury is waived, as it may be in a misdemeanor trial, the court takes the place of a jury, and must determine the facts as well as the law of the case. *Briggs v. S.* 6 App. 144.

**§2432—ART. 729.—Judge shall not discuss evidence offered, etc.**—In ruling upon the admissibility of evidence the judge shall not discuss or comment upon the weight of the same, or its bearing in the case, but shall simply decide whether or not it be admissible. Nor shall he, at any stage of the proceedings, previous to the return of a verdict, make any remark calculated to convey to the jury his opinion of the case. [Added in revising.]

**§2433—Decisions under preceding article.**—It is error for the trial judge to violate the preceding article, but not material error unless it be made to appear that it operated to the prejudice of the defendant. *Rodriguez v. S.* 23 App. 503. In view of this statute, judges, in ruling upon the admissibility of evidence, should severely abstain from anything beyond a simple announcement of the ruling. The court, in a trial of a case before it, is presumed to be, and should be, an impartial arbiter as to the legal rights of the parties, and if com-

petent evidence is submitted to the jury, it is their exclusive province to consider that evidence, without any expression of opinion by the court as to whether it is of much or of little value. *Wilson v. S.* 17 App. 526. See an instance in which it was held that the judge violated the preceding article to the prejudice of the defendant. *Moncallo v. S.* 12 App. 171. An exception to such error must be saved at the time, otherwise, on appeal, the conviction will not be reversed because of it, unless it be apparent that the defendant was injured by it. *Copensey v. S.* 10 App. 473; see, also, *Mays v. S.* 7 App. 342; *Davis v. S.* 14 App. 645.

## II.—OF PERSONS WHO MAY TESTIFY.

§2434—ART. 730.—Persons incompetent to testify.—All persons are competent to testify in criminal actions, except the following:

1. Insane persons, who are in an insane condition of mind at the time when they are offered as witnesses, or who were in that condition when the events happened of which they are called to testify.

2. Children or other persons who, after being examined by the court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated, or who do not understand the obligation of an oath.

3. In prosecutions for seductions under the provisions of the Penal Code, ~~the female alleged to have been seduced. Repealed, Acts 1891, Ch. 33, p. 34.~~

4. ~~The defendant in the criminal action on trial.~~

5. All persons who have been or may be convicted of felony in this state, or in any other jurisdiction, unless such conviction has been legally set aside, or unless the convict has been legally pardoned for the crime of which he was convicted. But no person who has been convicted of the crime of perjury or false swearing, and whose conviction has not been legally set aside, shall have his competency as a witness restored by a pardon, unless such pardon by its terms specifically restore his competency to testify in a court of justice. [O. C. 644.]

### §2435—Decisions under preceding article.

1.—*Insane persons.*—A conviction cannot stand when based exclusively upon the testimony of a witness who is incapable of exercising a faculty necessary to a knowledge of the matter about which he has testified. *Williams v. S.* 44 Tex. 34; see, also, *Ake v. S.* 6 App. 398; *Williams v. S.* 12 App. 127.

2.—*Children.*—Children, or other persons, not possessed of sufficient intelligence to relate transactions about which they are interrogated, or who do not understand the obligation of an oath, are incompetent to testify. *Ake v. S.* 6 App. 398; *Holst v. S.* 23 App. 1; *Williams v. S.* 12 App. 127.

There is no precise age under which a child is deemed incompetent to testify, but when under fourteen years of age competency is determinable by an examination, and the action of the court thereon will not be revised in the absence of a showing that its discretion was abused. *Johnson v. S.* 1 App. 609; *Brown v. S.* 2 App. 115; *Mason v. S.* *Id.* 192; *Brown v. S.* 6 App. 286; *Ake v. S.* *Id.* 398; *Burk v. S.* 8 App. 336; *Davidson v. S.* 39 Tex. 129; *Williams v. S.* 12 App. 127.

The method of testing the competency of such witnesses is confided to the discretion of the trial judge, and his determination of the question will not ordinarily be disturbed on appeal, unless an abuse of that discretion is apparent. See the following cases for instances in which it was held that the court abused this discretion to the injury of the defendant, and, also, see them for a full discussion of the practice in relation to such witnesses. *Williams v. S.* 12 App. 127; *Taylor v. S.* 22 App. 529; *Holst v. S.* 23 App. 1. There is apparently a conflict in the two last cited cases, with respect to the question of postponing the trial for the purpose of instructing an incompetent witness as to the nature and obligation of an oath.

Where a child is incompetent as a witness, its statements made to others in relation to the matter involved cannot be used in evidence. *Smith v. S.* 41 Tex. 352; *Holst v. S.* 23 App. 1.

3.—*Seduced female.*—In a prosecution for seduction (*ante*, §§1417–1421), the injured female is an incompetent witness; but objection to her incompetency must be interposed *in limine*. It is too late to make the objection after verdict. *Cole v. S.* 40 Tex. 147. And a seducer is not a competent witness against the female seduced in a prosecution against her for fornication with him. *Spencer v. S.* 31 Tex. 64.

4.—*The defendant in a scire facias proceeding* is a competent witness in his own and in behalf of his co-defendants. *Reddick v. S.* 21 App. 267.

5.—*Convicted felon.*—A “felony” is an offense which is punishable with death, or by imprisonment in the penitentiary, either absolutely or as an alternative. *Ante*, §§117, 118. It is only a conviction of felony that disqualifies as a witness. *Welsh v. S.* 3 App. 114; *Pitner v. S.* 23 App. 366.

The words "any other jurisdiction," as used in the statute, do not limit the conviction to the tribunals of the United States exercising their jurisdiction in Texas, but a conviction of a felony is available to disqualify a witness, although such conviction was not had within the territorial limits of this state, but in such case it must be shown that the offense of which the witness was convicted was a felony by the laws of the state in which it was had, which fact may be proved by the laws of such state, and it must also appear from the judgment of conviction, or be otherwise shown, that it is a valid judgment under the laws of the state in which it was rendered. *Pitner v. S.* 23 App. 366.

The disqualification of being a convicted felon must be shown by the judgment of conviction. It cannot be shown by parol testimony over the objection of the defendant. *Cooper v. S.* 7 App. 194; *Perez v. S.* 8 App. 610; *Perez v. S.* 10 App. 327.

A pardon, in order to have the effect of restoring competency as a witness, must be a full pardon. A partial or conditional pardon will not have such effect. A pardon is full when it fully and unconditionally absolves the party from all the legal consequences of his crime and conviction, direct and collateral. See this case for a full discussion of the subject: *Carr v. S.* 19 App. 635; *Dudley v. S.* 24 App. 163.

That a previous conditional or partial pardon was granted to and accepted by the party, does not affect the validity of a full pardon subsequently granted to and accepted by him. *Martin v. S.* 21 App. 1.

It is within the power of the governor to restore the competency of a witness laboring under the disqualification of a felony conviction, even after such person has suffered the penalty assessed against him, and a full pardon in such case fully restores his competency as a witness. *Hunnicut v. S.* 18 App. 498.

A full pardon renders the party competent to testify to facts which have come to his knowledge after his conviction, and before his pardon, as well as to any other facts within his knowledge. *Thornton v. S.* 20 App. 519.

When a pardon is relied on to prove a restoration of competency, the pardon itself should be produced, or its non-production should be satisfactorily accounted for, in which case it may be proved by the next best evidence, which would be a certified copy thereof, or an exemplification from the record or register of the secretary of state. *Hunnicut v. S.* 18 App. 498; *Cooper v. S.* 7 App. 195; *Schell v. S.* 2 App. 30.

Competency, by reason of pardon, may be shown although the witness is dead, where it is desired to use his testimony taken before an examining court. *Schell v. S.* 2 App. 30.

A pardon is valid, in the absence of fraud, though it states the date of a conviction incorrectly, if it was intended to cover, and does cover, the particular offense. *Martin v. S.* 21 App. 1; *Hunnicut v. S.* 18 App. 498. And the court may hear proof, and even the statement of the party himself, to show that the pardon was intended to, and does cover, the particular offense of which he was convicted, notwithstanding discrepancies in the description of the conviction as recited in the pardon. *Hunnicut v. S.* 20 App. 632; *Hunnicut v. S.* 18 App. 498.

The delivery and acceptance of a pardon are complete when the grantor has parted with his entire control or dominion over the instrument, with the intention that it shall pass to the grantee, and the latter assents to it, either in person or by his agent. A pardon once delivered and accepted cannot be revoked, but if obtained by fraud, practiced upon the governor, it is void. *Rosson v. S.* 23 App. 287; *Rosson v. S.* 24 App. 226; *Hunnicut v. S.* 18 App. 498.

It is only in cases of conviction for perjury or false swearing, that a pardon must specifically restore the competency of the convict to testify. In all other cases a full pardon effectuates the restoration of competency. *Rivers v. S.* 10 App. 177.

It is not essential, in order to warrant a conviction upon the testimony of a convicted felon whose competency to testify has been restored, that such testimony should be corroborated. And, however correct may be the proposition that the evidence of a pardoned convict is entitled to but little credit, an instruction to the jury to discredit or receive it with suspicion, would be erroneous. *Thornton v. S.* 20 App. 519.

No fact stated by or derived from a convict can, so long as his disability exists, be detailed as testimony by another, or used as evidence for any purpose against another. *Long v. S.* 10 App. 186.

§2436—ART. 731.—**Principals, accomplices and accessories.**—Persons charged as principals, accomplices or accessories, whether in the same indictment or different indictments, cannot be introduced as witnesses for one another, but they may claim a severance; and if any one or more be acquitted, or the prosecution against them be dismissed, they may testify in behalf of the others. [O. C. 230.]

See, *ante*, §§171a-171e; *post*, §2444; *Helm v. S.* 20 App. 41; *Blain v. S.* 24 App. 626.

§2437—**Decisions under preceding article.**—In a murder case it was held competent for the state to introduce in evidence, in order to sustain objections to a proffered witness, an indictment charging such witness as a principal in the commission of the same murder for which the defendant was on trial; and that such indictment, in the absence of a contrary showing, identified the murder therein charged as the same for which the defendant was on trial, and the court had judicial knowledge that the proposed witness had not been tried upon said indictment. It was also further held, that it was competent for the state to show,



*altunde*, such indictment, the witness' participation in the murder, and thus establish his incompetency to testify in behalf of the defendant. *Moore v. S.* 15 App. 1.

Where it appears that an indictment against a defendant's witness has been obtained, not in good faith, but for the purpose of depriving the defendant of the testimony of such witness, the disqualification provided by the preceding article does not obtain, and such witness will be held competent. See the case cited below for an illustration of this rule, and for the further holding that where the depositions of a witness were taken at a time when he was competent to testify in the case, cannot be rejected when offered by the defendant because of a disqualification of the witness produced by the act of the prosecution. *Doughty v. S.* 18 App. 179.

On a trial for theft the defendant offered his mother as a witness in his behalf. The state objected to her testifying, because an indictment was pending against her charging her with receiving and concealing the property alleged to have been stolen. The objection was sustained. Held error. The witness was neither charged as a principal nor as an accomplice in the theft, and because of her relationship to the defendant, she could not be an accessory, and she was therefore a competent witness in his behalf. *Gray v. S.* 24 App. 611; but see *Crutchfield v. S.* 7 App. 65.

The disqualification prescribed by the preceding article does not apply to witnesses produced in behalf of the state, but only to those who are produced in behalf of the defendant. In so far as the prosecution is concerned, the rule at common law, with regard to the admissibility of such evidence, has not been changed by said article. *Rangel v. S.* 22 App. 642; *Meyers v. S.* 3 App. 8; *Meyers v. S.* 8 App. 321; *Rutter v. S.* 4 App. 57; *Morgan v. S.* 44 Tex. 511.

If the indictment against the witness has been dismissed, or if the witness has been tried and acquitted, or has been convicted of a misdemeanor merely, and has paid the penalty assessed against him, he is a competent witness for the defendant as well as for the state. *Rich v. S.* 1 App. 207; *Morrill v. S.* 5 App. 447; *Tilley v. S.* 21 Tex. 200; *Ellege v. S.* 24 Tex. 78; see, *post*, Art. 737.

If the proposed witness stands indicted for any character of complicity in the commission of the offense for which the defendant is on trial, he is an incompetent witness for the defendant, and, if presented by the state, the defendant may show that he is under indictment, or is suspected of the same offense, in order to show that he is interested. But it is not permissible for the state to introduce in evidence an indictment against a witness, charging a different offense than that for which the defendant is on trial. *Clark v. S.* 18 App. 467. The defendant may prove by the witness that he was indicted for the same offense for which the defendant was on trial, but that the prosecution had been dismissed upon condition that he would testify as a witness for the state. *Hinds v. S.* 11 App. 238.

The declarations of a co-defendant, unless a part of the *res gestæ*, are inadmissible in behalf of the defendant. *Blain v. S.* 24 App. 626.

As to accomplice testimony, see, *post*, §§2448, 2449.

As to acts and declarations of "conspirators," see, *ante*, §1048 and, *post*, §2503.

**§2438 — ART. 732. — Court may interrogate witness touching competency.**—The court may, upon suggestion made, or of its own option, interrogate a person who is offered as a witness for the purpose of ascertaining whether he is competent to testify, or the competency or incompetency of the witness may be shown by evidence. [O. C. 645.]

See *Hunnicutt v. S.* 18 App. 498.

**§2439 — ART. 733. — All other persons competent witnesses.**—All other persons except those enumerated in articles 730 and 735, whatever may be the relationship between the defendant and witness, are competent to testify, except that an attorney at law shall not disclose a communication made to him by his client during the existence of that relationship, nor disclose any other fact which came to the knowledge of such attorney by reason of such relationship. [O. C. 646.]

Negroes are competent witnesses. *Ex parte Warren*, 31 Tex. 143; see, *post*, §2455.

**§2440—Privileged communications—Decisions as to.**—It is a settled rule of the law, founded upon public policy, that communications made by a client to his attorney, in the course of their relations as such, and with respect to the business about which the attorney had been employed by the client, shall not be disclosed. This rule has been most rigidly, and with great unanimity, adhered to by the courts, and the tendency has been to contract rather than relax it. *Sutton v. S.* 16 App. 490.

An attorney is not only not allowed to disclose any communication made to him by his client, during the existence of that relationship, but is also disqualified to testify to any other fact which may have come to his knowledge by reason of such relationship from any source whatever. *Hernandez v. S.* 18 App. 134. But to render the communications inadmissible they must have been made to the attorney, counsel or solicitor acting for the time being in the character of legal adviser. The privilege does not extend to information received in the character of friend, and not as counsel; nor to a law student in the office of the attorney; nor to third persons present at a conference between the attorney and client. *Walker v. S.* 19 App. 176.

Privileged communications are subject to two rules: 1. To be privileged they must pass between the attorney and his client in professional confidence, and in the legitimate course of the professional employment of the former. 2. If the communications were made before the commission of the offense, and for the purpose of being guided or helped in its commission, they are not privileged, and this second rule is not affected by the fact that the attorney was wholly without blame. *Orman v. S. 22 App. 604; Orman v. S. 24 App. 495.*

Declarations made by a defendant to, or in the hearing of, his attendant physician, are not privileged communications. *Steagald v. S. 22 App. 464.*

**§2441—ART. 734.—Husband and wife shall not testify as to, etc.**—Neither husband or wife shall in any case testify as to communications made by one to the other while married; nor shall they, after the marriage relation ceases, be made witnesses as to any such communication made while the marriage relation subsisted, except in a case where one or the other is prosecuted for an offense, and a declaration or communication made by the wife to the husband, or by the husband to the wife, goes to extenuate or justify an offense for which either is on trial. [O. C. 647.]

**§2442—ART. 735.—Same subject.**—The husband and wife may in all criminal actions be witnesses for each other, but they shall in no case testify against each other except in a criminal prosecution for an offense committed by one against the other. [O. C. 648.]

**§2443—Decisions under the two preceding articles.**—The husband and wife are incompetent to testify against each other, or against a joint offender with either, and a dismissal of the prosecution as to the husband or wife on trial, after such illegal testimony has been admitted, will not cure the error. *Dill v. S. 1 App. 278.* But when one spouse is not disqualified from testifying by reason of the marital relation, neither is the other. *Doffin v. S. 11 App. 76.*

One spouse is not a competent witness against the other in a prosecution against either for adultery, for incest, or for fornication, these offenses not coming within the meaning of the exception in Art. 735, that is, offenses committed by one against the other. *Compton v. S. 13 App. 271*, overruling upon this point *Morrill v. S. 5 App. 447*, and *Rowland v. S. 9 App. 277*; see, also, *Thomas v. S. 14 App. 70.*

But the spouse of the defendant's paramour is a competent witness against him in a prosecution for adultery. *Alonzo v. S. 15 App. 378; Morrill v. S. 5 App. 447.*

One spouse cannot be used to impeach the testimony of the other, by proving contradictory statements, as this would be allowing testimony of communications made while the marriage relation subsisted between them. *Roach v. S. 41 Tex. 261.* But it is permissible to contradict the testimony of one spouse by that of the other, even though the effect be to discredit the one contradicted. *Clubb v. S. 14 App. 192.*

When a spouse is a competent witness in the case, he or she may be compelled to testify therein as any other witness. *Dumas v. S. 14 App. 464; Bramlette v. S. 21 App. 611.*

The spouse of a defendant, when a witness in the case, like any other witness, is subject to cross-examination, but the cross-examination should be confined to the matters about which the witness testified on the examination-in-chief. *Washington v. S. 17 App. 197; Creamer v. S. 34 Tex. 173; Greenwood v. S. 35 Tex. 578.* And such witness may be interrogated for the purpose of laying a predicate for impeachment. *Shelton v. S. 34 Tex. 662; Hampton v. S. 45 Tex. 154.* But cannot be asked irrelevant questions, or call for privileged communications. *Owen v. S. 7 App. 173.*

One spouse cannot testify against the other in a prosecution for the theft of his or her property. *Overton v. S. 43 Tex. 616.* But one may testify against the other in a prosecution for an assault by one upon the other. *Mathews v. S. 32 Tex. 117; Owen v. S. 7 App. 173; Navarro v. S. 24 App. 378.*

The disqualification of husband and wife as witness against each other extends only to those who are lawfully married, and does not extend to those who are living together unlawfully, although they may recognize each other as husband and wife. *Mann v. S. 44 Tex. 642.*

The declarations of one spouse are evidence against another when they are part of the *res gesta* of the offense, or when the parties are co-conspirators in the offense, under the same rules governing other conspirators. *Cook v. S. 22 App. 511.*

**§2444—ART. 736.—Religious opinion, etc., does not disqualify.**—No person is incompetent to testify on account of his religious opinion or for the want of any religious belief. [Bill of rights, §5; inserted in revising.]

See, *ante*, §1457.

But a witness must testify under oath, and counsel for defendant cannot waive the sanction of an oath. *Bell v. S. 2 App. 216.* A witness may be sworn upon the cross, or in any other manner most binding upon his conscience. *Ake v. S. 6 App. 398; Gonzales v. S. 31 Tex. 496; Const. Art. 1, §5.* A witness, to be competent, must understand the obligation of an oath. *Ante*, §2433, Sub. 2.

**§2445—ART. 737.—Defendant jointly indicted may testify, when.—**A defendant jointly indicted with others, and who has been tried and convicted, and whose punishment was fine only, may testify for the other defendant after he has paid the fine and costs. [Added in revising.]

See, *ante*, §§2435, 2436.

**§2446—ART. 738.—Judge of the court is a competent witness.—**The judge of a court trying an offense is a competent witness for either the state or the defendant, and may be sworn upon the trial and examined. [O. C. 650.]

The judge may decline to testify, and postpone the case for trial before some other judge; but, if he testifies, he must do so under oath as other witnesses. *Valentine v. S.* 6 App. 439.

**§2447—ART. 739.—Judge not required to testify, when.—**When it is proposed to offer the testimony of a judge in a cause pending before him, he is not required to testify if he declares that there is no fact within his knowledge important in the cause. [O. C. 651.]

**§2448—ART. 740.—Oath administered to the judge by the clerk.—**When the judge of a court is offered as a witness, the oath may be administered to him by the clerk. [O. C. 652.]

**§2449—ART. 741.—Testimony of accomplice not sufficient to convict, unless, etc.—**A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the offense committed, and the corroboration is not sufficient if it merely shows the commission of the offense. [O. C. 653.]

**§2450—"Accomplice"—Meaning of as used in preceding article.—**The word "accomplice" is used in the preceding article in a different sense from its technical meaning defined in Article 79 of the Penal Code. As used in the preceding article, it includes principals and accessories, and persons who are *particeps criminis*. It means a person who, either as a principal, accomplice or accessory, is connected with the crime by unlawful act or omission on his part, transpiring either before, at the time of, or after the commission of the offense, and whether or not he was present and participated in the crime. *Phillips v. S.* 17 App. 169; *Harrison v. S. Id.* 442; *House v. S.* 16 App. 25; *Zollicoffer v. S. Id.* 312; *Hornsberger v. S.* 19 App. 335; *Anderson v. S.* 20 App. 312; *Smith v. S.* 13 App. 507; *Roach v. S.* 4 App. 46; *Jones v. S.* 3 App. 575; *Davis v. S.* 2 App. 588; *Irvin v. S.* 1 App. 301; *Kelley v. S. Id.* 628; *Barrara v. S.* 42 Tex. 260; *Williams v. S. Id.* 392.

**§2451—Instances illustrating who are, and who are not, accomplices.—**In a prosecution against a man for incest, the female is an accomplice, if she knowingly, voluntarily and with the same intent which actuated him, united with him in the commission of the crime. But if, in the commission of the incestuous act, she was the victim of force, threats, fraud or undue influence, so that she did not act voluntarily, and did not join in the commission of the act with the same intent which actuated the defendant, she would not be an accomplice. *Mercer v. S.* 17 App. 452; *Freeman v. S.* 11 App. 92; *Dodson v. S.* 24 App. 514.

In the offense of adultery both parties are accomplices. *Merritt v. S.* 12 App. 203; *Merritt v. S.* 10 App. 402.

A pregnant woman who willingly received and took medicine to produce an abortion was held to be not an accomplice; but her father, who encouraged and consented to the administration of the medicine, was held to be an accomplice. *Watson v. S.* 9 App. 237; *Freeman v. S.* 11 App. 92.

In a prosecution for receiving stolen property, the person who stole the property is an accomplice, and if the prosecution be for the theft of property, a receiver of it, knowing it to have been stolen, would be an accomplice. *Miller v. S.* 4 App. 251; *Crutchfield v. S.* 7 App. 65.

If a witness implicates himself as a *particeps criminis*, he is an accomplice, notwithstanding he claims that he was coerced. Thus, where two witnesses fabricated and testified to a false state of facts for the purpose of concealing the guilt of a party of murder, it was held that they were accomplices, although they claimed that they had been told and induced to so testify by the murderer, and did so through fear of him. *Blakely v. S.* 24 App. 616; see, also, *Dodson v. S. Id.* 514; *Mercer v. S.* 17 App. 452; *Freeman v. S.* 11 App. 92; *Davis v. S.* 2 App. 588.

The mere concealment of knowledge that a felony is to be committed, does not make the party concealing such knowledge an accomplice. *Smith v. S.* 23 App. 356; *Noftsingher v. S.* 7 App. 301; *Rucker v. S. Id.* 550. But where the witness, knowing of the unlawful intent of the defendant to commit the offense, furnished him transportation to the place where the offense was committed, it was held that such witness was an accomplice. *Phillips v. S.* 17 App. 169.

Trustees of a common school district signed a check or voucher, and delivered it to the defendant, whom they had employed as a teacher, in order to enable him to draw from the

county treasury certain funds which were not due him, but which they contemplated would become due him in the future. Said teacher was indicted for perjury in making the required affidavit to obtain said funds, and it was held that said trustees, who testified as witnesses in said prosecution, were accomplices. *Anderson v. S. 20 App. 312.*

Where a defendant was on trial for conveying tools into a jail to aid the escape of a prisoner therein confined, another prisoner who also escaped by using the same tools, was held not to be an accomplice with respect to the offense for which the defendant was on trial. *Peeler v. S. 3 App. 533.*

One jointly indicted with another is not necessarily an accomplice. *Roberts v. S. 44 Tex. 120.* But if one who is jointly indicted testifies in behalf of the state upon condition that the prosecution against him is to be dismissed, he is an accomplice. *Barrara v. S. 42 Tex. 261; Williams v. S. Id. 392.*

(A joint offender in gaming is not an accomplice.) *Ante, §§599, 600.*

When a witness participates in a transaction in the capacity of a detective, without guilty intent, but solely to aid in ferreting out crime, he is not an accomplice. *Wright v. S. 7 App. 574; see, also, Allison v. S. 14 App. 122; Steele v. S. 19 App. 425.*

In a prosecution for the theft of a watch, the evidence showed that the stolen watch when found was in possession of a state's witness; but the defendant asserted claim to it, and charged that said witness had stolen it from him. It was held that while the witness may have stolen the watch from the defendant, that did not make him an accomplice in the original theft of it. *Smith v. S. 8 App. 39.*

In a trial for theft of money a witness for the state, who was a daughter of the defendant, had falsely denied any knowledge of the stolen money. Held, that this did not make her an accomplice. *Rhodes v. S. 11 App. 563.*

Complicity with the defendant in other crimes than that for which he is on trial, does not render a witness an accomplice with respect to that crime. *Ham v. S. 4 App. 645.*

Whether or not a child seven years old can be an accomplice is suggested, but not decided, in *Mason v. S. 2 App. 192.*

(A joint offender in betting or gaming is not an accomplice.) *Ante, §§599, 600; Wright v. S. 23 App. 313.*

A witness loaned his gun to the defendant, the defendant declaring at the time that he intended to kill one M. After the defendant started off with the gun, the witness pursued him and tried unsuccessfully to recover the gun. After the defendant had killed M, the witness went to a house where defendant had stopped and advised him to leave. Held, that the witness was an accomplice. *Barnes v. S. 36 Tex. 639.*

**§2452—Complicity must be proved.**—In all cases in which the law treats a witness as an accomplice, there must appear facts or circumstances showing his complicity in the offense, or creating a reasonable presumption of such complicity. *Brown v. S. 6 App. 286.* A witness cannot be regarded as an accomplice when there is nothing shown to connect him in any manner with the transaction. *Ham v. S. 4 App. 645.* But if a witness implicates himself in the crime, he must be regarded as an accomplice. *Irvin v. S. 1 App. 302; Kelly v. S. Id. 629; Freeman v. S. 11 App. 92; Phillips v. S. 17 App. 169; Dubose v. S. 13 App. 418; May v. S. 23 App. 595.*

If a witness denies complicity it is competent to contradict him. *Butler v. S. 7 App. 635.* But not to prove that his general reputation for honesty is bad. *Coffelt v. S. 19 App. 436.* But the defendant may impeach an accomplice witness in the usual manner. *Turney v. S. 9 App. 192.* And may prove his complicity by any character of evidence, which would be admissible if the witness himself were on trial for the offense. *Dubose v. S. 10 App. 230.*

**§2453—Accomplice testimony must be corroborated.**—At common law a conviction would be warranted upon uncorroborated accomplice testimony, but it was the practice to advise against it. *Hoyle v. S. 4 App. 239.* But the preceding article is positive and peremptory, and a conviction is not warranted, and cannot be sustained, upon accomplice testimony, unless it is corroborated by other evidence, no matter how much credit the jury may give to the accomplice testimony. *Lopez v. S. 34 Tex. 133; Wright v. S. 43 Tex. 170; Coleman v. S. 44 Tex. 109; Morgan v. S. Id. 511; Roberts v. S. Id. 119; Dill v. S. 1 App. 279; Chester v. S. Id. 703; Davis v. S. 2 App. 588; Gillian v. S. 3 App. 133; Jones v. S. Id. 575; Dubose v. S. 10 App. 230; Powell v. S. 15 App. 441; House v. S. Id. 522; Dunn v. S. Id. 560; Zollicoffer v. S. 16 App. 312; Harrison v. S. 17 App. 442; Tisdale v. S. Id. 444; Hunnicutt v. S. 18 App. 498; Anderson v. S. 20 App. 312; Stone v. S. 22 App. 185; Dodson v. S. 24 App. 514; Blakely v. S. Id. 616.*

**§2454—Character and extent of corroboration required.**—The burden of proof to corroborate an accomplice witness, so as to warrant and sustain a conviction upon his testimony, is upon the state; and it is not incumbent upon the defendant to disprove the uncorroborated testimony of an accomplice. *House v. S. 15 App. 522.*

An accomplice cannot corroborate his own testimony. *Jernigan v. S. 10 App. 546; Harper v. S. 11 App. 1; Dunn v. S. 15 App. 560; Zollicoffer v. S. 16 App. 312; Hannah v. S. 7 App. 664.*

The testimony of one accomplice cannot be corroborated by one or more other accomplices. *Phillips v. S. 17 App. 169; Jernigan v. S. 10 App. 546; Gonzales v. S. 9 App. 374.*

But the testimony of an accomplice may be corroborated by that of his wife, when her testimony is admissible in the case. *Dill v. S. 1 App. 278.*

A conviction is not warranted, and will not be supported, by the uncorroborated testimony of any number of accomplices. *Roberts v. S. 44 Tex. 120; Heath v. S. 7 App. 464.*

The corroborating evidence to be sufficient, must, of itself, and without the aid of the accomplice testimony, tend in some degree to connect the defendant with the commission of the offense for which he is on trial, but it need not be sufficient of itself to establish his guilt. It must tend to connect the defendant with the offense committed. It must be as to a material matter. It must tend directly and immediately, not merely remotely, to connect the defendant with the commission of the offense. Corroboration as to immaterial facts, having no tendency to connect the defendant with the commission of the offense, is not sufficient. The corroboration must be as to a criminative fact or facts. But it need not be corroborative of any particular statement made by the accomplice. The corroboration is not sufficient if it merely shows the commission of the offense by some person, it must go further, and tend to connect the defendant with its commission. The accomplice testimony need not be corroborated circumstantially and in detail, and if corroborated in material matters, it is unimportant that it was also corroborated in immaterial matters, as it is permissible to strengthen such testimony by proof of connected incidents tending to show its reasonableness and consistency. *Dill v. S. 1 App. 278; Nourse v. S. 2 App. 304; Davis v. S. Id. 588; Jones v. S. 3 App. 575; Hoyle v. S. 4 App. 239; Jones v. S. Id. 529; Jackson v. S. Id. 292; Toomey v. S. 5 App. 163; Myers v. S. 7 App. 640; Simms v. S. 8 App. 230; Roach v. S. Id. 478; Burton v. S. 21 Tex. 337; Watson v. S. 9 App. 237; Weldon v. S. 10 App. 400; Jernigan v. S. Id. 546; Harper v. S. 11 App. 1; Cohea v. S. Id. 622; Powell v. S. 15 App. 441; Dunn v. S. Id. 560; Zollicoffer v. S. 16 App. 312; Phillips v. S. 17 App. 169; Harrison v. S. Id. 442; Tisdale v. S. Id. 444; Blakely v. S. 24 App. 616.*

In a prosecution for the theft of an animal, the ownership of the animal was proved only by the testimony of an accomplice, and such testimony was uncorroborated as to that fact. Held, that the evidence as to ownership was insufficient to support the conviction. *Crowell v. S. 24 App. 404.*

§2455—Charge of the court as to accomplice testimony.—See form of charge held to be sufficient ordinarily: *Willson's Cr. Forms, 714a.* A charge in the language of the statute, with a definition of the word "accomplice" as used in the preceding article, as explained by the decisions, is usually sufficient. *Simms v. S. 8 App. 230; Jackson v. S. 4 App. 292; Avery v. S. 10 App. 199.*

The charge need not define "corroborating evidence," nor instruct that the corroboration must relate to "some material matter." *Hoyle v. S. 4 App. 239; Hozler v. S. 6 App. 501.*

Where the prosecution is against two or more defendants, the court is not required to instruct that if the accomplice testimony has not been corroborated as to all of the defendants, it is not sufficient as to either of them. *Dill v. S. 1 App. 278.*

When there is evidence tending to show that a states witness is an accomplice, and the testimony of such witness is materially prejudicial to the defendant, it is incumbent on the court, whether asked or not, to give in charge to the jury proper instructions relating to accomplice testimony. *Winn v. S. 15 App. 171; Sitterlee v. S. 13 App. 587; Howell v. S. 16 App. 93; Coffelt v. S. 19 App. 436; Fuller v. S. Id. 380; Anderson v. S. 20 App. 312; Stone v. S. 22 App. 185; Boren v. S. 23 App. 28.*

To charge that the witness "is an accomplice with the defendant," is error, it being tantamount to instructing that the defendant, as well as the witness, was guilty of the offense. *Spears v. S. 24 App. 537.*

While in some cases it may be proper for the court in its charge to assume and state to the jury that a witness is an accomplice, the better and safer practice is to submit that question to the jury, taking great care to instruct fully and clearly as to what will constitute an accomplice. *Zollicoffer v. S. 16 App. 312.*

Whether or not a witness is an accomplice, cannot be made to depend upon the conclusion of the jury as to the truth or falsity of his testimony, and it is error to instruct the jury that if they find the testimony of the accomplice to be true, he is an accomplice. *Hornsberger v. S. 19 App. 335.*

In the absence of any evidence tending to show the complicity of a witness in the commission of the offense for which the defendant is on trial, the court is not required to, and should not, instruct with regard to accomplice testimony. *Dubose v. S. 13 App. 418.*

§2456—ART. 742.—In trials for forgery, etc.—In trials for forgery, the person whose name is alleged to have been forged is a competent witness, and in all cases not otherwise specially provided for, the person injured or attempted to be injured is a competent witness. [O. C. 658.]

<sup>a</sup>See, ante, §2438.

### III.—EVIDENCE AS TO PARTICULAR OFFENSES.

§2457—ART. 743.—Must be two witnesses, etc., in treason, or, etc.—No person can be convicted of treason except upon the testimony of at least two witnesses to the same overt act, or upon his own confession in open court. [O. C. 654.]

§2458—ART. 744.—What evidence not admitted in treason, etc.—Evidence shall not be admitted in a prosecution for treason as to an overt act

not expressly charged in the indictment; nor shall any person be convicted under an indictment for treason, unless one or more overt acts are expressly charged therein. [O. C. 655.]

**§2459—ART. 745.—In cases where two witnesses are required, etc.**—In all cases where by law two witnesses, or one with corroborating circumstances, are required to authorize a conviction, if the requirement be not fulfilled, the court shall instruct the jury to render a verdict of acquittal, and they are bound by the instruction. [O. C. 656.]

The court is positively required to instruct the jury to acquit when the requirements of the law as to the *quantum* of the evidence have not been fulfilled. This responsibility cannot be shifted to the jury. *Gabrielski v. S.* 13 App. 428; *Cox v. S.* *Id.* 479; *Hernandez v. S.* 18 App. 134.

**§2460—ART. 746.—Perjury and false swearing—two witnesses, etc., required.**—In trials for perjury no person shall be convicted except upon the testimony of two credible witnesses, or of one credible witness corroborated strongly by other evidence as to the falsity of the defendant's statements under oath, or upon his own confession in open court. [O. C. 657.]

See, *ante*, §§310, 311; *Anderson v. S.* 24 App. 705.

**§2461—ART. 747.—Proof of intent to defraud in forgery.**—In trials of forgery it need not be proved that the defendant committed the act with intent to defraud any particular person. It shall be sufficient to prove that the forgery was in its nature calculated to injure or defraud any of the sovereignties, bodies corporate or politic, officers or persons named in the definition of the offense of forgery in the Penal Code. [O. C. 659.]

See, *ante*, §744; also, §§1961, 1962.

#### IV.—OF DYING DECLARATIONS AND OF CONFESSIONS OF THE DEFENDANT.

**§2462—ART. 748.—Dying declarations, evidence, when.**—The dying declarations of a deceased person may be offered in evidence either for or against a defendant charged with the homicide of such deceased person under the restrictions hereafter provided. To render the declarations of the deceased competent evidence it must be satisfactorily proved—

1. That at the time of making such declarations he was conscious of approaching death and believed there was no hope of recovering.
  2. That such declaration was voluntarily made, and not through the persuasion of any person.
  3. That such declaration was not made in answer to interrogatories calculated to lead the deceased to make any particular statement.
  4. That he was of sane mind at the time of making the declaration.
- [O. C. 660.]

For the decisions under the preceding article, see, *ante*, §1045.

**§2463—ART. 749.—Confession of defendant.**—The confession of a defendant may be used in evidence against him if it appear that the same was freely made without compulsion or persuasion, under the rules hereafter prescribed. [O. C. 661.]

**§2464—ART. 750.—When confession shall not be used.**—The confession shall not be used if at the time it was made the defendant was in jail, or other place of confinement, nor while he is in custody of an officer, unless such confession be made in the voluntary statement of the accused, taken before an examining court in accordance with law, or be made voluntarily after having been first cautioned that it may be used against him, or unless in connection with such confession he make statement of facts or of circumstances that are found to be true which conduce to establish his guilt, such as the finding of secreted or stolen property, or instrument with which he states the offense was committed. [O. C. 662.]

**§2465—Confession—Definition of.**—A confession is a voluntary declaration made by a person who has committed a crime, of the agency or participation which he had in the same; an admission or acknowledgment that he committed, or was concerned in, the commission of the offense with which he is charged. It is not necessary, in order to make the statement a confession that it should be a direct acknowledgment of guilt.

*Acts*, as well as *words*, may constitute a confession, and even *silence*, under certain circumstances. And these characters of confession are governed by the same rules as to their admissibility, as the usual confession by words. *Nolen v. S.* 14 App. 474, overruling *Rhodes v. S.* 11 App. 563.

A statement with reference to the future commission of an offense in pursuance of a conspiracy, made prior to the commission of an offense, is not a confession. *Banks v. S.* 13 App. 182.

**§2466—Should be received with great caution, etc.**—A confession should be received with great caution, and a jury should hesitate to convict upon it in the absence of some corroboration, and in cases of murder, without proof of the *corpus delicti*, a confession of guilt, uncorroborated by other evidence, is not sufficient to warrant a conviction. *Ante*, §939; *Fields v. S.* 41 Tex. 25; *Jones v. S.* 13 Tex. 168; *Gay v. S.* 2 App. 127; *Riley v. S.* 4 App. 538.

But the foregoing should not be given in charge to the jury, as that would be charging upon the weight of evidence. *Thuston v. S.* 18 App. 26; *Collins v. S.* 20 App. 399.

A confession is in the nature of positive rather than circumstantial evidence. *Eckert v. S.* 9 App. 105.

**§2467—Burden upon state to show confession admissible.**—The burden is upon the state to show that the confession proposed to be given in evidence by it is admissible. And until the proper predicate is laid, the confession should not be received. *Cain v. S.* 18 Tex. 387; *Greer v. S.* 31 Tex. 129; *Angell v. S.* 8 App. 451. But a contrary doctrine to the above seems to have been held in *Williams v. S.* 19 App. 276, without reference to the cases above cited. In the *Williams* case, *supra*, the evidence left it doubtful whether the confession was made at a time when the defendant was under arrest, and it was held that the burden devolved upon the defendant to show that he was, at the time of the confession, under arrest.

**§2468—Judge to determine admissibility of confession.**—It is the province of the judge to hear and determine the sufficiency of the evidence as to the admissibility of the confession offered. *Cain v. S.* 18 Tex. 387; *Carter v. S.* 37 Tex. 362. The competency of a confession is a question of law. *Hauck v. S.* 1 App. 357; *Speer v. S.* 4 App. 474.

In a capital case, when a confession is about to be offered, the proper practice is to retire the jury from the court room until the admissibility of the confession has been determined by the judge. *Carter v. S.* 37 Tex. 362.

**§2469—Common law rules as to confessions.**—In the absence of statutory provisions regulating confessions not made when the defendant was in confinement, or in the custody of an officer, the common law rule on the subject controls. That rule is as follows: To be admissible, the confession must be voluntary, not obtained by improper influence, nor drawn from the party by means of threat or promise, of a character and under circumstances such as might have influenced the person making the confession. The essence of the rule is, that to qualify the confession as evidence, it must have been voluntarily made, without the appliances of hope or fear by any other person. *Womack v. S.* 16 App. 178; *Weller v. S.* *Id.* 200; *Collins v. S.* 20 App. 399; *Allen v. S.* 12 App. 190; *Cain v. S.* 18 Tex. 387; *Carter v. S.* 37 Tex. 362; *Speer v. S.* 4 App. 474; *Warren v. S.* 29 Tex. 369.

But when the confession was freely and voluntarily made, without compulsion or persuasion, and when the person making it was not in confinement, or in the custody of an officer, it is admissible against the defendant. *Weller v. S.* 16 App. 200; *Womack v. S.* *Id.* 178; *Williams v. S.* 19 App. 276; *Penland v. S.* *Id.* 365; *Allen v. S.* 12 App. 190; *Pockett v. S.* 5 App. 552; *Speer v. S.* 4 App. 474; *Conoly v. S.* 2 App. 412; *Johnson v. S.* 20 App. 178.

**§2470—Confessions made while in confinement, etc.**—General rules as to.—When the person making a confession is in confinement, or in custody of an officer, such confession is not admissible evidence against him, unless it is shown to be within some one of the exceptions specified in the preceding Article 750. *Ake v. S.* 30 Tex. 466; *Adams v. S.* 34 Tex. 526; *Barnes v. S.* 36 Tex. 356; *Williams v. S.* 37 Tex. 474; *Haynie v. S.* 2 App. 169; *Angell v. S.* 8 App. 451; *Williams v. S.* 10 App. 526; *O'Connell v. S.* *Id.* 567; *Kennon v. S.* 11 App. 356; *Lopez v. S.* 12 App. 27.

But if inculpatory declarations of the defendant are *res gestæ*, they are admissible against him, though they might be incompetent as confessions. *Powers v. S.* 23 App. 42.

**§2471—Exceptions to general rule—Voluntary statement before examining court.**—The voluntary statement of the defendant made before an examining court, or before a coroner's inquest, if the same has been made and taken in accordance with the statutory requirements, is admissible against the defendant. But to render the same admissible as a voluntary statement under the statute, it must appear that the same was made and taken after the person making it had been informed by the magistrate that it was his right to make such statement, but that he was not compelled to make any statement whatever, and that if he did make such statement it might be used in evidence against him. No form of such caution is prescribed, and it is sufficient to inform the party that so much of the statement as may be inculpatory of himself, may be used against him. See this case for a full discussion of the requisites to the admissibility of a "voluntary statement;" *Kirby v. S.* 23 App. 13; see, as to manner, etc., of making a voluntary statement, *ante*, §§1762, 1763.

A voluntary statement cannot be used in evidence against the defendant, unless it was made after a proper caution, and proof must be made of the verity and genuineness of such statement. *DeWarren v. S. 29 Tex. 464; Powell v. S. 37 Tex. 348; Briz v. S. 39 Tex. 95.*

An oral plea of guilty, made before an examining court, preceded by a proper caution, is admissible in evidence against the defendant as an *extra judicial* confession, if voluntarily made. *Rice v. S. 22 App. 654.*

And a confession made before an examining court and reduced to writing, but not properly authenticated, if otherwise competent evidence, may be proved by parol. *Guy v. S. 9 App. 161; Alston v. S. 41 Tex. 39.*

§2472—When made voluntarily, and after being cautioned.—A confession, to be admissible in evidence, if the party was in confinement or custody when it was made, must be freely made, without compulsion or persuasion, voluntarily, and after the person making it has been cautioned that it may be used against him.

To render a confession inadmissible upon the ground that it was induced by compulsion, it is not sufficient that the person making the confession was influenced by fear of legal punishment. *Gentry v. S. 24 App. 80; Thompson v. S. 19 App. 593; but see, also, Womack v. S. 16 App. 178.*

And to render it inadmissible, upon the ground that it was induced by a promise of some benefit, the promise must be positive, and must be made or sanctioned by a person in authority, and must be of such character as would be likely to influence the party to speak untruthfully. *Gentry v. S. 24 App. 80; Rice v. S. 22 App. 654; Thompson v. S. 19 App. 593.*

See, also, upon the subject: *Cain v. S. 18 Tex. 387; Elizabeth v. S. 27 Tex. 329; Warren v. S. 29 Tex. 369; Haynie v. S. 2 App. 168; Davis v. Id. 588; Shafer v. S. 7 App. 239; Taylor v. S. 3 App. 387; Williams v. S. 10 App. 526; O'Connell v. S. Id. 567; Waite v. S. 13 App. 169; Bryant v. S. 18 App. 107.*

An application for a continuance, made when the defendant was in custody, cannot be used in evidence against him, unless before making it he was cautioned that it might be so used. *Austin v. S. 15 App. 388; see, also, Gonzales v. S. 12 App. 657; Vickery v. S. 7 App. 401; Wimberly v. S. 22 App. 506; Adams v. S. 16 App. 162.*

When the confession by words is inadmissible, because the defendant was uncautioned, his acts or his silence would, for the same reason, be inadmissible. *Nolen v. S. 14 App. 474, overruling Rhodes v. S. 11 App. 563.*

§2473—When verified by statement found to be true.—When, in connection with a confession, the party makes a statement of facts, or of circumstances that are found to be true, which conduce to establish his guilt, such confession is admissible against him, whether it was voluntarily made or not, or whether he was first cautioned or not. The entire confession, together with such statements of facts or circumstances found to be true, are admissible in evidence against him. *Weller v. S. 16 App. 200, overruling, in so far as they conflict with this decision, Davis v. S. 8 App. 510; Walker v. S. 9 App. 38; Massey v. S. 10 App. 645; O'Connell v. S. Id. 567; Kennon v. S. 11 App. 356; see, also, Walker v. S. 2 App. 326; Davis v. S. 29 Tex. 369; Warren v. S. 29 Tex. 370; Selvidge v. S. 30 Tex. 60; Strait v. S. 43 Tex. 486; Speights v. S. 1 App. 551; Collins v. S. 14 App. 141; Zumwalt v. S. 5 App. 521; Berry v. S. 4 App. 492; Bean v. S. 17 App. 60; Buntain v. S. 15 App. 485; Loyd v. S. 19 App. 137; Burfey v. S. 8 App. 519.*

But to render the confession admissible under this exception, the facts or circumstances must be discovered by means of the statement made. If they had already been discovered when the confession was made, or were not discovered by means of the information afforded by the defendant, the confession is not admissible. *Walker v. S. 2 App. 326; Allison v. S. 14 App. 122; Nolen v. S. Id. 474.*

If the statement be with regard to where the fruits of a crime, or the instruments with which a crime was committed, are secreted or to be found, it is not essential, in order to render the confession admissible, that such property or instruments be found in the exact place stated; but it is sufficient they be found in the immediate vicinity of such place, and be found in consequence of the information afforded by the defendant. *Buntain v. S. 15 App. 485; Davis v. S. 8 App. 510.*

The truth of the inculpatory facts or circumstances must be shown by evidence, *aliunde* the statements of defendant. *Kennon v. S. 11 App. 356.*

The facts or circumstances stated and found to be true, must be such as *conduce to establish the guilt of the defendant*, and if they are not of this character, the confession will not be admissible. But a single fact or circumstance stated and found to be true, and which is inculpatory of the defendant, conducing to establish his guilt of the crime for which he is on trial, will render the confession admissible. *Owens v. S. 16 App. 448.* Irrelevant facts or circumstances, which cannot conduce to the establishment of guilt, are not admissible, even though found to be true. *Warren v. S. 29 Tex. 369.*

§2474—"Confinement"—"Custody"—What constitutes.—Actual custody, whether that of an officer or not, is sufficient to exclude the confession, if made without caution. *Warren v. S. 29 Tex. 369.* See the following cases illustrating the meaning of "confinement" and "custody." *Grosse v. S. 11 App. 364; Nolen v. S. 9 App. 419; Nolen v. S. 14 App. 474; Nolen v. S. 8 App. 585; Conoly v. S. 2 App. 412; Smith v. S. 13 App. 507; Owens v. S. 16 App. 443; Williams v. S. 19 App. 276.*

It is immaterial that the offense for which the defendant was confined, or was in custody when the confession was made, is a different offense than that for which he is on trial. *O'Connell v. S. 10 App. 567; Taylor v. S. 3 App. 387; Neiderluck v. S. 21 App. 320; Grosse v. S. 11 App. 364; Davis v. S. 19 App. 201.*



If a witness, in an examining trial, is charged or suspected of the crime under investigation, and is aware of the fact that he is so charged or suspected, his testimony on such investigation is not admissible against him when on trial for the offense investigated. *Woods v. S.* 22 App. 431.

§2475—"Caution"—Decisions as to.—Ordinarily, a confession made when the party is in confinement or in custody, is not admissible unless, before it was made, the defendant was informed or cautioned that it might be used in evidence against him. And a statement made by a prisoner uncautioned, cannot be made evidence by proving that the same was repeated in his presence and he made no reply thereto. *Jackson v. S.* 7 App. 363; *Shrivers v. S.* *Id.* 450.

But where the prisoner wrote out a confession and handed it to an officer, who, when he received it, warned him that it might be used in evidence against him, it was held that such confession was admissible, as the prisoner, after being cautioned, evinced no desire to retract it; but that if he had evinced such desire, the confession would not have been admissible. *Harris v. S.* 6 App. 97; *Waite v. S.* 13 App. 169.

See the following other decisions upon this subject: *Pockett v. S.* 5 App. 552; *Marshall v. S.* *Id.* 273; *Neiderluck v. S.* 21 App. 320; *Davis v. S.* 19 App. 201; *Taylor v. S.* 3 App. 387; *Davis v. S.* 2 App. 583; *Kirby v. S.* 23 App. 13.

§2476—Entire confession admissible, etc.—When any part of a confession is admitted in evidence, the defendant is entitled to have the whole of it admitted. *Riley v. S.* 4 App. 538; *Brown v. S.* 2 App. 139; *Harrison v. S.* 20 App. 387; *Greene v. S.* 17 App. 395; *Jones v. S.* 13 Tex. 168; *Powell v. S.* 37 Tex. 348; *McHenry v. S.* 40 Tex. 46.

But the jury may believe that part of the confession which is inculpatory of the defendant, and reject that which is in his favor, if they see fit. *Brown v. S.* 2 App. 139; *McHenry v. S.* 40 Tex. 46.

A defendant is not entitled to put in evidence his confession in the first instance. It must be introduced by the state. *Cock v. S.* 8 App. 659.

§2477—Subsequent confession.—Although a first confession may be inadmissible in evidence, a subsequent one may be free from objection and admissible. See the following cases in relation to subsequent confessions: *Thompson v. S.* 19 App. 593; *Walker v. S.* 7 App. 245; *Maddox v. S.* 41 Tex. 205; *Walker v. S.* 9 App. 38.

§2478—Confession of collateral facts not admissible, unless, etc.—When a confession of the main fact would be inadmissible, a confession of collateral facts tending to establish the main fact is, likewise, inadmissible. *Haynie v. S.* 2 App. 168; *Taylor v. S.* 3 App. 387; *Marshall v. S.* 5 App. 273; *Nolen v. S.* 9 App. 419; *Williams v. S.* 10 App. 526; *Austin v. S.* 15 App. 388.

In considering a confession a jury may accept one portion of it as true, and reject as untrue that which has been contradicted by other testimony. *Carr v. S.* 24 App. 562.

§2479—Confession by other than defendant—Decisions as to.—The general rule is, that a person's confession cannot be used as evidence against any other person than himself. *Draper v. S.* 22 Tex. 400; *Hightower v. S.* *Id.* 605; *Ake v. S.* 30 Tex. 466; *Ake v. S.* 31 Tex. 416; *Armistead v. S.* 22 App. 51.

Where a defendant is on trial, charged as an accomplice or accessory, it is competent for the state to prove confessions made by the principal in the crime, for the sole purpose, however, of establishing the guilt of such principal; and when a confession is admitted for this purpose, the jury must be instructed that it is not evidence against the defendant for any other purpose than to establish the guilt of the principal. *Simms v. S.* 10 App. 131.

A confession made by a co-conspirator with the defendant, if admissible against such co-conspirator, is also admissible against the defendant, if it was made pending the conspiracy and in furtherance thereof; but not if made after the consummation of the conspiracy. *Zumwalt v. S.* 5 App. 521; *Hannon v. S.* *Id.* 549; *Allen v. S.* 8 App. 67; *Cohea v. S.* 11 App. 153; see, *ante*, §1048; *Armistead v. S.* 22 App. 51; *Willey v. S.* 22 App. 408.

Where two defendants are being tried jointly, a confession made by one may be admitted in evidence against him, but the jury must be instructed that they cannot consider such confession against the other defendant. *Collins v. S.* 24 App. 141.

For decisions relating to the charge of the court with respect to confessions, see, *ante*, §2341.

## V.—MISCELLANEOUS PROVISIONS.

§2480—ART. 751.—When part of an act, declaration, etc., is given in evidence, the whole may be required.—When part of an act, declaration or conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other, as when a letter is read all other letters on the same subject between the same parties may be given. And when a detailed act, declaration, conversation or writing is given in evidence, any other act, declaration or writing which is necessary to make it fully understood or to explain the same, may also be given in evidence. [O. C. 664.]

**§2481—Decisions under preceding article.**—The preceding article expands the common law rule with reference to such evidence. At common law, when a confession or admission is introduced in evidence against a party, such party is entitled to prove the whole of what he said on the subject at the time of making such confession or admission. But the preceding article does not restrict the explanatory act, declaration, conversation or writing, to the time when the act, declaration, conversation or writing sought to be explained, occurred, but extends the rule so as to render such acts or statements admissible, if necessary to a full understanding of, or to explain, the acts or statements introduced in evidence by the adverse party, although the same may have transpired at a time so remote even as to not be admissible as *res gestæ*. *Greene v. S.* 17 App. 395, overruling *Shrivers v. S.* 7 App. 450, in so far as it conflicts with the above; see, also, *Rainey v. S.* 20 App. 455.

This article is not intended to operate against a defendant, and cannot be invoked by the state to exclude the declarations of the defendant made when in custody, if the same be otherwise admissible as *res gestæ*. *Harrison v. S.* 20 App. 387.

But where the acts and declarations of the defendant were introduced in evidence as *res gestæ*, subsequent explanations thereof were held to be inadmissible. *Gibson v. S.* 23 App. 414, distinguished from *Greene v. S.* 17 App. 395, and *Harrison v. S.* 20 App. 387; see, also, *Penland v. S.* 19 App. 365, for evidence offered by the defendant, which was held to be inadmissible under the preceding article.

If the state proves an act of the defendant material to be understood, either party is entitled to accompanying declarations explanatory of such act. *Davis v. S.* 3 App. 91; *Stockman v. S.* 24 App. 387.

If the state elicits part of a conversation or declaration, the defendant is entitled to all that relates to the same subject, and to all that may be necessary to a full understanding of the portion elicited by the state, or explanatory of it. *Massey v. S.* 1 App. 563; *Davis v. S.* 3 App. 91; *Riley v. S.* 4 App. 538; *Satterwhite v. S.* 6 App. 609; *Shrivers v. S.* 7 App. 450; *Pharr v. S.* 9 App. 129; *Sager v. S.* 11 App. 110; *Greene v. S.* 17 App. 395; *Penland v. S.* 19 App. 365; *Harrison v. S.* 20 App. 387; *Stockman v. S.* 24 App. 387. For testimony offered under this rule, but held to be inadmissible, see *Kunde v. S.* 23 App. 65; *Gibson v. S.* 23 App. 414; *Rainey v. S.* 20 App. 455; see, further, *ante*, §§1047, 1300.

When a portion of a writing is put in evidence by the state, it is the privilege of the defendant to put the whole of such writing in evidence. *Early v. S.* 9 App. 476.

**§2482—ART. 752.—Written part of an instrument shall control, etc.**—When an instrument is partly written and partly printed the written shall control the printed portion when the two are inconsistent. [O. C. 665.]

See, *ante*, §67, P. C.

**§2483—ART. 753.—When subscribing witness denies execution, etc., of instrument.**—When a subscribing witness denies or does not recollect the execution of an instrument to which his name appears, its execution may be proved by other evidence. [O. C. 666.]

See *Sayles' Civ. Stat.*, Art. 2245, note 75; see, also, *post*, §2497.

**§2484—ART. 754.—Evidence of handwriting by comparison.**—It is competent in every case to give evidence of handwriting by comparison, made by experts or by the jury; but proof by comparison only shall not be sufficient to establish the handwriting of a witness who denies his signature under oath. [O. C. 667.]

See, *Sayles' Civ. Stat.*, Art. 2455, note 75; Art. 2262, note 10.

**§2485—Handwriting—Decisions as to proof of.**—A signature offered as a standard of comparison must be an admitted signature, or established as genuine by other testimony than the mere opinion of a witness, before it can be used in proving handwriting by comparison therewith. *Phillips v. S.* 6 App. 364. Upon this point see the following other cases: *Walker v. S.* 14 App. 609; *Heacock v. S.* 13 App. 97; *Rogers v. S.* 11 App. 608; *Phillips v. S.* 6 App. 364; *Hatch v. S.* *Id.* 384; *Harris v. S.* *Id.* 97; *Eborn v. Zimpleman*, 47 Tex. 503; *Heard v. S.* 9 App. 1. A letter written by a convicted felon cannot be used as a standard of comparison. *Long v. S.* 10 App. 186.

Experienced tellers of banking houses, whose daily duties require them to pass upon signatures, etc., and who consider themselves qualified to judge of handwriting, are competent expert witnesses to prove handwriting by comparison, and their opinions with reference to such matter are admissible. *Speiden v. S.* 3 App. 156, distinguished from *Haynie v. S.* 2 App. 168.

To entitle a witness to be examined as an expert in the comparison of handwriting, he must, in the opinion of the court, have special practical acquaintance with the immediate line of inquiry, and the question of his competency as such expert is one for the court and not the jury, to determine. A witness offered as an expert to prove handwriting by comparison, testified that he was not experienced in the comparison of handwriting; that he was not an expert in that respect, but thought he could tell whether or not two different instruments were written by the same individual, was held to be not qualified to testify as an

expert. *Heacock v. S.* 13 App. 97. As to qualification of witness, see, also, *Walker v. S.* 14 App. 609; *Chester v. S.* 23 App. 577.

The fact that the statute, in criminal cases, permits evidence of handwriting by comparison, does not change the well established rules as to such testimony. Such evidence has always been considered feeble, and in some States unsafe to act upon, and in civil cases such express statutory permission to introduce such evidence is not given. *Heacock v. S.* 13 App. 97; *Jones v. S.* 7 App. 437; *Hanley v. Gandy*, 28 Tex. 211.

Handwriting may be proved otherwise than by comparison, by two modes: 1. By a witness who has seen the party write, and a witness who has seen the party write but once is competent to testify to the handwriting of such party. 2. By a witness who has seen letters, bills or other writings, purporting to be the handwriting of the party, and who acted upon them as such with the knowledge and acquiescence of such party, or when such party has adopted them as his writings, etc. *Haynie v. S.* 2 App. 168; *Hanley v. Gandy*, 28 Tex. 211; *Long v. S.* 10 App. 186.

A witness cannot testify to handwriting without it being first shown that he is qualified to do so, and the best proof of the genuineness of a writing is the testimony of the writer, and when that is not competent or cannot be produced, the next best is the testimony of a witness who saw the writing executed. *Haun v. S.* 13 App. 383; *Hanley v. Gandy*, 28 Tex. 211; *Mapes v. Leal*, 27 Tex. 345.

Standards of comparison used by expert witnesses, should not be permitted to go into the hands of the jury to be used by them as proof of the handwriting on an alleged forged instrument. See the facts upon which this ruling was based: *Chester v. S.* 23 App. 577.

In a trial for forgery, an expert witness was permitted to make a *fac simile* of one of the signatures in question, which, together with a genuine signature, were over defendant's objections exhibited to the jury, for the purpose of showing how easily the genuine signature could be counterfeited. Held, that such evidence was inadmissible. *Thomas v. S.* 18 App. 213.

**§2486—ART. 755.—Party may attack testimony of his own witness, when and how.**—The rule that a party introducing a witness shall not attack his testimony is so far modified as that any party, when facts stated by the witness are injurious to his cause, may attack his testimony in any other manner, except by proving the bad character of the witness. [O. C. 668.]

**§2487—Decisions under preceding article.**—The party introducing a witness cannot attack his testimony in any manner, unless the witness has stated facts injurious to such party. This is the only modification of the common law rule which denies a party the right to attack the testimony of his own witness. *Thomas v. S.* 14 App. 70; see, also, upon this subject, *Clanton v. S.* 13 App. 139; *Tyler v. S.* *Id.* 205; *White v. S.* 10 App. 381. It is not enough to authorize a party to impeach his own witness that such witness made a different statement from that which the party had reason to and did believe he would make. But if the party be *bona fide* surprised at unexpected testimony from his witness, he may be permitted to interrogate him as to his previous declarations inconsistent with his testimony, the object being to test the witness' recollection and to enable him, if mistaken, to correct his evidence. Such corrective testimony is also admissible to explain the attitude of the party calling the witness. But if the sole object of such testimony be to discredit the witness, it will not be received. *Bennett v. S.* 24 App. 73.

**§2488—ART. 756.—Interpreter shall be sworn to interpret, when.**—When a witness does not understand and speak the English language, an interpreter must be sworn to interpret for him. Any person may be *subpœnaed*, attached or recognized in any criminal action or proceeding to appear before the proper judge or court to act as interpreter in such criminal action or proceeding, under the same rules and penalties as are provided in the case of the witnesses. [Added in revising.]

See Willson's Cr. Forms, 671.

**§2489—Presumptions—Statutes and decisions as to.**—As to presumption of "innocence," see, *ante*, §§28, 33, 110, 114, 1071, 2425, 2426. As to presumption of "intent," see, *ante*, §§107-111. In "rape" by fraud, §910. In "homicide," §§1078-1084. In "murder," §1041. In "assault," §812. Of "chastity" of a slandered female, §1121. Of "sanity," §85.

The law presumes, ordinarily, in favor of the regularity of all the proceedings in a case. *Meredith v. S.* 40 Tex. 480; *Escareno v. S.* 16 App. 85.

It presumes that an officer has performed his duty properly, but this presumption does not extend to a person not an officer. *James v. S.* 21 App. 353; see, also, *Sayles' Civ. Stat.*, Art. 2245, Rule 14.

In theft, the fact that the defendant disposed of different recently stolen articles at the same time, warrants the presumption that they came to his possession at the same time. *Jack v. S.* 20 App. 656.

The presumption of innocence counterbalances the presumption of continued life, in a prosecution for bigamy. *Hull v. S.* 7 App. 593.

The force of testimony is increased by a failure to rebut it, where, from the nature of the circumstances, its falsity can be easily shown; and counsel have a right to comment on such non-production. *Mercer v. S.* 22 App. 452; *Thompson v. Shannon*, 9 Tex. 536; *Needham v. S.* 19 Tex. 332. But a mere failure to produce exculpatory evidence within the power of the defendant easily to produce, does not always lend additional probative force to inculpatory evidence. *Strong v. S.* 18 App. 19. But if the inculpatory fact be questioned, or its criminative import be controverted, and the defendant has it in his power, but fails to disprove it if false, or to explain it if true, his failure to do so tends to establish its truth or criminative import. *Davis v. S.* 15 App. 594; *Mercer v. S.* 17 App. 452.

A presumption of guilt arises from fabrication of evidence, or attempts to escape or evade justice, when accused of an offense. *Benavides v. S.* 31 Tex. 579; *Sheffield v. S.* 43 Tex. 378. But presumptions of fact are always for the consideration of the jury, and the court must not instruct that they are evidence of guilt. *Sheffield v. S.* 43 Tex. 378.

**§2490—Judicial knowledge.**—Judicial knowledge of municipal corporations is not chargeable to the courts of this state, inasmuch as the law enables cities, and towns of two hundred inhabitants, to incorporate, and such incorporations are not by public act. *Temple v. S.* 15 App. 304. And a court or judge is not charged with judicial knowledge that any designated locality is in an incorporated city or town. *Patterson v. S.* 12 App. 222.

General statutes, which recognize the location of a place, will authorize judicial knowledge of such location. In the absence of such a statute, and in the absence of evidence, a court cannot judicially know that a named place is in a particular county. *Hoffman v. S.* 12 App. 406; *Terrill v. S.* 41 Tex. 463; *Boston v. S.* 5 App. 383; see, also, *S. v. Lee*, 15 Tex. 252; *Bell v. S.* 1 App. 81.

The boundaries of counties as municipal subdivisions of the state is a matter of judicial knowledge. *S. v. Jordan*, 13 Tex. 205.

That municipal corporations are authorized by law to hold elections for city attorney and other officers, was held to be within judicial cognizance. *Gallagher v. S.* 10 App. 469.

A court will take judicial cognizance of the statutory terms of district and county courts, but not of terms of the county court fixed otherwise than by an act of the legislature. *Conner v. S.* 6 App. 455; *Wills v. S.* 4 App. 613.

Judicial cognizance will be taken of the courts of the state, and of the counties in which they are held, and of the judges thereof. *Watson v. S.* 5 App. 11; *Long v. S.* 1 App. 709.

In an early case it was held that the offense of betting at "rondo" had been so frequently brought under discussion and adjudication before the courts, that judicial cognizance would be taken that it was a "gaming table" within the meaning of the statute. *S. v. Mann*, 13 Tex. 61.

Courts will not take judicial cognizance of special laws, or of ordinances of municipal corporations. *Willson v. S.* 16 App. 497; *Hailes v. S.* 9 App. 170.

A court will take judicial notice of its own records and proceedings. *Harris v. S.* 21 App. 478; *Robinson v. S.* 12 App. 160.

In proper cases a court will assume knowledge of natural laws, such as are ordinarily admitted by experience, or demonstrated by science. But this rule will not authorize the assumption that a boy sixteen years of age presented the physical appearances of a person under the age of twenty-one years. *Hunter v. S.* 18 App. 444.

Courts of this state judicially know that the Indian Territory is beyond the jurisdiction of this state. *Conner v. S.* 23 App. 378. And that the "Muscogee Nation" is the same as the "Creek Nation." *Cowell v. S.* 16 App. 57.

When judicial knowledge of a fact can be indulged, such fact need not be alleged or proved. *S. v. Mann*, 13 Tex. 61.

See further, upon the subject of judicial knowledge, *Sayles' Civ. Stat.*, Art. 2245, Rule 15.

**§2491—Province of judge and jury as to the evidence.**—See *Sayles' Civ. Stat.*, Art. 2445, Rules 3 and 4. The admissibility of evidence is determinable by the judge, and illegal testimony should not be admitted, and when admitted inadvertently or erroneously, should be excluded, and the jury instructed to not consider it. *Carter v. S.* 37 Tex. 362; *Myers v. S.* 6 App. 1; *Moore v. S.* 7 App. 14; *Clark v. S.* 23 App. 260; *Gose v. S.* 6 App. 121.

In perjury, the materiality of the matter assigned as perjury is determinable by the court, and should not be submitted to the jury. *Davidson v. S.* 22 App. 372; *Jackson v. S.* 15 App. 579; *Donohue v. S.* 14 App. 638.

The sufficiency or effect of evidence is a question for the jury ordinarily, and a verdict will not be set aside for the reason that the evidence is insufficient, unless it is clearly so. See, *ante*, §§2429, 2430.

**§2492—Relevancy—Rules as to.**—The general rule is, that the evidence must correspond to the allegations, and be confined to the issue; otherwise it is irrelevant, immaterial, and inadmissible. This rule excludes all evidence of collateral facts. An exception to this general rule exists in a case where the knowledge, motive or intent of a party is a material fact in issue, in which case evidence of collateral facts may be admissible. *Wilburn v. S.* 41 Tex. 237; *Cesure v. S.* 1 App. 19; *Persons v. S.* 3 App. 241; *Fore v. S.* 5 App. 251; *Francis v. S.* 7 App. 501; *Rye v. S.* 8 App. 153; *Heard v. S.* 9 App. 1; *Green v. S.* 12 App. 51.

It is not necessary that evidence should bear directly upon the issue; it is admissible if it tends to prove the issue or constitutes a link in the chain of proof, although it might not justify a verdict in accordance with it. *Marshall v. S.* 5 App. 273; *Francis v. S.* 7 App. 501.

All the circumstances of the transaction may be submitted to the jury, provided they afford any fair presumption or inference as to the matter in issue. *McMahon v. S.* 16 App. 357.

Relevancy is defined to be that which conduces to the proof of a pertinent hypothesis—a pertinent hypothesis being one which, if sustained, would logically influence the issue. Hence, it is relevant to put in evidence any circumstance which tends to make the proposition at issue more or less probable. Whatever is a condition, either of the existence, or of the non-existence, of a relevant hypothesis, may be shown. But no circumstance is relevant which does not make more or less probable the proposition at issue. *McGuire v. S.* 10 App. 125; *Grimmett v. S.* 22 App. 36.

It is the right of a defendant to have every relevant circumstance, from which a conclusion can be drawn favorable to his innocence, placed before the jury. *Pridgen v. S.* 31 Tex. 420; *Myers v. S.* 24 App. 334; *Bowers v. S.* *Id.* 542.

However remote from the main issue in point of time, place or other circumstances a fact may be, if relevant, and tending to explain the main issue, the safer practice is to admit evidence thereof, leaving the question of its weight to the jury. *Russell v. S.* 11 App. 288.

But facts so remotely pertinent as to have no possible weight, or which are incapable of generating any reasonable presumption or inference respecting the guilt or innocence of the defendant, should be rejected. *Bowen v. S.* 3 App. 617; *Boothe v. S.* 4 App. 202; *Shultz v. S.* 5 App. 390; *Walker v. S.* 6 App. 576; *Sharp v. S.* *Id.* 650; *Cooper v. S.* 7 App. 194.

A fact apparently irrelevant may be made relevant and admissible by other facts with which it is connected by the proof. See this case for an example: *Campbell v. S.* 15 App. 506.

§2493—Instances of relevant evidence.—In a prosecution for perjury, statements and declarations made by the defendant as a witness before the grand jury, contradictory to his evidence upon which the perjury was assigned, were held to be relevant and admissible. *Littlefield v. S.* 24 App. 167.

And in a prosecution for perjury alleged to have been committed before an examining court, the complaint upon which the examination was based was held to be relevant and competent evidence for the state, to prove that the alleged false statements were made in a judicial proceeding, etc., but not evidence to be considered in determining the main issue. *Higgenbotham v. S.* 24 App. 505; see, also, *Partain v. S.* 22 App. 100; *Gabrielski v. S.* 13 App. 428; *St. Clair v. S.* 11 App. 297.

In a prosecution for maiming, where the injured party was a fellow-prisoner in jail with the defendant, it was held relevant and competent testimony on the issue of intent to prove that the prisoners had a code of laws adopted by themselves, which prescribed penalties for certain offenses, and that it was in the effort to enforce one of these laws upon the injured party that the maiming of him resulted. *Bowers v. S.* 24 App. 542.

In a prosecution for rape, it was held competent for the state to show by a medical expert that five weeks after the alleged rape he examined the alleged injured female, and to state the result of such examination. While such evidence was remote in point of time, it tended to throw light upon the transaction, and in a prosecution for this offense no testimony should be rejected which, in the remotest degree, will tend to aid the jury in reaching the truth. *Pless v. S.* 23 App. 73.

In a prosecution for assault with intent to rape, it was held competent for the state to prove the condition of an undergarment of the alleged injured female on the first evening and the second morning after the alleged outrage upon her person. *Grimmett v. S.* 22 App. 36.

Investigation with reference to other parties than the defendant is not permissible, unless the inculpatory facts as to such parties are such as are proximately connected with the transaction for which the defendant is on trial. In other words, to show remote acts or threats of a third party, is not admissible, unless other facts are in proof which proximately and pertinently connect such third party with the crime charged against the defendant. See this case for evidence held to be admissible under this rule, and as overruling the decisions in the cases of *Bowen v. S.* 3 App. 617; *Boothe v. S.* 4 App. 202; *Walker v. S.* 6 App. 576; *Holt v. S.* 9 App. 571, in so far as they conflict with the rule announced. *Kunde v. S.* 22 App. 65; see, also, upon this point, *McInturff v. S.* 20 App. 335; *Hart v. S.* 15 App. 202; *Dubose v. S.* 10 App. 230; *Means v. S.* *Id.* 16; *Aiken v. S.* *Id.* 610.

In a murder trial, it was held competent for the state to prove that the homicide occurred in a house of prostitution, and that the defendant was the keeper of the house. *Gibson v. S.* 23 App. 414.

In the trial of a husband for the murder of his wife, it is relevant for the state as tending to show motive, that the wife was unfaithful to him, provided it be further shown that at the time of the homicide he had knowledge of her infidelity; but without proof of such knowledge on his part, evidence of her infidelity is irrelevant and inadmissible. *Phillips v. S.* 22 App. 139.

In a murder trial, a state's witness, who was shown to be an active participant in the transaction, which resulted in the homicide, having testified to material facts, it was held competent for the defendant to prove that two hours before the homicide said witness said that she directed the deceased to kill defendant if he came on the premises. *Tow v. S.* 22 App. 175.

In a prosecution for keeping a disorderly house, the defense being that B., and not the defendant, was the proprietor of the house, certain promissory notes, and a mortgage on the furniture, etc., in the house, executed by said B., were held to be relevant, tending to show that B., and not the defendant, kept the house. *Stone v. S.* 22 App. 185.

In a prosecution for willfully and wantonly killing a cow, it was held competent for the defendant to prove, that said cow associated with breachy animals that were in the habit of trespassing upon crops. *Rudy v. S.* 22 App. 271.

In a trial held for perjury, it was held relevant and competent for the state to prove by the attorney who represented the defendant in the trial in which the perjury was alleged to have been committed, his reason and purpose for having the defendant to testify in said cause, such testimony tending to show that the defendant did not make the alleged false statements through inadvertence or mistake, or under agitation. *Davidson v. S.* 22 App. 372.

In a prosecution for pursuing the occupation of a liquor dealer without paying the occupation tax, it was held to be relevant and competent for the state to prove that the son of the defendant, in the discharge of the defendant's business, sold liquors, as such testimony tended to establish that the defendant was engaged in such occupation. *Wade v. S.* 22 App. 629.

Where a defendant on an examining trial had pleaded guilty, and his said plea was introduced in evidence against him on his final trial, it was held competent for the state to also introduce the complaint to which the plea of guilty referred in order to identify the offense therein charged with the offense for which the defendant was then being tried. *Rice v. S.* 22 App. 654.

In a prosecution for rape, recent complaint of the injured female, her state and appearance, marks of violence, and the condition of her clothing, shortly after the alleged occurrence, may be proved as original evidence. *Lights v. S.* 21 App. 308. But the particulars of the complaint made by her cannot be proved, except to corroborate her testimony when attacked. *Johnson v. S.* 21 App. 368; *McGee v. S.* *Id.* 670.

Evidence tending to show the animus, motive, feeling, or interest of a witness who testifies in the cause, is always relevant. *Rosborough v. S.* 21 App. 672; *Hart v. S.* 15 App. 202.

A state's witness, in a trial for murder, testified that after the fatal blow was struck, and just after the deceased fell, he, the witness, picked up a pistol from the ground near the feet of the deceased; that he did not know to which of the parties it belonged, but supposing it to belong to the deceased, he put it in deceased's wagon among his other things. The defense proved the defendant's declarations, made a few minutes after he struck the fatal blow, to the effect that just before he seized the weapon, with which he struck the blow, he saw the deceased thrust his hand behind him, as he thought, to draw a knife. He then proposed to prove that a very short time after the difficulty, he requested a witness to summon a doctor; that said witness in going for the doctor put on and wore the coat of the state's witness who testified to having picked up the pistol, and that witness who went for the doctor, found in the coat pocket of said state's witness a pistol, which he identified as the pistol of the deceased. Held, that the proposed testimony, in view of the other evidence in the case, was pertinent and admissible. *Lilly v. S.* 20 App. 1.

In a prosecution for slander, by calling an unmarried female a whore, it was held competent for the defendant to prove that, shortly previous to the alleged slander, said female had had illicit carnal intercourse with a man, and that defendant, before he uttered the alleged slander, had been informed of that fact. Said act of illicit intercourse tended to establish that the female was a whore. *Duke v. S.* 19 App. 14.

In a trial for murder, a state's witness having described the peculiarity of a certain track seen by him at the place of the homicide, it was held competent for him also to testify, that at the examining trial of defendant and others charged with the murder, he saw on the foot of one of the defendant's alleged accomplices, a boot which would have made such a track as he had described. Such testimony tended to throw light upon the transaction. *Thompson v. S.* 19 App. 593.

In the case of conspirators, when a conspiracy has been shown, any fact or circumstance which tends to establish the guilt of one of them, is relevant and competent evidence against the others. *Pierson v. S.* 18 App. 524.

In a murder trial, it was held correct to permit the state to prove that eleven days before the murder, the co-defendants of the defendant were seen in the town in which the murder was committed. In connection with other proof, this testimony tended to show preparation and complicity on the part of all the defendants. *George v. S.* 17 App. 513.

Where one theory of the defense in a murder trial was, that a state's witness had committed the murder, it was held competent for the state to introduce any evidence that would tend to refute it; and that it was not error to permit the state to prove the intimate personal and business relations existing between the deceased and said witness at the time of the homicide. *Walker v. S.* 17 App. 16.

Defendant was a watchman at a railroad freight depot, and in the night time fired upon and wounded two men passing near the depot. It was held competent, as tending to throw light upon the question of motive in shooting, etc., for the defendant to prove that there had been a great deal of car breaking and stealing from the cars at the depot, during a time shortly previous to the shooting. *Hobbs v. S.* 16 App. 517.

As tending to show a motive for a murder, an affidavit made by the deceased a short time before the homicide, charging the defendant with an offense, and upon which a prosecution was then pending, is relevant and admissible. *Robinson v. S.* 16 App 347; see, also, as to proof of motive, *ante*, §1044.

In a prosecution for theft of sheep, it was held competent for the state to prove by the owner of the sheep, that in the same flock in which he found his stolen sheep he saw other sheep with marks and brands recently altered, as had been the marks and brands upon his said stolen sheep, into the mark and brand of the defendant, said flock having been recently

**sold** by defendant as his property. Said testimony was admissible as a link in the chain of circumstances relied on by the state to connect the defendant with the theft of the sheep described in the indictment. *Hester v. S. 15 App. 567.*

In proof of malice, former grudges, antecedent menaces, and difficulties, are always relevant and admissible against the defendant. *Ante*, §1043.

Indications of a consciousness of guilt by a person accused or suspected of crime, or of one who in consequence of such indications, is accused or suspected of crime, may be proved as evidence against him. No limit to the number of such indications can be assigned, nor can their nature or character be theoretically defined. However numerous or minute they may be, they are admissible, if they tend to elucidate the transaction in question. *Hart v. S. 15 App. 202*; see, also, *Williams v. S. Id. 104*; *Tooney v. S. 8 App. 452*.

Under a separate indictment for murder, or assault with intent to murder, it is competent for the state to prove that another committed the murder or assault, and that the defendant was present, aiding and abetting such other person in the commission of the offense, although it is not so alleged in the indictment. *Davis v. S. 3 App. 91*; *Gladden v. S. 2 App. 508*; *Williams v. S. 42 Tex. 392*; *Mills v. S. 13 App. 487*.

In a trial for murder, if the position of the parties at the time of the homicide is a material inquiry, it is proper to admit in evidence the garments worn by the deceased at the time of the homicide, if such evidence would tend to show the position of either party. *King v. S. 13 App. 277*; *Hart v. S. 15 App. 202*.

In a trial for murder, the defense having proved that deceased was a man of violent and dangerous character, and the state having adduced contrary evidence, it was held that the defendant was entitled to introduce the records of another court to show that the deceased had at one time been convicted of manslaughter. *Brunett v. S. 12 App. 521*.

When one of several defendants, charged with the offense of conspiracy, has been tried and acquitted, the record of such acquittal is competent evidence in behalf of another of such defendants subsequently tried. *Paul v. S. 12 App. 346*.

On the trial of a husband for an assault with intent to murder his wife, the testimony of the wife tended to show that he assaulted her because he found an unknown man with her two days prior to the assault. Under the peculiar circumstances of the case, it was held that the defendant should have been permitted to prove that twenty days previous to the assault she had been surprised in an act of criminal intercourse with said unknown man, and that defendant, at the time he assaulted her, was apprised of that fact. *Greta v. S. 10 App. 36*.

In a trial for murder, the evidence showed that the deceased was found dead behind a gambling house. It was held competent for the state to identify the deceased by the apparel and appearance of the body, and by the description and contents of a valise found a short distance from the body, and also to prove that the defendant was a "capper and roper-in" for the gambling house. *Tooney v. S. 8 App. 452*.

For other instances of relevant evidence, see under heads of the different offenses; also, *post*, §2496.

**§2494—Instances of irrelevant evidence.**—Evidence that a defendant, who was on trial for theft of a horse, was, at the time of the theft, a county convict, and as such hired to the owner of the horse, was held irrelevant. *Persons v. S. 3 App. 240*.

In a trial for assault with intent to murder, it was held not competent for the defendant to prove that an indictment was then pending against the alleged assaulted party for an assault with intent to murder him, the defendant. *McGuire v. S. 10 App. 125*.

In a trial for murder, the wife of the deceased testified, over objection of the defendant, that a few minutes before the killing the defendant made indecent proposals to her; but of this fact the deceased was not apprised, and there was no evidence indicating that such proposals influenced or explained the motives or acts of either the deceased or the defendant. Held, that such testimony was irrelevant and it was error to admit it. *Gardner v. S. 11 App. 265*.

In a murder trial, the defendant proposed to prove, in explanation of his recent purchase of a pistol, and of his possession of it on the day of the homicide, that it was then the custom and habit of the people of that county to carry pistols. Held, that such testimony was irrelevant. *Creswell v. S. 14 App. 1*.

In a theft case, it was held error to permit the state to prove that the alleged owner of the property, after said property had been found, identified and claimed the same, the defendant not being present at the time. *Anderson v. S. 14 App. 49*.

See *Allison v. S. 14 App. 402*, for evidence held to be irrelevant in a murder case, the murder growing out of a feud, having its origin in a controversy about a school house.

In a prosecution for an assault, defendant proposed to prove that it was the custom and practice of himself and associates to denounce each other in violent and abusive language, sometimes flourishing deadly weapons and indulging in threats, when in fact such conduct was merely matter of jest, and accompanied by no actual intention of committing violence. Held, that such evidence was properly rejected. *Hawkins v. S. 17 App. 593*.

In a prosecution for arson, against the defendant jointly indicted with one Lovelace, it was shown that Lovelace had shot an officer who was attempting to arrest him upon said charge, and the officer thereupon shot and killed Lovelace. It was held error to permit the state to introduce in evidence the blood-stained warrant for the arrest of Lovelace, which the officer had when the shooting occurred. It was also held error to permit the state to prove that before the arson was committed, the defendant was under charge of another crime, and was a fugitive evading arrest, etc., at the time of the arson. *Chumley v. S. 20 App. 547*.

In a prosecution for keeping a disorderly house, evidence of the common reputation of the character of the defendant as a prostitute, or a person devoid of chastity, is not admissible. *Gamel v. S.* 21 App. 357.

In the trial of a husband for the murder of his wife, it is not competent for the state to prove acts of infidelity on the part of the wife, unless it is also proved that the husband, at the time of the homicide, had knowledge of such acts. *Phillips v. S.* 22 App. 139. See the same case for other testimony held to be irrelevant.

In a prosecution for false swearing, the alleged false statement being that the mother of an intended bride was willing for her to marry a certain person, it was held to be irrelevant and incompetent testimony for the state to prove that another person than the said mother, with whom said intended bride lived, did not give his consent to said marriage. *Steber v. S.* 23 App. 176.

It is not permissible for the state to prove a former trial and conviction of the defendant for the same offense. *Clark v. S.* 23 App. 260.

In a prosecution for the theft of a horse, committed in B. county, on January 19, 1887, it was held error to permit the state to prove that the defendant was seen in another county on the night of January 31, 1887, at a place where, on said last named date, another horse, different from that named in the indictment, was stolen. *Carter v. S.* 23 App. 508.

It was held error to permit a state's witness to testify that, after he had testified against the defendant on an examining trial, he fled the county because serious threats had been made against him, it not being shown that defendant made the threats, or that he was in any way responsible for them. *Maines v. S.* 23 App. 568.

Testimony as to the character of a defendant's associates is irrelevant and inadmissible. *Holsey v. S.* 24 App. 35.

Proof that an examining court had denied the defendant bail is irrelevant. *Richardson v. S.* 9 App. 612.

It was held error for the state to introduce in evidence an order changing the venue in the cause. Jurisdiction is a question addressed to the court alone, and is not a subject for the consideration of the jury. The said order did not relate to any relevant fact in issue. *Shamberger v. S.* 24 App. 433.

In a prosecution for swindling it was held error to admit in evidence a certain petition, citation and judgment, as the same were immaterial and irrelevant to any issue in the case. *Moody v. S.* 24 App. 458.

Evidence that the defendant had been confined in the penitentiary for felony, was held irrelevant and inadmissible. *Guajardo v. S.* 24 App. 603.

For other instances of irrelevant evidence, see under heads of the different offenses.

**§2495—Relevancy need not appear at time evidence is offered.**—It is not necessary that the relevancy of evidence should appear at the time it is offered, it being the usual course to receive, at any proper and convenient stage of the trial, in the discretion of the judge, any evidence which the counsel offering it states will be rendered relevant and material by other evidence which he undertakes to produce. But counsel for the state should never make such a statement and introduce irrelevant evidence, unless he is morally certain that he can, by other evidence, render it relevant and material. And when irrelevant evidence has thus been introduced, and there is a failure to show its relevancy and materiality by other evidence, it is the duty of the court, of its own motion, to exclude such irrelevant evidence, and to instruct the jury to disregard it. *Marshall v. S.* 5 App. 273; *Phillips v. S.* 19 App. 139; *Smith v. S.* 21 App. 133; *Pierson v. S.* 18 App. 524.

No testimony should be offered by the prosecution that is not relevant and legal. *Gazley v. S.* 17 App. 267.

**§2496—Exceptions to the general rule—Collateral facts, etc.**—An exception to the general rule, stated in §2491, *ante*, obtains when it becomes necessary to prove motive, intent or knowledge on the part of the defendant. In such cases greater latitude is allowed in the introduction of evidence than is allowed with respect to other issues. *Francis v. S.* 7 App. 501; *Fore v. S.* 5 App. 257; *Heard v. S.* 9 App. 1; *Cameron v. S.* *Id.* 332.

In a prosecution for theft, when necessary to establish identity in developing the *res gestæ*, or to prove guilt by circumstances connected with the alleged theft, or to explain the intent with which the defendant acted with respect to the alleged stolen property, it is competent for the state to prove that other property was stolen at or about the same time and in the same neighborhood from which the property in question was stolen, and that such other property was in the defendant's possession recently after it had been stolen. See the decisions upon this subject collated in §1295, *ante*.

In a prosecution for murder, it is competent for the state, when it becomes necessary to show the *scienter* or *quo animo* of the defendant, to introduce evidence of his acts, conduct or declarations, which tend to establish his knowledge or intent, though such acts, conduct or declarations may themselves constitute distinct crimes, and though they are apparently collateral to the main issue, and though they occurred either prior or subsequent to the homicide for which the defendant is on trial. *Ante*, §1047.

For decisions respecting this character of evidence in prosecutions for forgery, and uttering forgeries, see, *ante*, §765.

**§2497—Primary and secondary evidence—Rules as to.**—It is an established rule that the best existing evidence within the reach of the prosecution must be produced, or its absence satisfactorily accounted for, before a resort to secondary or inferior evidence will be sanctioned. *Porter v. S.* 1 App. 394; *Butler v. S.* 3 App. 48; *Scott v. S.* *Id.* 103; *Barnes v. S.* 5



App. 113; Somerville v. S. 6 App. 433; Smith v. S. 10 App. 420; Powell v. S. 11 App. 401; Hunter v. S. 13 App. 16; Baldwin v. S. 15 App. 275; Wyers v. S. *Id.* 57; Smith v. S. *Id.* 507; White v. S. 14 App. 449; Woodson v. S. 24 App. 153; Scott v. S. 19 App. 325.

When direct and positive proof is attainable, circumstantial evidence cannot be resorted to. Miller v. S. 18 App. 34; Dixon v. S. 15 App. 480; Clarton v. S. *Id.* 348; Porter v. S. 1 App. 394; Gabrielski v. S. 13 App. 428; Scott v. S. 19 App. 325; Williams v. S. *Id.* 276.

The rule requiring the production of the best evidence attainable, does not demand the greatest amount of proof procurable, but only excludes such evidence as implies that better evidence exists, and is withheld or not accounted for. This rule has been adopted for the prevention of fraud, and to secure a pure administration of justice. Porter v. S. 1 App. 394; Rodriguez v. S. 5 App. 256.

In theft it is not permissible to prove the owner's want of consent to the taking of the property by circumstantial evidence, unless the positive and direct testimony of the owner's cannot be produced, and its non-production is satisfactorily accounted for. Porter v. S. 1 App. 394; Erskine v. S. *Id.* 405; Jackson v. S. 7 App. 363; Lanham v. S. *Id.* 137; Stewart v. S. 9 App. 321; Bowling v. S. 13 App. 338; Smith v. S. *Id.* 507.

But when it is shown that the direct testimony of the owner cannot be produced, and that the failure to produce it is not attributable to any want of diligence, or to any fault on the part of the prosecution, then it is perfectly competent and proper to resort to circumstantial evidence. Wilson v. S. 45 Tex. 76; McMahon v. S. 1 App. 102; Welsh v. S. 3 App. 422; Foster v. S. 4 App. 246; Trafton v. S. 5 App. 480; Rains v. S. 7 App. 588; Jackson v. S. *Id.* 363; Clayton v. S. 15 App. 348; Spruill v. S. 9 App. 695; Wilson v. S. 12 App. 481; Williamson v. S. 13 App. 514.

In proving a conviction for felony, in order to disqualify a witness, the best evidence is the judgment of conviction, and proof that the records of the court, in which the conviction is claimed to have been had, had been partially searched without finding the judgment; and that those records are voluminous, will not authorize resort to secondary evidence to prove the conviction. Perez v. S. 10 App. 327.

The best evidence is the charter of pardon. The next best evidence of it is a certified copy or exemplification of it, from the office of the secretary of state, and parol evidence cannot be used to prove it, in the absence of a showing satisfactorily accounting for the non-production of both the original and such copy. Hunnicutt v. S. 18 App. 498.

An exception to the general rule is, that the official character of an alleged public officer need not be proved by the commission or other written evidence of the officer's right to act as such, except in an issue directly between the officer and the public. Such official character may be proved, ordinarily, by parol testimony. Woodson v. S. 24 App. 153.

When an original written instrument can be produced, secondary evidence of its contents is inadmissible. Huff v. S. 23 App. 291; Chester v. S. *Id.* 577; Miller v. S. 18 App. 34; Myers v. S. 13 App. 57; Sager v. S. 11 App. 110; see further, as to secondary evidence of written instruments, *post*, §2506.

In the case of a telegram sent, the original message sent, or the transcript delivered by the company to the receiver, are the best evidence of the contents thereof. Conner v. S. 23 App. 378; Chester v. S. *Id.* 577.

In proving the execution of a written instrument, if there be a subscribing witness thereto, the testimony of such witness is primary, and must be produced, or its non-production satisfactorily accounted for, before the execution of the instrument can be proved by secondary evidence. Morrow v. S. 22 App. 239; Sample v. Irwin, 45 Tex. 567; White v. Holliday, 20 Tex. 679; Craddock v. Merrill, 2 Tex. 494. When the subscribing witness denies, or does not recollect, the execution of the instrument, its execution may be proved by other evidence. *Ante*, §2483.

If a locality has been incorporated by special legislative enactment, the primary evidence of the fact is the original charter or incorporative act, or an authenticated copy thereof. But when it is shown that such primary evidence is lost, or cannot be had, secondary evidence is competent. If the corporation was created under the general incorporation statute (Rev. Stat. Ch. 11, Title 17), a certified copy of the entry of that fact, upon the record of the commissioner's court, would be primary evidence. Temple v. S. 15 App. 304.

In a prosecution for resisting the execution of process, the process, the execution of which is alleged to have been resisted, is the best evidence of its existence, etc., and should be produced, or its absence accounted for. Porter v. S. 1 App. 394; Scott v. S. 3 App. 103.

In a prosecution for an assault, if others besides the assaulted person witnessed the transaction, their testimony is primary, and is competent without producing the testimony of the assaulted party, or accounting for its non-production. Eckert v. S. 9 App. 105.

In order to authorize secondary evidence of a lost written instrument, it must be shown that the instrument once existed, and that a *bona fide* and diligent search has been made for it in the place where it should most likely be found, if the nature of the case admits of such proof. What degree of diligence in the search for the lost instrument must be shown, depends upon the peculiar circumstances of the particular case; but, as a general rule, the party is required to show that he has, in good faith, exhausted, in a reasonable degree, all the sources of information and means of discovery, which the nature of the case would naturally suggest, and which were accessible. Haun v. S. 13 App. 383. If the proof establishes a reasonable presumption of the loss of the instrument, it is sufficient to admit secondary evidence of it. Cheatham v. Riddle, 8 Tex. 162.

Secondary evidence of records may be received to establish their existence and contents, when the primary evidence has been lost or destroyed, under the same rules governing in the

case of other writings. The statute providing for the substitution of lost records and papers is merely cumulative, and does not abolish or affect other modes of establishing the same. *McMillan v. S.* 18 App. 375; *Stallworth v. S.* *Id.* 378.

The best evidence that a change of venue was duly ordered in a case, is the order or judgment of the court, and until it be shown that such primary evidence cannot be produced, parol evidence cannot be resorted to. *Valentine v. S.* 6 App. 439.

Where the contest was whether or not an alleged stolen animal corresponded with a description in a bill of sale, the witnesses agreeing as to the description in the bill of sale, it was held that the production of the bill of sale, as primary evidence, was not essential. *Hailes v. S.* 10 App. 490.

When parol evidence is offered, and it is objected to because there is written evidence of the fact sought to be proved, it devolves upon the objector to produce the writing, or show that it once existed. *Allen v. S.* 8 App. 67.

The pendency of litigation between parties in a justice's court, may be proved by the justice of the peace, without producing or accounting for the non-production of his records. *Kennedy v. S.* 19 App. 618. Or by a constable who served process in the litigation. *Thompson v. S.* 19 App. 593.

See further, upon this subject, *post*, §2507; *Sayles' Civ. Stat.*, Art. 2245, Rule 9.

§2498—Circumstantial evidence—Rules as to.—Circumstantial evidence, when fully and conclusively made out, is sufficient to sustain a conviction for crime, but the circumstances must not be of a vague, indefinite, shadowy character, and the facts constituting the chain must be clearly defined and fully proved. The more there may be of them, and the longer the chain connecting them, the stronger and more confident will be the conclusion. In cases depending upon circumstantial evidence, the mind seeks to explore every possible source from which any light, however feeble, may be derived, and it is peculiarly proper that the jury should have before them every fact and circumstance, however slight, which may aid them in reaching a satisfactory conclusion. Greater latitude in the presentation of evidence must necessarily be allowed in cases of circumstantial than in those of direct evidence. *Shultz v. S.* 13 Tex. 401; *Cooper v. S.* 19 Tex. 449; *Landers v. S.* 35 Tex. 359; *Ballew v. S.* 36 Tex. 98; *Barnes v. S.* 41 Tex. 342; *Noftsinger v. S.* 7 App. 301; *Preston v. S.* 8 App. 53; *Bouldin v. S.* *Id.* 332; *Washington v. S.* *Id.* 377; *Somerville v. S.* 6 App. 433.

To warrant a conviction on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proven by competent evidence, beyond a reasonable doubt, and all the facts necessary to such conclusion must be consistent with each other, and with the main fact sought to be proved, and the circumstances, taken together, must be of a conclusive nature, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused, and no other person, committed the offense charged. The mere union of a limited number of independent circumstances, each of an imperfect and inconclusive character, will not justify a conviction. They must be such as to generate and justify full belief according to the standard rule of certainty. It is not sufficient that they coincide with, and render probable the guilt of the accused, but they must exclude every other reasonable hypothesis. No other conclusion but that of the guilt of the accused must fairly and reasonably grow out of the evidence, but the facts must be absolutely incompatible with innocence, and incapable of explanation upon any other reasonable hypothesis than that of guilt. A legal test of the sufficiency of circumstantial evidence is, is it sufficient to satisfy the mind and conscience of a common man, and so convince him that he would venture to act upon the conviction produced by it, in matters of the highest importance and concern to his own interest. *Henderson v. S.* 14 Tex. 503; *Powers v. S.* 16 Tex. 546; *Burrill v. S.* 18 Tex. 713; *Perkins v. S.* 32 Tex. 109; *Law v. S.* 33 Tex. 37; *Elizabeth v. S.* 27 Tex. 329; *White v. S.* 36 Tex. 329; *Cave v. S.* 41 Tex. 182; *Barnes v. S.* *Id.* 342; *Roseborough v. S.* 43 Tex. 570; *Black v. S.* 1 App. 368; *Hampton v. S.* *Id.* 652; *Rodriguez v. S.* 5 App. 256; *Bonats v. S.* 29 Tex. 183; *Pogue v. S.* 12 App. 283; *Pharr v. S.* 10 App. 485; *Hunt v. S.* 7 App. 212; *Lovelady v. S.* 14 App. 545; *Scott v. S.* 19 App. 325.

Another practical test of the sufficiency of evidence is its ability to satisfy the understanding and conscience of the jury, and to produce in their minds a moral certainty of the defendant's guilt, beyond a reasonable doubt. Moral certainty is that degree of certainty which is supported by a reasonable probability, founded on the experience of the ordinary course of things, and, consequently, must be reasonable in itself. It is not requisite that circumstantial evidence, to warrant conviction, must demonstrate the guilt of the accused beyond a possibility of his innocence. If, beyond a reasonable doubt, it convinces the understanding, and satisfies the reason and judgment of those who must act upon it, the degree of certainty required by the law is attained. *Taylor v. S.* 9 App. 100; *Jackson v. S.* *Id.* 114; *Pharr v. S.* 10 App. 485; *Law v. S.* 33 Tex. 37.

When the inculpatory evidence is circumstantial, any fact, however unimportant in itself, which tends in the least degree to establish the guilt or innocence of the accused, is competent evidence. In such cases, therefore, incidents may be legitimate evidence, which would be deemed irrelevant in a case dependent on direct and positive testimony. In such cases no definite line of demarkation between proximate and remote facts can be drawn. The only criterion of competency is whether the facts proposed to be proved tend to cast any light, however feeble, upon the subject of the inquiry. *Preston v. S.* 8 App. 30; *Washington v. S.* *Id.* 377; *Bouldin v. S.* *Id.* 332; *Howard v. S.* *Id.* 53; *Simms v. S.* 10 App. 131; *Langford v. S.* 17 App. 445.

Fabrication of evidence by the defendant, or his flight after the crime has been committed, together with the circumstances attending, may be proved in all cases, and are legitimate evidence to be considered by the jury. *Benavides v. S.* 31 Tex. 579; *Sheffield v. S.* 43 Tex. 378; *Blake v. S.* 3 App. 581; *Hardin v. S.* 4 App. 355; *Gosé v. S.* 6 App. 121; *Alken v. S.* 10 App. 610; *Mathews v. S.* 9 App. 138; *Arnold v. S.* *Id.* 435; *Williams v. S.* 22 App. 497. And flight may be proved by showing the forfeiture of the defendant's bail-bond or recognizance. *Gilliland v. S.* 24 App. 524. And suppression of, or failure to produce, evidence may sometimes be indicative of guilt. *Mercer v. S.* 17 App. 452; *ante*, §2488.

A defendant may introduce rebutting proof in explanation of his flight, etc. *Arnold v. S.* 9 App. 435.

Circumstances relied on to establish the principal fact at issue, or such as are necessary to the conclusion sought, must be actually proved, or no inference or presumption can be legitimately based thereon. *Jernigan v. S.* 10 App. 546.

Circumstantial is regarded as inferior to direct or positive evidence, and cannot be resorted to, when the latter exists, without accounting satisfactorily for its non-production. See, *ante*, §2496.

But circumstantial evidence may be, and often is, as strong and conclusive as direct and positive evidence. *Law v. S.* 23 Tex. 37.

But these remarks as to the weight to be attached to this character of evidence are intended merely as directions to aid the mind in arriving at a correct conclusion. They are not rules of law, to be obeyed, but of reason, to be considered. Our statute has established as a test for the sufficiency of the proof, that the concurrent minds of the jury should be satisfied of the guilt of the defendant, beyond a reasonable doubt, and the charge of the court to the jury should be confined to this statutory test. *Brown v. S.* 23 Tex. 195.

Though necessary in every criminal case that the *corpus delicti* be proved, yet the proof may be made by circumstantial evidence, and the legal test of its sufficiency is whether it satisfies the understanding and conscience of the jury, beyond a reasonable doubt. But circumstances indicative of guilt, no matter how strong, avail nothing without proof of the *corpus delicti*. *Brown v. S.* 1 App. 154; *Henderson v. S.* 14 App. 503; see, also, *ante*, §§939, 1042.

A confession of guilt partakes of the nature of positive rather than circumstantial evidence, and has uniformly been so regarded in the decisions in this state. *Eckert v. S.* 9 App. 105; *Dubose v. S.* 13 App. 419; *Jack v. S.* 20 App. 656.

For decisions relating to the charge of the court in cases of circumstantial evidence, see, *ante*, §2342.

And for other decisions relating to circumstantial evidence, see under heads of different offenses and subjects.

**§2499—Hearsay evidence—Decisions relating to.**—The general rule is that all reports or statements, verbal or written, made by a person not produced as a witness, are inadmissible in evidence. The principle of this rule is, that such evidence requires credit to be given to the statements of a person who is not subjected to the ordinary tests enjoined by the law for ascertaining the correctness and completeness of his testimony—namely, that oral testimony should be delivered in the presence of the court, or a magistrate, under the moral and legal sanctions of an oath, and where the moral and intellectual character, the motives and deportment of the witness can be examined, and his capacity and opportunities for observation, and his memory can be tested by cross-examination. Such evidence, moreover, as to oral declarations, is very liable to be fallacious, and its value is, therefore, greatly lessened by the probability that the declaration was imperfectly heard, or was misunderstood, or is not accurately remembered, or has been perverted. It is also to be observed, that the persons communicating such evidence are not exposed to the danger of a prosecution for perjury to the extent that other witnesses are exposed. *Harris v. S.* 1 App. 74.

Mere hearsay is not only not the best, it is not even secondary evidence; it is no evidence. It is not admissible, although no better evidence is to be obtained. *Belverman v. S.* 16 Tex. 130; *Reeves v. S.* 7 App. 276; *Holt v. S.* 9 App. 572; *Felder v. S.* 23 App. 477.

To the general rule excluding hearsay evidence there are exceptions, as in the case of dying declarations, *ante*, §§1045, 2461; confessions, §§2462, 2478; declarations of conspirators, *ante*, §§152, 1048, *post*, §2502; proof by general reputation, *post*, §2499; *res gestæ*, *ante*, §1046, *post*, §2503.

In a prosecution for an assault with intent to rape, a state's witness was allowed to testify, over defendant's objection, that after the commission of the offense, certain persons came to witness and made overtures for a compromise of the complaint against the defendant, inquiring how much money it would take to settle it, etc. There was no proof that these overtures were made by the authority or with the knowledge of the defendant, and he was not present when they were made. Held, that this evidence was purely hearsay and inadmissible. *Barbee v. S.* 23 App. 199. For similar instances of hearsay evidence, see *Favors v. S.* 20 App. 155; *Washington v. S.* 17 App. 197; *Tyler v. S.* 11 App. 388; *Langford v. S.* 9 App. 283; *Maines v. S.* 23 App. 568; *Estes v. S.* *Id.* 600; *Montgomery v. S.* *Id.* 650.

In a trial for murder, the state was permitted, over objection of the defendant, to prove that some member of a crowd congregated at the place of the homicide, just after the shooting, pointed to the defendant, who was walking away from the place, and said: "There is the man who did the shooting." It was not shown that the defendant heard this remark, or understood that it related to him. Held, that this evidence was hearsay and inadmissible. To entitle the state to introduce in evidence the declaration of a bystander, it must be clearly shown that the defendant understood himself to be accused of the criminal act committed;

and, further, the circumstances must have been such as to require of him a response. *Felder v. S. 23 App. 477.*

In a theft case it was held hearsay, and inadmissible for a witness to testify, that a few moments after the alleged theft, he told the owner of the property stolen that he had seen two suspicious looking negroes in the vicinity, one of whom witness recognized as the defendant. *Jackson v. S. 20 App. 190.*

A statement made to a defendant, or in his hearing, and which he hears and understands, and which is made under circumstances which reasonably require of him a reply, is not hearsay, and may be given in evidence. *Bond v. S. 20 App. 421; Felder v. S. 23 App. 477.*

Conversations, statements, and acts of third persons, had, made, and performed in the absence of the defendant, are ordinarily not admissible in evidence against him or in his behalf. *Chumley v. S. 20 App. 547; Fuller v. S. 19 App. 380; Segura v. S. 16 App. 221; Robinson v. S. Id. 347; Gonzales v. S. Id. 152; Anderson v. S. 14 App. 49; Hammel v. S. Id. 326; Campbell v. S. 8 App. 84; Green v. S. Id. 71; Washington v. S. 17 App. 197; Alkin v. S. 10 App. 610; Cohea v. S. 11 App. 153; Tyler v. S. Id. 388; Hester v. S. 15 App. 567; Burke v. S. Id. 156; White v. S. 18 App. 57; Snow v. S. 6 App. 284; McCracken v. S. Id. 507; Grant v. S. 3 App. 1; Speiden v. S. Id. 156; Sneed v. S. 4 App. 514; Morrill v. S. 5 App. 447; Spencer v. S. 31 Tex. 64; Davis v. S. 37 Tex. 227.*

A person who was present when others were negotiating a trade between themselves, and who heard them make the trade, is a competent witness to testify about the trade, and his testimony is original and not hearsay. *Hester v. S. 15 App. 567.*

A medical witness, having expressed his opinion as to the cause of the death of the deceased, on a trial for murder, was permitted, over the objection of the defendant, to testify that other physicians in attendance at a *post mortem* examination of the deceased, concurred in his opinion as to the cause of death. Held, that this evidence was clearly hearsay, and inadmissible. *Morgan v. S. 16 App. 593.*

In a trial for assault with intent to murder, the defendant proposed to prove that an officer, a short time before the assault, directed one of the assaulted parties to take the other home, because such other party was intoxicated. Held, hearsay, and properly rejected. *Hobbs v. S. 16 App. 517.*

See a case in which the state having introduced hearsay testimony, it was held that the defendant should have been permitted to rebut it with the same character of testimony. *Ellison v. S. 12 App. 558.*

For other decisions as to "Hearsay," see Sayles' Civ. Stat., Art. 2245, Rule 35.

**§2500—General reputation—When admissible as evidence.**—General reputation is admissible to prove character when that is an issue. *Post*, §2500.

County boundaries may be proved by general reputation. *Cox v. S. 41 Tex. 1; Nelson v. S. 1 App. 42.* Except in trials for bigamy, incest and adultery, marriage may be proved as at common law, that is, by general reputation, cohabitation, declarations, and the like. *Jackson v. S. 8 App. 60.*

In a prosecution for keeping a disorderly house, the character of the house, and of its occupants also, may be proved by general reputation. *Ante*, §537.

**§2501—Character—Evidence as to.**—An inquiry as to character must be limited to the general reputation of the person impugned in the community of his residence, or where he is best known, and the witness must speak from his knowledge of that general reputation, and not from his own individual opinion. *Holsey v. S. 24 App. 35; Brownlee v. S. 13 App. 255; Marshall v. S. 5 App. 273; Roach v. S. 41 Tex. 261; Boon v. Weathered, 23 Tex. 675.*

A defendant may prove his general good character in all cases, whether the evidence against him be direct or circumstantial, doubtful or certain, whenever guilty knowledge or criminal intention is of the essence of the offense. *Coffee v. S. 1 App. 548; Lee v. S. 2 App. 338; Lockhart v. S. 3 App. 567; Jones v. S. 10 App. 552; Johnson v. S. 17 App. 565.*

When evidence of character is admissible it should be restricted to the trait of character in issue; or, as otherwise expressed, the evidence should have some analogy and reference to the nature of the charge, it being obviously irrelevant and absurd to inquire into the party's loyalty on a charge of theft, or to inquire into his character for truth on a charge of murder, or into his character for honesty on a charge of treason. *Jones v. S. 10 App. 552; Lockhart v. S. 3 App. 567; Johnson v. S. 17 App. 565; Coffelt v. S. 19 App. 436; Leader v. S. 4 App. 162; Plasters v. S. 1 App. 673.*

It is not permissible for the state to give in evidence the bad character of the defendant, unless he has initiated the inquiry by introducing evidence of his good character. *Hartless v. S. 32 Tex. 88.*

It was held error for the state to prove that for four or five years prior to the trial the defendant had been confined in the penitentiary for felony. *Guajardo v. S. 24 App. 603.*

For decisions as to proof of the character of an injured party, see, *ante*, §§913, 1054. As to character of a witness, see, *post*, §2513.

**§2502—Opinions as evidence—Decisions as to.**—Opinions of witnesses are not, as a general rule, admissible in evidence; but witnesses must be confined to a statement of facts, and it is the province of the jury to decide from the facts detailed in evidence the conclusion which should be deduced therefrom. Where the jury are as competent as any other persons to deduce the proper conclusions from a given state of facts, the opinions even of experts are not admissible in evidence as to the conclusion or inference to be drawn from them. *Cooper v. S. 23 Tex. 331; Campbell v. S. 10 App. 560; Lumbkin v. S. 12 App. 341; Koblenschlag v. S. 23 App. 264.*

An exception to the above stated general rule obtains where the sanity of a party is in issue. In such case the opinions of witnesses, even though not experts, are admissible. See the decisions upon this subject collated in §§85-88.

The exception also obtains where, in case of non-age, the discretion of the defendant is an issue. *Carr v. S.* 24 App. 562.

Another exception to the general rule is, that on questions of science, or skill, or trade, persons of skill in those particular departments are allowed to give their opinions in evidence. *Sayles' Civ. Stat.*, Art. 2245, Rule 36.

An expert witness is one who is selected by the court, or by a party in a cause, on account of his knowledge or skill, to examine, estimate and ascertain things, and make report of his opinion. To entitle a witness to be examined as an expert in a specific topic he must, in the opinion of the court, have special practical acquaintance with the immediate line of inquiry. *Heacock v. S.* 13 App. 97.

An expert's opinion must be limited to a matter of science, skill, trade, or the like, and is not allowable on the merits of the case, or on matters about which the jury are as competent to form a conclusion as he is. His opinion must not be based upon extra-judicial information, but must be founded either upon the evidence or the expert's personal knowledge of the facts, or else be postulated upon a hypothetical state of facts. *Hunt v. S.* 9 App. 166; *Pharr v. S.* *Id.* 129; *Cooper v. S.* 23 Tex. 331.

In the examination of an expert as to his opinion upon a hypothetical state of facts, it is improper practice to allow hypothetical questions having no foundation in the evidence adduced; yet it is not essential that counsel shall state to such witness the facts as they have been proved. He may assume the facts in accordance with his theory of them. *Lovelady v. S.* 14 App. 545; *Webb v. S.* 9 App. 490; *Leache v. S.* 22 App. 279.

The opinions of medical men or surgeons, who are shown to be experts, are admissible as to the cause of death, the nature and consequence of wounds, the causes and effects of disease, the character of instrument with which a wound was inflicted, and the character of a particular weapon, as to whether or not it is deadly or dangerous. *Waite v. S.* 13 App. 189; *Banks v. S.* *Id.* 182; *Lovelady v. S.* 14 App. 545; *Shelton v. S.* 34 Tex. 662.

But not as to the manner in which an injury was inflicted. *Steagald v. S.* 24 App. 207.

A witness, who is shown to be experienced in the use and handling of fire-arms, may give his opinion, after having made an examination of a fire-arm, that it had been recently discharged. *Meyers v. S.* 14 App. 35.

It has been held competent for a witness to state his opinion, that certain blood spots appeared to him to have been made with a hand. *Richardson v. S.* 7 App. 486.

In a prosecution for adultery it was held, that the opinion of witnesses that a certain woman was the wife of the defendant, was not competent evidence. *Webb v. S.* 24 App. 164. Nor that a woman "looks like a white woman." *Moore v. S.* 7 App. 608.

Witness will not be permitted to state that he had investigated a charge of felony made by one party against another, and found it to be without evidence to support it. Such statement is a mere conclusion of the witness. *Tillery v. S.* 24 App. 224.

Another exception to the general rule is, where the facts from which the opinion proceeds as an effect are of a character that they cannot be so detailed and presented to the minds of a jury as to impart to them the knowledge which the witness actually possesses. Whenever a condition of things is such that it cannot be reproduced and made palpable in the concrete to the jury, or when language is not adequate to such realization, then the witness may describe it by its effects upon his mind, even though such effect be opinion. *Powers v. S.* 23 App. 42; *Richardson v. S.* 7 App. 486; *Hardin v. S.* 8 App. 658; *Allen v. S.* *Id.* 67; *Dill v. S.* 6 App. 113; *Cooper v. S.* 23 Tex. 331.

Where the value of property is an issue, the opinions of witnesses acquainted with the property, or with like property, are admissible evidence. *Saddler v. S.* 20 App. 195; *Martinez v. S.* 16 App. 122.

The opinion of a witness not an expert, is not competent to prove the sex of a skeleton. In such case a person skilled in anatomy should be called in to examine the skeleton and testify as to the sex of it. *Wilson v. S.* 41 Tex. 321.

The cause of death may be proved without the aid of expert testimony, even where death did not ensue immediately after the infliction of the injury which caused it. *Smith v. S.* 43 Tex. 643; *ante*, §§939, 1042.

An expert, like any other witness, may be compelled to testify as such. *Summers v. S.* 5 App. 365.

A witness cannot testify as an expert as to the length of time it would take to gather a certain number of cattle within a given range. He must state the facts, leaving the jury to determine the question of time. *Tyler v. S.* 11 App. 388.

An expert may be asked by either party as to the reasons on which his opinion is based; or he may, with leave of the court, give such explanation on his own account. Beyond this he cannot go, though he may be examined in details to test his credibility and judgment. *Leache v. S.* 22 App. 279.

When a claimed result becomes so remote that conclusion and deduction are necessary to connect it with a cause, a non-expert witness can only state physical facts, leaving the conclusions to be drawn by a jury. See this case for an illustration of this rule: *Navarro v. S.* 24 App. 378.

It is not permissible to ask a witness his opinion as to the danger likely to follow the use of a weapon in a particular mode. But when a witness was present at an affray, and seized

the arm of the assaulted party, it was held competent for the defendant to ask him why he seized the arm of such party. *Thomas v. S.* 40 Tex. 36.

• For decisions as to proof of "Handwriting" by experts, see, *ante*, §2484.

**§2503—Conspirators—Acts and declarations of, evidence when.**—Acts and declarations of conspirators transpiring pending the conspiracy, and performed and made in furtherance of the common design, and which tend to throw light upon its execution, or upon the motive or intent of the conspirators, are competent evidence against each and all of them, whether they be indicted jointly or separately. But, if such acts or declarations transpire *after* the consummation of the conspiracy, and not in furtherance of the common design of the conspirators, they are not evidence against any of the conspirators, except the one who performed the acts or made the declarations, unless the same were performed or made by him in the presence and with the knowledge and acquiescence of those against whom they are sought to be used. See the decisions upon this subject collated in §§152, 1048, *ante*, and the following other decisions not there cited: *Williams v. S.* 24 App. 17; *Cortez v. S.* *Id.* 511; *Tillery v. S.* *Id.* 251.

**§2504—Res gestæ.**—The decisions with respect to this character of evidence are fully collated in §1046, *ante*, in so far as they relate to cases of homicide; and the same general principles enunciated in those decisions are applicable in all cases. It is not considered necessary to do more than to refer to §1046, *ante*, and to add the following other decisions relating to other than homicide cases.

Circumstances constituting *res gestæ* may always be shown to the jury, along with the principal facts, and their admissibility is determined by the judge, according to the degree of their relation to the principal facts, and in the exercise of his sound discretion—it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description. Declarations made at the time of the transaction, and expressive of its character, motive, or object, are regarded as verbal acts indicating a present purpose and intention, and are, therefore, admitted in proof, like any other material fact. When the ascertainment of the motive with which an act is done becomes material, on the trial of the actor, to determine his guilt or innocence, his declarations made at the time the act is done, and expressive of its character and object, are regarded as verbal acts indicating a present purpose and intention, and are admissible as evidence. See an application of the doctrine above stated in a case of theft. *Williams v. S.* 4 App. 5; see, also, *Gillian v. S.* 3 App. 132, a case of jail breaking; *Ward v. S.* 41 Tex. 611, a case of theft; *Taylor v. S.* 7 App. 659, a case of theft, and §§1295-1300, for other decisions in theft cases involving the doctrine of *res gestæ* evidence.

**§2505—Foreign laws—Proof of.**—Articles 2250 and 2251, of the Revised Statutes, apply in criminal as well as in civil cases. Under these articles, laws of another state, when offered as evidence, are not subservient to, or within the purview of, the rules which apply to proof of private documents. The written law of another state cannot be proved by parol. The imprint of a book of statutes of another state suffices *prima facie* to authenticate and render it admissible in evidence. When a statute of another state is proved under article 2251, of the Revised Statutes, and only a portion of the provisions of a particular statute are embraced in the certificate of the secretary of state, the failure to embrace the entire statute will not invalidate the certificate, but, in the absence of proof to the contrary, it will be presumed that the portions omitted are immaterial. *Patterson v. S.* 17 App. 102; *Cummins v. S.* 12 App. 121.

A book which purported to be the Code of Laws of the Muscogee Nation, and which purported to be published by authority of said nation, and was certified to be a true copy of the laws of said nation by the principal chief, under the great seal of said nation, was held to be admissible in evidence. The local governments of the Indian nations come within the meaning of "foreign governments," as used in article 2250 of the Revised Statutes. Every nation is "foreign" to all others. And the several states of the American Union are "foreign" to each other with respect to their statutes. *Cowell v. S.* 16 App. 57.

See further, as to "Foreign Laws," notes to Arts. 2250, 2251, *Sayles' Civ. Stat.*

**§2506—Laws of this state, etc.**—Private acts of this state must be proven by the printed statute book, or by a certified copy from the office of the secretary of state. And the best evidence of the terms of an act is a duly certified copy of the enrolled bill. *Sayles' Civ. Stat.*, Art. 2245, note 90, *ante*, §2489.

Charters and ordinances of municipal corporations must be proved, as courts do not take judicial notice thereof. *Ante*, §2489; *Temple v. S.* 15 App. 304.

**§2507—Documentary evidence.**—Documentary evidence is admissible in criminal cases under the rules of the common law, to establish collateral facts, and this practice is not in contravention of the constitutional right of the defendant to be confronted with the witnesses against him. *Rogers v. S.* 11 App. 608; *May v. S.* 15 App. 430.

Records are proved by their production in court, or by exemplified or certified copies thereof. *Elsner v. S.* 22 App. 687.

A court will take judicial notice of the record, pleadings and proceedings in a case before it, and it is unnecessary, therefore, to introduce the same in evidence. *Robinson v. S.* 21 App. 180; *Harris v. S.* *Id.* 478.

Article 2252 of the Revised Statutes is cumulative and not restrictive in effect, therefore does not affect the rule or right with regard to the admissibility of the originals as evidence. *Rainey v. S.* 20 App. 455.

A certified copy of a record of a mark and brand is competent evidence without producing the record. *Wilson v. S.* 3 App. 206; see, *ante*, §1297, for other decisions as to marks and brands; see, also, *Myers v. S.* 24 App. 334; *Crowell v. S.* *Id.* 404.

A notary's certificate of protest, whether given in this or another state, is competent evidence of the facts therein recited, but of nothing more. *May v. S.* 15 App. 430; *May v. S.* 17 App. 213.

Article 720 of the Revised Statutes requires the secretary of state to keep a fair register of all the official acts of the governor, which is tantamount to requiring that he shall keep a record of all official acts of the governor, and certified copies from such registry are admissible evidence. *Hunnicut v. S.* 18 App. 498.

See a state of facts in a trial for forgery in which it was held that certain post-office receipts were competent evidence against the defendant as tending to show his intent. *Hennessey v. S.* 23 App. 340.

A telegram is documentary evidence, and parol evidence of its contents is not admissible unless the non-production of the telegram is satisfactorily accounted for. *Conner v. S.* 23 App. 378; *Chester v. S.* *Id.* 577.

Deeds, bills of sale, and other instruments in writing, which are required or permitted by law to be recorded, may be read in evidence without proof of their execution, if they have been filed among the papers in the cause, and notice of such filing given to the adverse party at least three days before the trial of the cause. But without such filing and notice, their execution must be proved, as in the case of other written instruments, before they can be read in evidence. *Allison v. S.* 14 App. 402; *Morrow v. S.* 22 App. 239; *Timbrook v. S.* 18 App. 1; *Sayles' Civ. Stat.*, Art. 2257, and notes. Records of marks and brands are not within the contemplation of Article 2257 of the Revised Statutes, and do not require to be filed, etc. *Ninnon v. S.* 17 App. 650.

Where a document is in the possession or power of the adverse party, secondary evidence cannot be introduced of its contents, unless the adverse party, or his attorney, has been given regular notice to produce the original. There are three instances in which such notice is not required: 1. Where the document to be proved and that to be produced are duplicate originals. 2. Where the document to be produced is itself a notice. 3. Where, from the nature of the action, the defendant has notice that he is charged with the possession of the document. Notice to produce is not required where the document belongs to a third party, and the defendant has fraudulently obtained possession of it. An allegation in an indictment for forgery, that the alleged forged order was in the possession of the defendant, or was lost or destroyed, and that access to the same could not be had, etc., being made for another purpose, was held to be not a notice to produce the order. *Rollins v. S.* 21 App. 148.

Where there is a subscribing witness to a document, the testimony of such witness is primary, and secondary evidence of the execution of the document is not admissible without accounting for that of the subscribing witness. *Morrow v. S.* 22 App. 239; *Sample v. Irwin*, 45 Tex. 567; *White v. Holliday*, 20 Tex. 679; *Craddock v. Merrill*, 2 Tex. 494; see, *ante*, §§2483-2497.

As to proof of a lost document, see *Haun v. S.* 13 App. 383; *Cheatham v. Riddle*, 8 Tex. 162.

For other decisions as to documentary evidence, see *Sayles' Civ. Stat.*, notes to Arts. 2245, 2252, 2257.

**§2508—Facts transpiring in grand jury room.**—Evidence of what transpires in a grand jury room, while the grand jury is in session, is only admissible when, in the judgment of the court, it becomes material to the administration of justice. *Thompson v. S.* 19 App. 693; *Clanton v. S.* 13 App. 139, the latter case overruling *Ruby v. S.* 9 App. 353, in so far as it holds that such evidence is not admissible in any case.

**§2509—Reproducing testimony of a deceased witness.**—It is competent for either the state or the defendant to reproduce the testimony given on a former trial of the cause by a witness who has since died. Such testimony may be proved by a person who heard it given, and who can state the substance of it. Such evidence is not in contravention of the constitutional right of the defendant to be confronted with the witnesses against him. *Black v. S.* 1 App. 368; *Greenwood v. S.* 35 Tex. 587. The witness called to reproduce the testimony of the deceased witness may state the substance thereof, and it is not essential that he should be able to repeat the exact words of it. *Simms v. S.* 10 App. 131; *Avery v. S.* *Id.* 199.

Where the testimony of a deceased witness, on a former trial of the case, had been reduced to writing and filed in the court in which the cause was then pending, it was held that a duly certified copy thereof would be admissible, in behalf of the defendant, to reproduce the testimony of the deceased witness, on a trial had in a county to which the venue of the case had been changed. *Walker v. S.* 13 App. 618.

As to the written evidence of a witness, since deceased, etc., see succeeding chapter.

**§2510—Examination of witnesses, and introduction of evidence.**—The mode of conducting the examination of witnesses on a trial is, and must necessarily be, left in a great measure to the discretion of the judge presiding. His action will be presumed correct in the absence of a contrary showing. *Yanez v. S.* 6 App. 429.

Leading questions on the direct examination are permissible: 1. Where the witness appears to be hostile to the party producing him, or in the interest of the other party, or unwilling to give evidence. 2. Where the witness has a weak memory. *Navarro v. S.* 24 App. 378; *Rodriguez v. S.* 23 App. 503; *Armistead v. S.* 22 App. 51; *Taylor v. S.* *Id.* 529; *Mann v. S.* 44 Tex. 642. They are also permissible to the extent of apprising the witness of the matter

of inquiry, and by permission of the court facts already proved may be recited to the witness. *West v. S. 2 App. 460; Shultz v. S. 5 App. 390; Anschicks v. S. 6 App. 524; Sigler v. S. 7 App. 283.*

A leading question is one which may be answered by "yes" or "no," and which plainly suggests to the witness the answer to be elicited by the interrogator. A question to be answered "yes" or "no," but which suggests no more the affirmative than the negative answer, is not a leading question. *Ranyel v. S. 22 App. 642; Kennedy v. S. 19 App. 618; Ashlock v. S. 16 App. 13; Luttrell v. S. 14 App. 147; Wright v. S. 10 App. 476; Tinsley v. Carey, 26 Tex. 350; Mathis v. Buford, 17 Tex. 152; Cole v. S. 16 App. 461.*

When a witness manifests no disposition to evade frank, plain and pertinent answers to questions propounded, the fact that he was related to a co-defendant not on trial, did not authorize the prosecuting attorney to propound leading questions to him. *Conn v. S. 11 App. 390.*

A witness should not be called from the stand and conferred with by counsel. *Williams v. S. 35 Tex. 855.*

A witness may refresh his memory by referring to his testimony in writing given on a former trial, or to other documents, but he must testify from memory, independent of the testimony or documents referred to. *Hubby v. S. 8 App. 597.* His attention may also be specially called to some fact, for the purpose of refreshing his memory. *Sigler v. S. 7 App. 283; see, also, White v. S. 18 App. 57.*

It was held not to be error to permit a witness to retire from the stand and the court-room into a room by himself, so that he could examine certain papers for the purpose of identifying and explaining them in his testimony. *Kunde v. S. 22 App. 65.*

It is proper for a party to inquire privately of a witness, before he is called to testify, what his testimony will be, but if the witness refuses to divulge his testimony, the court cannot compel him to do so. *Withers v. S. 23 App. 396; Yanez v. S. 20 Tex. 656.*

It is not error to refuse to grant time to the defense to take down in writing the testimony of the witnesses while they are being examined. *Lewis v. S. 15 App. 647.*

The state may anticipate defensive testimony upon a material issue, and may support its theory thereupon by its evidence in chief as well as by evidence in rebuttal. *Gibson v. S. 23 App. 414.*

When a witness, after being admonished by the court, persists in injecting into his testimony statements which he has been informed are not legal evidence, he should be punished by fine, and, if necessary, by imprisonment. *Harrison v. S. 16 App. 325.*

Questions respecting the mode of examining a witness, or relative to the scope of interrogation allowable in the examination, should be raised and disposed of while the witness is on the stand, and such questions cannot be submitted to the jury. *Holbert v. S. 9 App. 219.*

The state, ordinarily, is not required to introduce every eye witness to the transaction. *Gibson v. S. 23 App. 414; Wheelis v. S. Id. 238; Phillips v. S. 22 App. 139; Hunnicutt v. S. 20 App. 626.*

The law does not prescribe the order in which testimony shall be introduced. The practice is to admit competent evidence at any convenient stage of the trial; and to admit evidence which may not appear to be material or relevant upon the assurance of counsel that it will be followed by other evidence rendering it competent; but the better practice is, when practicable, to determine the competency of evidence when it is offered. *Heard v. S. 9 App. 1; Davis v. S. Id. 363.*

**§2511—Cross-examination.**—The extent and character of a cross-examination is left largely to the discretion of the trial judge. Ordinarily any question which may tend to affect the credit of a witness is allowable on cross-examination. His relations to the defendant, or the alleged injured party; his bias in favor of, or prejudice against, the defendant; his interest in the matters involved in the prosecution; his motives, means of knowledge, etc., may be inquired into on the cross-examination. *Stevens v. S. 7 App. 39; Thompson v. S. 11 App. 51; Daffin v. S. Id. 76; Blunt v. S. 9 App. 234; Sims v. S. 4 App. 144; Walts v. S. 18 App. 381; Crist v. S. 21 App. 361.*

A witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence. *Brite v. S. 10 App. 368; Rainey v. S. 20 App. 473; Stevens v. S. 7 App. 39; Johnson v. S. 22 App. 206.*

When the cross-examiner seeks to draw out new matter, the witness becomes his *pro hac vice*, the adverse party may insist upon the right to cross-examine upon the new matter. *Bassham v. S. 38 Tex. 622.* But a party does not make a witness his own if he merely recalls him for the purpose of cross-examination. *Harvey v. S. 37 Tex. 365.*

The husband or wife testifying in behalf of each other may, like any other witness, be cross-examined, except that the cross-examination should be confined to matters about which the witness testified on the examination-in-chief. And such witness may also be asked questions for the purpose of laying a predicate for impeachment, but not irrelevant questions or such as call for privileged communications. *Ante, §2442.*

**§2512—Privilege of witness.**—A witness cannot be compelled to answer a question tending to degrade him, or that may subject him to a civil or criminal suit. But this is a privilege personal to the witness, to be claimed by him or not, as he chooses, and not by counsel for either party. But the court should advise the witness that he is not compelled to answer. If the witness chooses to answer he is bound to answer everything relating to the transaction. If he declines to answer no inference of the truth of the fact is permitted to be drawn from that fact. And no answer forced from him after he has claimed protection, if he is entitled



to protection, can afterwards be given in evidence against him. *Owen v. S.* 7 App. 329; *Floyd v. S.* 7 Tex. 215. And a witness may be asked if he has ever been confined in the penitentiary for crime, and he is not privileged from answering. *Lights v. S.* 21 App. 308, overruling *S. v. Ivey*, 41 Tex. 35; see, also, *Perez v. S.* 8 App. 610.

A joint offender in gaming is not privileged from testifying as to the gaming in which he participated, as he is exempt from punishment should he testify. *Ante*, §§599, 600. And it seems a witness is not privileged from answering as to a transaction which, as to him, is barred by the statute of limitations. *Floyd v. S.* 7 Tex. 215.

**§2513—Impeachment of witness.**—In impeaching the credit of a witness by proving his bad character for truth, it is proper to inquire as to his general reputation for truth in the neighborhood in which he resides, and whether that reputation is good or bad, or whether that general reputation is such as to entitle the witness to credit on oath. But the impeaching witness should not be asked whether or not he would believe the witness sought to be impeached, on oath. The inquiry as to character should be restricted to the general reputation of the witness sought to be impeached, for truth in the community where he lives, or where he is best known, and the impeaching witness must speak from general reputation or report, and not from his own private opinion. *Marshall v. S.* 5 App. 273; *Boon v. Weathered*, 23 Tex. 675; *Holbert v. S.* 9 App. 219; *Bluitt v. S.* 12 App. 39; *Johnson v. Brown*, 51 Tex. 65; *Stockholm v. S.* 24 App. 598.

Before being permitted to testify as an impeaching witness with respect to character, such witness must state that he knows the general reputation of the witness sought to be impeached in the neighborhood where he resides or is best known, and such impeaching witness is amenable to cross-examination as other witnesses. *Holbert v. S.* 9 App. 219; *Trammell v. S.* 10 App. 467; *Ayres v. Dupree*, 27 Tex. 593.

Where a witness had removed from one county to another, and had been so removed for three years, it was held competent, in assailing his reputation for truth, to prove that such reputation was bad in the neighborhood from which he had removed. *Lum v. S.* 11 App. 483; *Coffelt v. S.* 19 App. 436.

To impeach a witness by proving bad character for truth, such character must be notorious in the neighborhood in which he lives or is best known, and such proof should be made by more than one witness. *Butler v. S.* 3 App. 48; *Wafford v. S.* 44 Tex. 439.

A witness may be discredited by proving that on a former occasion he made a statement inconsistent with his testimony on trial, provided such statement be material to the issue. And generally, whenever, on a former occasion, it was the duty of the witness to state the whole truth, it is admissible to show that in his statement he omitted facts sworn to by him on the trial. But the omission of a witness to state facts on a former occasion, to which he testifies on the trial, may be explained. *Williams v. S.* 24 App. 637; *Kunde v. S.* 22 App. 65; *Lewis v. S.* 15 App. 647.

But it is only upon a denial, direct or qualified, by the witness, that he made such contradictory statements, that proof of them can be made. *Williams v. S.* 24 App. 637. When the witness admits that he made such statements, it is not competent to introduce evidence that he did make them. *Walker v. S.* 17 App. 16; *Rodriguez v. S.* 23 App. 503.

Evidence of contradictory statements made by a witness is not allowable until a predicate therefor has been laid by asking the witness if he had made such statements, and in laying such predicate, the statement, and the time and place, and person, when, where and to whom the same was made, must be stated to the witness. *Jordan v. S.* 10 Tex. 479; *Henderson v. S.* 1 App. 432; *Treadway v. S.* *Id.* 668; *Williams v. S.* 3 App. 316; *Booker v. S.* 4 App. 564; *Walker v. S.* 6 App. 576; *Mason v. S.* 7 App. 623; *Butler v. S.* *Id.* 635; *Ayres v. Dupree*, 27 Tex. 593.

The contradictory statements must have been as to matters material and relevant to the issue, and not as to mere collateral matters. *Walker v. S.* 6 App. 576; *Sims v. S.* 4 App. 144; *Ramsey v. S.* 20 App. 473. And the impeachment must be restricted to the exact predicate laid. *Shields v. S.* 8 App. 427; *McKinney v. S.* *Id.* 626; *Estep v. S.* 9 App. 366.

But the animus, interest, motive, or ill will of a witness, with reference to the case, are not collateral or irrelevant, and may be inquired into, or shown either by the witness himself or by other testimony. But a witness cannot be asked as to the cause of his enmity to a party. *Rosborough v. S.* 21 App. 672; *Hart v. S.* 15 App. 202; *Sims v. S.* 4 App. 144; *Mason v. S.* 7 App. 623; *Hill v. S.* 18 App. 665; *Watts v. S.* *Id.* 381; *Watson v. S.* 9 App. 238; *Sager v. S.* 11 App. 110.

When it is proposed to contradict the testimony of a witness by his testimony taken before an examining court, it is necessary to show him his signature thereto, and so much of the contents of the document as involves the statement sought to be impeached. It is not necessary to ask him if his said testimony before the examining court was read over to him in the examining court. The fact, however, that it was not read over to him may be elicited as a circumstance tending to account for discrepancies between it and his present testimony. If the written testimony itself is to be used for the purpose of contradicting the witness, it must be shown that he subscribed it, or put his mark to it. But if it be inadmissible because not signed or authenticated, it is competent to contradict the witness by oral proof of his conflicting statements made before the examining court, if they were of a material nature. *Grosse v. S.* 11 App. 364; *Ballinger v. S.* 11 App. 323. But, if his testimony on a former trial was reduced to writing, the writing must be produced, or its non-production accounted for, before oral testimony will be allowed as to it. *Hunter v. S.* 8 App. 75.

An effort to impeach the credit of a witness, though unsuccessful, raises the issue of the character for truth of such witness, and entitles the party producing him to introduce ev.

idence to sustain his credit. *Coombes v. S.* 17 App. 258; *Wilson v. S. Id.* 525; *Phillips v. S.* 19 App. 158; *Dixon v. S.* 15 App. 271; *Burrill v. S.* 18 Tex. 713; *Williams v. S.* 24 App. 637; *Gonzales v. S.* 16 App. 152; *Thomas v. S.* 18 App. 213.

But it is not permissible to sustain the credibility of the witness, by proving by other witnesses that from their personal knowledge of him they would believe him. *Speiden v. S.* 1 App. 541.

He may be sustained by proof of previous statements made by him corresponding with his testimony. *Bailey v. S.* 9 App. 98.

Contradictory statements made by a witness when testifying before a grand jury may be proved for the purpose of discrediting him, when, in the judgment of the court, such evidence is material to the due administration of justice. *Clanton v. S.* 13 App. 139, overruling, upon this point, *Ruby v. S.* 9 App. 353.

That a witness on a former trial did not state all the facts that he now testifies to, is not a contradiction, when there is no inconsistency in his two statements, and when his attention on the former trial was not called to the new facts to which he testifies on the pending trial. *Lewis v. S.* 15 App. 647.

An attorney who has interviewed witness while under the rule, cannot be used to prove contradictory statements made by the witness to him in such interview. *Brown v. S.* 3 App. 294.

A witness who has testified in the case may, in the discretion of the court, be recalled by the adverse party for the purpose of laying a predicate to impeach him. *Harvey v. S.* 37 Tex. 365; *Treadway v. S.* 1 App. 668; *Garza v. S.* 3 App. 286.

The party introducing a witness cannot assail his credibility in any manner unless such witness has testified to some fact injurious to such party. *Ante*, §§2485, 2486.

In order to discredit a witness it is not competent to prove that he had harbored horse thieves. *McAfee v. S.* 17 App. 135.

Assaults upon the veracity of a witness made only by counsel in argument, do not constitute such impeachment of the credibility of the witness as will authorize the admission of testimony to sustain his credibility. *Ricks v. S.* 19 App. 308.

**§2514—Exclusion of evidence admitted.**—When improper evidence has, through inadvertence or otherwise, been admitted, even when not objected to, it is a proper practice to exclude it from the jury, and to instruct the jury that it must not be considered by them. It is error in such case to overrule a motion made by the defendant to exclude. *Branch v. S.* 15 App. 156; *Thomas v. S.* 17 App. 437; *Phillips v. S.* 22 App. 139; *Gose v. S.* 6 App. 121; *Marshall v. S.* 5 App. 273; *Rountree v. S.* 10 App. 110.

But if the illegal evidence has been elicited by the defendant, it will not be excluded. *Speights v. S.* 1 App. 551; *Moore v. S.* 6 App. 563.

**§2515—Agreements as to evidence.**—In order to avoid a postponement of a trial, it was agreed that the defendant might read in evidence the testimony of an absent witness as set forth in defendant's application for a continuance. Held, that such agreement did not preclude the state from introducing the absent witness to testify in person on the trial. *Hackett v. S.* 13 App. 406.

In a theft case an agreement in writing, signed by state's counsel and the defendant, and an attesting witness, that an attached affidavit of the owner of the alleged stolen property proving his want of consent to the taking of the property, might be read in evidence on the trial, was presented by the state, and said affidavit was thereunder offered and admitted in evidence, the defendant objecting thereto: 1. That he has the right to be confronted by the witnesses against him. 2. That it was not proved that he executed the agreement. Held, that the first objection was not tenable, because the defendant had the personal power to waive the right of being confronted with the witness; but that the second objection should have been sustained, as it devolved upon the state, before reading in evidence the said affidavit, to prove the execution by the defendant of said agreement by the attesting witness if accessible, and if not, by secondary evidence. *Allen v. S.* 16 App. 237.

In determining the propriety of recalling a witness who has testified on the trial, the trial court is vested with a wide discretion, and such discretion cannot be defeated or controlled by any agreement entered into by counsel in the case. *Pierson v. S.* 18 App. 524.

**§2516—Practice on appeal—Bill of exception, etc.**—Ordinarily no ruling or action of the trial court in relation to questions of evidence will be considered and revised on appeal, unless presented by proper bill of exception, and unless objection to such ruling or action was promptly interposed. If primarily made after verdict such objections are not usually available. *Daffin v. S.* 11 App. 76; *Waite v. S.* 13 App. 169; *Williams v. S.* 19 App. 276; *Etheridge v. S.* 8 App. 133; *Cavitt v. S.* 15 App. 190; *Thomas v. S.* 17 App. 437; *Masterson v. S.* 20 App. 574; *Rountree v. S.* 10 App. 110; *Holbert v. S.* 9 App. 219; *Pippin v. S. Id.* 269.

Bills of exception should be full, clear and specific, setting forth distinctly every fact essential to an understanding of the matter sought to be presented thereby. When taken to the admission of evidence, the bill should clearly disclose the ground or grounds of the objection made to the evidence; otherwise it is not entitled to be considered. Grounds of objection not so stated will ordinarily be considered as waived. *Gilleland v. S.* 24 App. 524; *Davis v. S.* 14 App. 645; *Walker v. S.* 9 App. 200; *Ballinger v. S.* 11 App. 323; *Gaitan v. S. Id.* 544; *Wright v. S.* 10 App. 476; *Conner v. S.* 17 App. 1; *Logan v. S. Id.* 50; *Bryant v. S.* 18 App. 107; *Lewis v. S.* 15 App. 647.

A bill of exception to the exclusion of evidence must set forth the evidence offered and the objections made thereto, and such facts as may be necessary to disclose its relevancy, materi-

ality and competency, or the questions sought to be presented by it will not be considered. Inferences will not be indulged to supply the omission of essential statements in a bill of exceptions. *Buchanan v. S.* 24 App. 195; *Walker v. S.* 19 App. 176; *Counts v. S.* 19 App. 450; *Sutton v. S.* 16 App. 490; *Luttrell v. S.* 14 App. 147; *Walker v. S.* 9 App. 200.

Exceptions to evidence *admitted* over the defendant's objection may be embraced in a statement of facts in connection with the evidence objected to; but exceptions to evidence *excluded* cannot be embraced in a statement of facts, but must be presented by bill of exception. *Cooper v. S.* 7 App. 194; *Green v. S.* 12 App. 51; *McWhorter v. S.* 13 App. 523; *Branch v. S.* 15 App. 96.

See, as to bill of exception generally, *ante*, §§2364-2370.

In felony cases less than capital, and in misdemeanor cases, a conviction will not be set aside on appeal, on account of the admission of illegal evidence against the defendant, unless such evidence was material and relevant, and the legal evidence in the case is insufficient to warrant the conviction. The court looks to the whole record in determining whether the illegal evidence was relevant and material. This rule does not obtain in a capital felony. On the contrary, a capital conviction will be set aside, if illegal evidence has been admitted over the defendant's objection, and he has duly reserved exceptions, and the court will not inquire whether there is sufficient legal evidence to sustain the conviction, or whether the verdict was influenced by the illegal evidence. *Hester v. S.* 15 App. 567; *Preston v. S.* 4 App. 200; *Bigley v. S.* 5 App. 101; *Haynie v. S.* 2 App. 168; *Evans v. S.* 13 App. 225; *Logan v. S.* 17 App. 50; *Draper v. S.* 22 Tex. 400; *Somerville v. S.* 6 App. 433; *Jones v. S.* 7 App. 457.

But the admission of immaterial evidence, even in a capital case, when not objected to in the court below, is not necessarily cause for a reversal of the conviction. It may, however, become cause for reversal, if the jury, by imputing undue importance to it, may have been misled to the prejudice of the defendant, or if the charge gives undue prominence to it. *Simms v. S.* 8 App. 230; *Cooper v. S.* 23 App. 331.

The admission of illegal evidence of an important fact, material and pertinent to the issue, and which is additional to other facts legally in evidence, is error for which a conviction will be set aside, however certain it may be that the jury would have found a verdict of guilty upon other sufficient evidence adduced on the trial. *McWilliams v. S.* 44 Tex. 117; *Saddler v. S.* 20 App. 195.

But the erroneous admission of evidence, which is neither pertinent nor material to an issue in the case, and which could have no tendency whatever to affect or prejudice the rights of the defendant, is not cause for reversal. *Post v. S.* 10 App. 579. But see in this connection *Tyson v. S.* 14 App. 388, and cases there cited; see, also, *Saddler v. S.* 20 App. 195; *Bond v. S.* *Id.* 427.

For other decisions relating to evidence not found in the notes to this chapter, see under heads of the several offenses, and under other appropriate heads.

## CH. 8.—OF THE DEPOSITIONS OF WITNESSES AND TESTIMONY TAKEN BEFORE EXAMINING COURTS AND JURIES OF INQUEST.

ART.	SEC.	ART.	SEC.
757. Defendant may have deposition taken when examination, etc.	2517	767. When two officers act, each shall sign and seal.	2527
758. May also be taken, when.	2518	768. Deposition before examining court may be taken without interrogatories.	2528
759. Depositions of witnesses within the state may be taken by whom.	2519	769. May be taken without commission.	2529
760. May be taken out of the state by whom.	2520	770. Duty of officer to attend.	2530
761. Deposition of non-resident witness temporarily within the state.	2521	771. How deposition shall be returned.	2531
762. Shall be taken as in civil cases.	2522	772. Deposition shall not be read unless oath be made that, etc.	2532
763. Same objections to depositions as in civil cases.	2523	773. District or county attorney may make oath.	2533
764. How defendant shall proceed in taking depositions.	2524	774. Testimony taken before examining court may be read in evidence, when.	2534
765. Written interrogatories shall be filed and notice given as in civil cases.	2525	Decisions as to depositions.	2535
766. Certificate of officer taking depositions.	2526		

§2517—**ART. 757.—Defendant may have deposition taken when examination, etc.**—When an examination takes place in a criminal action before a magistrate, the defendant may have the deposition of any witness taken by any officer or officers hereafter named in this chapter; but the state or person prosecuting shall have the right to cross-examine the witnesses, and the defendant shall not use the deposition for any purpose unless he first consent that the entire evidence or statement of the witness may be used against him by the state on the trial of the case. [O. C. 764.]

See *Kerry v. S.* 17 App. 178; for forms relating to depositions, see *Willson's Cr. Forms*, 672-678.

§2518—**ART. 758.—May also be taken, when.**—Depositions of witnesses may also, at the request of the defendant, be taken in the following cases:

1. When the witness resides out of the state.
2. When the witness is aged or infirm. [O. C. 765.]

§2519 — **ART. 759. — Depositions within the state, taken by whom.**—Depositions of witnesses within the state may be taken by a supreme or district judge, or before any two or more of the following officers: The county judge of a county, notary public, clerk of the district court and clerk of the county court. [O. C. 766.]

See *Kerry v. S.* 17 App. 178.

§2520—**ART. 760.—May be taken out of the state, by whom.**—Depositions of a witness residing out of the state may be taken before the judge or chancellor of a supreme court of law or equity, or before a commissioner of deeds and depositions for this state, who resides within the state where the deposition is to be taken. [O. C. 767.]

See *Kerry v. S.* 17 App. 178. A consul of the United States is an officer qualified to take such depositions. *Adams v. S.* 19 App. 250.

§2521—**ART. 761.—Depositions of non-resident witness temporarily within the state.**—The deposition of a non-resident witness, who may be temporarily within the state, may be taken under the same rules which apply to the taking of depositions of other witnesses in the state. [O. C. 768.]

See *Kerry v. S.* 17 App. 178; *Adams v. S.* 19 App. 250.

§2522—ART. 762.—**Shall be taken as in civil cases.**—The rules prescribed in civil cases for taking the deposition of witnesses shall, as to the manner and form of taking and returning the same, govern in criminal actions when not in conflict with the requirements of this Code. [O. C. 769.]

An objection that the depositions were taken and returned by an officer not authorized by law to take them, is an objection which goes to the manner and form of taking and returning them. *Adams v. S.* 19 App. 250. For rules governing depositions in civil cases, see Chap. 2, Title 38, Sayles' Civ. Stat.

§2523—ART. 763.—**Same objections to depositions as in civil cases.**—The same rules of procedure, as to objections to depositions, shall govern in criminal actions which are prescribed in civil actions, when not in conflict with this Code. [O. C. 770.]

See *Kerry v. S.* 17 App. 178; *Pinckney v. S.* 12 App. 352; Sayles' Civ. Stat. Ch. 2, Title 38.

§2524—ART. 764.—**How defendant shall proceed in taking depositions.**—When the defendant desires to take the deposition of a witness, at any other time than before the examining court, he shall, by himself or counsel, file with the clerk of the court in which the case is pending a statement on oath setting forth the facts necessary to constitute a good reason for taking the same, and in addition thereto state in his affidavit that he has no other witness whose attendance on the trial can be procured by whom he can prove the facts he desires to establish by the deposition. [O. C. 771.]

See *Kerry v. S.* 17 App. 178; *Adams v. S.* 19 App. 250; Willson's Cr. Forms, 672.

§2525—ART. 765.—**Written interrogatories filed, etc., as in civil cases.**—In cases arising under the preceding article, written interrogatories shall be filed with the clerk of the court, and a copy of the same served on the district attorney or county attorney of the proper district or county, the length of time required for service of interrogatories in civil actions. [O. C. 765.]

See *Kerry v. S.* 17 App. 178; Willson's Cr. Forms, 673, 674, 675.

§2526—ART. 766.—**Certificate of officer taking deposition.**—In every case where depositions are taken, under commission in criminal actions, the officer or officers taking the same shall certify that the person deposing is the identical person named in the commission and is a credible person; or, if they cannot certify to the identity of the witness, there shall be an affidavit of some person attached to the deposition proving the identity and credibility of such witness; and the officer or officers shall certify that the person making the affidavit is known to them and is worthy of credit. [O. C. 773.]

See *Kerry v. S.* 17 App. 178; Willson's Cr. Forms, 677, 678.

§2527—ART. 767.—**Where two officers act, each shall sign and seal.**—In cases where it is required that two officers shall act in executing a commission to take depositions, the official seal and signature of each shall be attached to the certificate authenticating the deposition. [O. C. 774.]

See *Kerry v. S.* 17 App. 178.

§2528—ART. 768.—**Deposition before examining court, taken how.**—The deposition of a witness taken before an examining court may be taken without interrogatories; but whenever a deposition is so taken, it shall be done by the proper officer or officers, and there shall be allowed both to the state and to the defendant full liberty of cross-examination. [O. C. 775.]

See *Kerry v. S.* 17 App. 178.

2529—ART. 769.—**May be taken without commission.**—The depositions of witnesses taken before an examining court may be taken without a commission, and if such examining court be held by a supreme or district judge he shall, upon request, proceed to take depositions of the witnesses. [O. C. 776.]

See *Kerry v. S.* 17 App. 178.

§2530—ART. 770.—**Duty of officer to attend.**—Where any of the officers, other than a supreme or district judge, are called upon to take a

deposition before an examining court, it is their duty to attend and take the same. [O. C. 777.]

§2531—ART. 771.—**How deposition shall be returned.**—A deposition taken in an examining court shall be sealed up and delivered by the officer or officers, or one of them, to the clerk of the court of the county having jurisdiction to try the offense; in all other cases the return of depositions may be made as provided for depositions in civil actions. [O. C. 778.]

See *Kerry v. S.* 17 App. 178; *Cowell v. S.* 16 App. 57.

§2532—ART. 772.—**Depositions shall not be read, unless oath be made that, etc.**—Depositions taken in criminal actions shall not be read, unless oath be made that the witness resides out of the state; or, that since his deposition was taken the witness has died; or, that he has removed beyond the limits of the state; or, that he has been prevented from attending the court through the act or agency of the defendant; or, by the act or agency of any person whose object was to deprive the defendant of the benefit of the testimony; or, that by reason of age or bodily infirmity such witness cannot attend. [O. C. 779.]

See *Willson's Cr. Forms*, 679.

§2533—ART. 773.—**District or county attorney may make oath.**—When the deposition is sought to be used by the state, the oath prescribed in the preceding article may be made by the district or county attorney or any other credible person, and when sought to be used by the defendant the oath shall be made by him in person. [O. C. 780.]

§2534—ART. 774.—**Testimony taken before examining court may be read in evidence, when.**—The deposition of a witness taken before an examining court or a jury of inquest and reduced to writing, and certified according to law, in cases where the defendant was present when such testimony was taken, and had the privilege afforded him of cross-examining the witness, may be read in evidence as is provided in the two preceding articles for the reading in evidence of depositions. [Act Nov. 10, 1866, p. 160.]

§2535—**Decisions as to depositions.**—The word "deposition," the second word in the preceding article, 774, is a manifest mistake on the part of the revisers, and was used by them inadvertently for the word "testimony," or the word "evidence," and the article should read, and must be construed to read, "the testimony," etc., or, "the evidence," etc. *Kerry v. S.* 17 App. 178.

Depositions are not admissible in evidence, except upon the conditions and with the restrictions prescribed by the statute. The consent of the parties that a deposition, taken otherwise than in accordance with the statute, may be used as evidence, will not, it seems, make such deposition admissible, if objected to. *Johnson v. S.* 27 Tex. 358.

The same rules which govern the admissibility of depositions are applicable to the written testimony of witnesses, taken before an examining court or a jury of inquest. Those rules require that oath be made to some one or more of the facts specified in article 772, *ante*. It is not required that the oath be made in the form of an affidavit, nor is a formal, independent oath necessary; but the fact or facts relied upon to render the deposition or testimony admissible may be proved by the testimony of witnesses, as any other fact in the case. *Pinckney v. S.* 12 App. 352; *Parker v. S.* 18 App. 72; *Post v. S.* 10 App. 579; *Steagald v. S.* 22 App. 464.

Article 772, *ante*, prescribes five alternative contingencies upon which a predicate may be laid for the introduction in evidence of a deposition. Unless the predicate be laid in conformity to one or more of these prescribed contingencies, the deposition cannot be read in evidence. *A fortiori* it is not competent to reproduce oral testimony, taken before an examining court or jury of inquest, without first laying such predicate. In this respect the Code is restrictive of the common law. *Evans v. S.* 12 App. 370, overruling *Sullivan v. S.* 6 App. 319, in so far as it holds a contrary doctrine to the above.

When a deposition has been taken before an examining court or a jury of inquest, and has been reduced to writing and certified according to law, the defendant having been present when it was taken, and having had the privilege of cross-examination afforded him; and it is shown by oath, that since said deposition was taken the witness has died, or has removed beyond the limits of the state, or has been prevented from attending court by reason of age or bodily infirmity, or through the act or agency of the defendant, or by the act or agency of any person whose purpose it was to deprive the defendant of the benefit of the testimony, the deposition is admissible in evidence for the defendant or for the state. *Post v. S.* 10 App. 579; *Johnson v. S.* 1 App. 333; *Ray v. S.* 4 App. 450; *Sullivan v. S.* 6 App. 319; *Cooper v. S.* 7 App. 194; *Cowell v. S.* 16 App. 57; *Garcia v. S.* 12 App. 335.

An affidavit that "the witness resides out of the State of Texas, and is a resident of the Indian Territory," was held sufficient to admit his deposition. *Ballinger v. S.* 11 App. 323.

And so an affidavit that the witness was out of this state, and was a resident of another state, was held sufficient. *Kerry v. S.* 17 App. 178.

But the statement of a witness, that he "did not know where the witness was," and the further showing, by the record, that attachment for said witness had been issued to several counties and returned not found, and that said witness appeared to be a railroad hand with no permanent place of abode, and that the state had no reasonable expectation of ever being able to procure his attendance, were held to not furnish a sufficient predicate for the admission of the deposition of said witness. *Pinckney v. S.* 12 App. 352.

The admission of this character of testimony rests solely upon necessity, and the rule as to its admission is an innovation upon the constitutional guaranty that, in all criminal cases, the accused shall have the right to be confronted with the witnesses against him. Such being the case, it is important that the facts which authorize its use should be proved to exist, and such proof may be rebutted and controverted, and shown to be insufficient, and this may be done without filing a counter-affidavit controverting the same. *Steagald v. S.* 22 App. 464; *Menges v. S.* 21 App. 413. But it is too late, after verdict, to controvert the truth of the predicate. *Ballinger v. S.* 11 App. 323.

A predicate sufficient to admit a deposition in evidence, is not established by proof merely that the witness is absent from the state. *Menges v. S.* 21 App. 413; *Cooper v. S.* 7 App. 194. Or that the witness had left for parts unknown, and that ineffectual search had been made for him. *Evans v. S.* 12 App. 370.

If the witness, at the time he testified, was a convicted felon, his testimony is not admissible, unless it be shown that his competency had been restored by a pardon. *Schell v. S.* 2 App. 30.

Where the statute authorizes the defendant to take the deposition of a witness, in order to entitle him to a continuance, he must show that he has used due diligence to obtain the absent testimony by that method, or must show good excuse for not using such diligence. *Ante*, §2164.

In the trial of a defendant charged with murder it was held competent for the state, after laying a proper predicate, to read in evidence the testimony of a witness taken on an examining trial, wherein the defendant was charged with an assault with intent to murder, it being shown that the wounds inflicted in said assault were an efficient cause for the death of the deceased, subsequent to said examining trial, the assault and the murder being, in fact, the same transaction. *Hart v. S.* 15 App. 202; *Dunlap v. S.* 9 App. 179.

It was urged, against the admissibility of the written testimony of a witness, that it was not sent to the clerk of the district court sealed up in an envelope, etc. Held, that the objection was untenable in view of the fact that the said testimony was identified as that of the witness by the magistrate who reduced it to writing, and was properly certified to by him at the time it was subscribed and sworn to by the witness. *Cowell v. S.* 16 App. 57.

The "bodily infirmity" which will authorize the admission of a deposition need not amount to a permanent disability. Thus, when a witness was at home, forty miles distant from the court, confined to his house from the effects of an attack of measles, which had destroyed one of his eyes and left him a chronic invalid, and he was also afflicted with constant pain in his head, and with palpitation of the heart, it was held that his written testimony was properly admitted. *Collins v. S.* 24 App. 141.

A sufficient predicate is laid by proof that the witness lives out of the state, or has removed beyond the limits of the state. Where the proof showed that the witness was an officer of the United States army; that he was temporarily on duty in this state at the time he testified; that his command, at that time, was stationed in the Indian Territory; that since he testified he had left this state to return to his command, and that a telegram, announcing his arrival there, had been received from him, it was held that a sufficient predicate had been laid to admit his testimony. *Conner v. S.* 23 App. 378.

The state offered the written testimony of certain witnesses, who had testified before an examining court, after having laid the predicate, that said witnesses had removed from the state. Defendant objected on the ground that the witnesses were absent by the aid and procurement of the attorney for the state. The proof showed that the witnesses were helpless and destitute women who, after coming to Texas at the instance of the defendant, had been swindled by him out of all their means of support, and that they were aided to return to their home, in another state, by the county attorney, from motives of charity and not for the purpose of depriving the defendant of their testimony. It was held that the testimony was properly admitted. *Golden v. S.* 22 App. 1.

It is not necessary that the magistrate's certificate to testimony should show affirmatively that the testimony was read by or to the witness. No particular form for such certificate is prescribed by law, and the presumption obtains that the magistrate complied with the directions of the law. *Golden v. S.* 22 App. 1; *O'Connell v. S.* 10 App. 567.

It being shown that a defendant's voluntary confession before an examining court was made in conformity with law, but was not so authenticated as to render it admissible in evidence, it was admissible to prove the statements therein contained by parol evidence. *Guy v. S.* 9 App. 161.

When a sufficient predicate has been laid for the admission of written testimony taken before an examining court or a jury of inquest, and such testimony has been reduced to writing, but has not been so authenticated as to render it admissible in evidence, or if it has not been reduced to writing, parol evidence is admissible to reproduce the testimony of the witness. *O'Connell v. S.* 10 App. 567; *Davis v. S.* 9 App. 363; *Dunlap v. S.* *Id.* 179.

See further, as to testimony taken before an examining court, *ante*, §§1765-1768. As to testimony taken before a jury of inquest, see, *post*, Arts. 998-1012.

## TITLE 9.—OF PROCEEDINGS AFTER VERDICT.

## CH.

## 1. OF NEW TRIALS.

## 2. ARREST OF JUDGMENT.

## CH.

## 3. JUDGMENT AND SENTENCE.

## 4. EXECUTION OF JUDGMENTS.

## CH. 1.—OF NEW TRIALS.

ART.	SEC.	ART.	SEC.
775. Definition of "new trial."	2536	780. Motions for new trial shall be in writing.	2552
776. Cannot be granted, except to a defendant.	2537	781. State may controvert truth of causes set forth, etc.	2553
777. New trial in felony cases shall be granted for what causes.	2538	Decisions under preceding article.	2554
Presence of defendant, and right to have counsel.	2539	782. Judge shall not discuss the evidence, etc., in ruling upon motion.	2555
Error committed by the court.	2540	783. Effect of a new trial.	2556
Verdict decided by lot, etc.	2541	Decisions under preceding article.	2557
Corrupt juror, etc.	2542	Suggestions to trial judges as to new trials.	2558
Absent testimony.	2543	Practice as to motions for new trial.	2559
Newly discovered evidence.	2544	784. When new trial is refused, statement of facts, etc.	2560
Where jury has received other testimony, etc.	2545	Statement of facts — Defendant's right to a.	2561
Misconduct of the jury.	2546	Same—Preparation and authentication of.	2562
Verdict contrary to law and evidence.	2547	Same—Judge may correct statement.	2563
Other causes for new trial.	2548	Same—Time of filing, etc.	2564
778. In misdemeanors, may be granted when.	2549	Same—In <i>habeas corpus</i> case.	2565
779. Must be applied for within two days, except.	2550	Same—Contents of.	2566
Decisions under preceding article.	2551	Same—Absence of an appeal.	2567

§2536—ART. 775.—Definition of "new trial."—A new trial is the rehearing of a criminal action, after verdict, before the judge or another jury, as the case may be. [O. C. 669.]

§2537—ART. 776.—Granted only to a defendant.—A new trial can in no case be granted where the verdict or judgment has been rendered for the defendant. [O. C. 670.]

This provision is applicable in a proceeding on a forfeited bail-bond or recognizance, and in such case the state is not entitled to a new trial. *Robertson v. S.* 14 App. 211; *Perry v. S.* *Id.* 166. These cases virtually, though not expressly, overrule *Gary v. S.* 9 App. 527.

§2538—ART. 777.—New trial in felony cases granted, for what causes.—New trials, in cases of felony, shall be granted for the following causes, and for no other:

1. Where the defendant has been tried in his absence, or has been denied counsel.

2. Where the court has misdirected the jury as to the law, or has committed any other material error calculated to injure the rights of the defendant.

3. Where the verdict has been decided by lot, or in any other manner than by a fair expression of opinion by the jurors.

4. Where a juror has received a bribe to convict, or has been guilty of any other corrupt conduct.

5. Where any material witness of the defendant has, by force, threats or fraud, been prevented from attending the court, or where any written evidence tending to establish the innocence of the defendant has been intentionally destroyed or removed so that it could not be produced upon the trial.



6. Where new testimony material to the defendant has been discovered since the trial. (A motion for a new trial, based on this ground, shall be governed by the same rules as those which regulate civil suits.

7. Where the jury, after having retired to deliberate upon a case, have received other testimony; or where a juror has conversed with any person in regard to the case; or, where any juror, at any time during the trial or after retiring, may have become so intoxicated as to render it probable his verdict was influenced thereby. But the mere drinking of liquor by a juror shall not be sufficient ground for granting a new trial.

8. Where, from the misconduct of the jury, the court is of opinion that the defendant has not received a fair and impartial trial, and it shall be competent to prove such misconduct by the voluntary affidavit of a juror; and a verdict may, in like manner, in such cases, be sustained by such affidavit.

9. Where the verdict is contrary to law and evidence. A verdict is not contrary to the law and evidence, within the meaning of this provision, where the defendant is found guilty of an offense of inferior grade to, but of the same nature as the offense proved. [O. C. 672.]

§2539—1.—**Presence of defendant, and right to have counsel.**—In felony cases the presence of the defendant at the trial is absolutely essential to the validity of the proceedings. *Ante*, §§2226, 2227.

In a *nisi prius* trial the right of the defendant to be heard by himself, or by counsel, or both, is guaranteed by the constitution, and cannot be denied, however simple, clear, unimpeached and conclusive the evidence against him may be. *Ante*, §§1431-1436.

It is only in a capital case that the court is required to appoint counsel for a defendant who has none. *Ante*, §2102.

Absence of counsel is no cause for a new trial, when a postponement of the trial on that account was not asked, and the result does not appear to have been affected by it. *Booth v. S.* 4 App. 202; *Williams v. S.* 10 App. 528; *Walker v. S.* 13 App. 618; *Madden v. S.* 1 App. 204.

Counsel for defendant, after filing a motion for a new trial, were imprisoned for contempt by the court, and, on a subsequent day, were brought before the court to argue said motion, while they were still in custody. Held, error, which entitled the defendant to a new trial without regard to the merits of the case. *Robertson v. S.* 38 Tex. 187.

§2540—2.—**Error committed by the court.**—See a state of facts which demanded of the trial court to change the venue of the cause upon its own motion, and having failed to do so, a new trial should have been granted. *Steagald v. S.* 22 App. 464.

When an application for a continuance, or for a postponement of the trial on account of the absence of testimony, has been refused, and it appears upon the trial that the absent testimony is of a material character, and that the facts set forth in the application are probably true, a new trial should be granted. See the decisions collated in §2186, *ante*.

The admission over the defendant's objection, of illegal evidence of an important fact, material and pertinent to the issue, though but cumulative, is good ground for a new trial, no matter how probable it may be that the jury would have convicted on the legal evidence alone. *McWilliams v. S.* 44 Tex. 116; *Draper v. S.* 22 Tex. 400; *Preston v. S.* 4 App. 186; *McKnight v. S.* 6 App. 158; *Tyson v. S.* 14 App. 388; *Haynie v. S.* 2 App. 168; *Hester v. S.* 15 App. 567; *Jackson v. S.* 20 App. 190; *Saddler v. S.* *Id.* 195; *Jones v. S.* 7 App. 457; *Harper v. S.* 11 App. 1; *Gardner v. S.* *Id.* 265; *Long v. S.* 17 App. 128; *Clark v. S.* 18 App. 467; *Chumley v. S.* 20 App. 5.

But the admission of immaterial, irrelevant or other illegal evidence, which could have no tendency whatever to affect or prejudice the rights of the defendant, is not good ground for new trial. *Post v. S.* 10 App. 420; *Bond v. S.* 20 App. 427; *Saddler v. S.* *Id.* 195.

The rejection of competent and material evidence offered by the defendant, or its exclusion after admission, is good ground for new trial—but if the evidence rejected or excluded be of a character which could not reasonably have influenced the result favorably to the defendant, a new trial should be refused. *Gose v. S.* 6 App. 121; *Black v. S.* 9 App. 328; *Arnold v. S.* *Id.* 435; *Greta v. S.* 10 App. 36; *Hinds v. S.* 11 App. 238; *Baker v. S.* *Id.* 262; *Russell v. S.* *Id.* 288; *Stone v. S.* 12 App. 219; *Logan v. S.* 17 App. 50; *Duke v. S.* 19 App. 14; *Phillips v. S.* *Id.* 158; *Boyd v. S.* *Id.* 446; *Lilly v. S.* 20 App. 1; *Favors v. S.* *Id.* 155; *Rainey v. S.* *Id.* 455; *Booth v. S.* 4 App. 202; *Boon v. S.* 42 Tex. 237.

A defendant cannot complain of illegal evidence elicited by himself or counsel, and the admission of illegal evidence at his instance, or the instance of his counsel, or the admission of illegal evidence without objection made to it at the time, will not be good ground for a new trial. *Speights v. S.* 1 App. 551; *Moore v. S.* 6 App. 563.

When the court in its charge has misdirected the jury as to the law of the case, a new trial should be granted. And when the court, with respect to its charge, has violated any of the provisions of the statute relating to charges of the court, and the error is excepted to at the time by the defendant, a new trial should be granted. When the error is not excepted to, but is for the first time called to the attention of the court in the motion for a new trial, it will

not be error for which the judgment will be reversed on appeal, to refuse a new trial upon such ground, unless the error in the charge is of a fundamental nature, or was calculated to prejudice the rights of the defendant, in which case a new trial should be granted. *Ante*, §2363.

Misconstruction of a charge by the jury is not a ground for a new trial. *Johnson v. S. 27 Tex. 758; Davis v. S. 43 Tex. 189; Rockhold v. S. 16 App. 577.*

If a charge be applicable to the case, and in other respects sufficient, it is not a ground for a new trial that the same charge had been used on the trial of another case. *Austin v. S. 42 Tex. 355.*

That the charge of the court was filed *nunc pro tunc* is not a ground for a new trial. *Nettles v. S. 4 App. 337.*

Where a charge, though erroneous, is favorable to the defendant, or where it has been given at the request of the defendant, he cannot be heard to complain of it, and the error does not constitute good ground for a new trial, ordinarily. *Cocker v. S. 31 Tex. 498; Collins v. S. 5 App. 38; Powell v. S. Id. 234; Templeton v. S. Id. 398; Pierce v. S. 17 App. 232; Weaver v. S. Id. 548; Thomas v. S. 14 App. 200.*

The reception of the final report of a grand jury pending a trial, accompanied by a few complimentary remarks by the court, is not a ground for a new trial. *Phillips v. S. 6 App. 44.*

The omission of the court to have the defendant in a capital case arraigned before change of venue, constitutes no ground for new trial. *Caldwell v. S. 41 Tex. 86.*

§2541-3.—**Verdict decided by lot, etc.**—A verdict should be the result of reason, deliberation and honest conviction, and not the offspring of chance or accident. If a jury, therefore, should so far forget a sense of duty and the obligations of their oath as to determine their verdict by the casting of lots, it is the right and duty of the court to set aside the verdict and grant a new trial. *Leverett v. S. 3 App. 213.*

Where the jury, after having found the defendant guilty, arrive at the punishment to be assessed, by averaging the several assessments of the individual jurors, that is by aggregating the punishment assessed by each juror and dividing the aggregate by the number of the jurors, and agreeing that the result of such calculation shall be the verdict of the jury absolutely, such verdict is bad, and should be set aside and a new trial granted the defendant. But where a verdict is arrived at in such manner, there being no agreement among the jurors to be bound by the result, and such result is agreed to by the jury after it has been thus ascertained, the verdict is not vitiated by the mode adopted by the jury to arrive at the punishment to be assessed. The impropriety, and that which vitiates the verdict, consists in the agreement by the jurors entered into *before* ascertaining the punishment in such manner, to be bound by the result. *Leverett v. S. 3 App. 213; Hunter v. S. 8 App. 75; Warren v. S. 9 App. 619; Wood v. S. 13 App. 135.*

§2542-4.—**Corrupt jury, etc.**—Where a juror, before he was impanelled, said to the alleged injured party: "I will be on the jury and will do all I can for you," it was held that a new trial should have been granted the defendant, it being shown that the prejudice of the juror was unknown to him until after the trial. *Hanks v. S. 21 Tex. 526.*

But where the defendant, knowing the bias or prejudice of a juror, fails to challenge him, he cannot make objection to him in a motion for a new trial. *Givens v. S. 6 Tex. 343; McGehee v. Shafer, 9 Tex. 20.* But a defendant is not precluded from making such objection a ground for new trial because he did not examine the juror upon his *voir dire* as to his bias or prejudice, unless gross negligence on his part is shown. *Hanks v. S. 21 Tex. 526.*

A loose expression of a juror, not indicative of a settled mind as to the merits of a particular cause, or a mere jocular remark that "he thought the defendant ought to have been hung twenty years ago" will not entitle the defendant to a new trial. *Monroe v. S. 23 Tex. 210; Hanks v. S. 21 Tex. 526; Simms v. S. 8 App. 230.* And, where the juror said "he would not be in the shoes of the defendant for ever so much," or that "he was going to the penitentiary anyhow," it was held that these remarks did not show prejudice of the juror. *Nash v. S. 2 App. 362.* But, where the juror said before the trial that defendant had killed a poor innocent soldier, and that he ought to have his neck broke, it was held, that in the absence of any explanation by the juror or other evidence, showing the absence of prejudice to the defendant on the part of the juror, a new trial should have been granted the defendant. *Henrie v. S. 41 Tex. 573.* So, where the juror said before the trial, that he was "a poor juror for the defendant," *Long v. S. 10 App. 186; see, ante, §2282, Sub. 12, 13, for other decisions as to bias or prejudice of juror.*

§2543-5.—**Absent testimony.**—Where testimony of a defendant is absent from any cause he should make application for a postponement or continuance of the trial, and make the refusal of such application a ground for new trial. *Cotton v. S. 24 Tex. 260; Higginbotham v. S. 3 App. 447; Walker v. S. 7 App. 245; Hartless v. S. 32 Tex. 88; Jackson v. S. 18 App. 586; Burton v. S. 9 App. 605.* If, on the trial, the defendant's witnesses testify differently from what he had expected, he must show, by his motion for a new trial, that the desired testimony is accessible from other sources. *Mayfield v. S. 44 Tex. 59; Jordan v. S. 10 Tex. 479.* If the materiality of absent testimony is first disclosed on the trial, the circumstances may be such as to entitle the defendant to a new trial. *Dunham v. S. 3 App. 465.* Surprise at testimony adduced by the state is, ordinarily, not a ground for new trial. *Walker v. S. 7 App. 245.* Nor has the defendant a right to rely upon what a state's witness will testify. *Fagan v. S. 3 App. 400; Yanez v. S. 20 Tex. 656; Evans v. S. 13 App. 225.* The mere fact that there is absent testi-

mony which might be procured on another trial, is no ground for new trial. *Brown v. S.* 16 Tex. 122.

For decisions relating to application for new trial, based upon the overruling of applications for continuance, see, *ante*. §2186.

§2544—6.—**Newly discovered evidence.**—When newly discovered evidence is assigned as cause for a new trial, the application is subject to the same rules as govern in civil cases. (For the rules which govern in civil cases, see Sayles' Civ. Stat., Ch. 17, Title 29.) Such an application is to be closely scrutinized, and the action of the trial court refusing it will not be revised, unless it be apparent that the discretion confided to such court has been abused to the prejudice of the defendant. *Burns v. S.* 12 App. 269; *Bell v. S.* 1 App. 598; *Templeton v. S.* 5 App. 398.

It is incumbent on the defendant, who asks a new trial upon the ground of newly discovered evidence, to satisfy the court: 1. That the evidence has come to his knowledge since the trial. 2. That it was not owing to a want of diligence on his part that it was not discovered sooner. 3. That on another trial it would probably produce a different result. 4. That it is competent, material to the issue, going to the merits, not merely cumulative, corroborative, collateral, or to impeach a witness. If the application is defective in establishing any of these essentials, a new trial will be refused. *Burns v. S.* 12 App. 269; *White v. S.* 10 App. 167; *Childs v. S.* Id. 183; *Burton v. S.* 9 App. 605; *Duval v. S.* 8 App. 370; *Hulto v. S.* 7 App. 44; *Williams v. S.* Id. 163; *Brown v. S.* 6 App. 286; *Darnell v. S.* Id. 482; *Walker v. S.* Id. 576; *Hutchinson v. S.* Id. 468; *Hasselmeyer v. S.* Id. 21; *Watson v. S.* 5 App. 11; *Tooney v. S.* Id. 163; *Templeton v. S.* Id. 398; *Boothe v. S.* 4 App. 202; *Harmon v. S.* 3 App. 51; *Terry v. S.* Id. 236; *Higginbotham v. S.* Id. 447; *Love v. S.* Id. 501; *West v. S.* 2 App. 209; *Johnson v. S.* Id. 456; *Thompson v. S.* Id. 289; *Gibbs v. S.* 1 App. 12; *Hauck v. S.* Id. 357; *Henderson v. S.* Id. 432; *Frazier v. S.* 18 App. 434; *Jackson v. S.* Id. 586; *De Olles v. S.* 20 App. 145; *Shaw v. S.* 27 Tex. 750; *Lewis v. S.* 15 App. 647; *Mackinson v. S.* 16 App. 133; *McAdams v. S.* 24 App. 86; *Grate v. S.* 23 App. 458.

The allegations of the motion should be such as would have sufficed for a continuance. They should disclose the source of the defendant's information as to the newly discovered evidence and his belief in the truth of such information, and show that there has been no lack of diligence on his part with respect to discovering and obtaining the evidence in time for the trial. It is not sufficient merely to show diligence, but it must be negatived that the evidence was known before the trial. If diligence to discover the evidence before the trial be not shown, good excuse for the want of such diligence must be shown. Confinement of the defendant in jail is not good excuse for the want of diligence in the absence of a showing that he had no one outside to assist him in using the necessary diligence. *Sims v. S.* 1 App. 627; *Johnson v. S.* 2 App. 456; *Thomason v. S.* Id. 550; *Franklin v. S.* Id. 8; *Harmon v. S.* 3 App. 51; *Blake v. S.* Id. 581; *Gross v. S.* 4 App. 249; *Tooney v. S.* 5 App. 163; *Shultz v. S.* Id. 390; *Hasselmeyer v. S.* 6 App. 21; *Yanez v. S.* Id. 429; *Polser v. S.* Id. 510; *Tuttle v. S.* Id. 556; *Golins v. S.* 41 Tex. 429; *Davidson v. S.* 33 Tex. 247; *Kemp v. S.* 38 Tex. 110; *Frazier v. S.* 18 App. 434; *Jackson v. S.* Id. 586.

The motion must be accompanied by the affidavits of the witnesses by whom it is alleged the newly discovered evidence can be produced, detailing the facts they will testify to, or if such affidavits cannot be obtained, good cause for failing to obtain them must be shown. *West v. S.* 2 App. 210; *Blake v. S.* 3 App. 581; *Love v. S.* Id. 501; *Evans v. S.* 6 App. 513; *Polser v. S.* Id. 510; *Dill v. S.* Id. 113; *Williams v. S.* 7 App. 163; *Stanley v. S.* 16 App. 392.

If an application shows upon its face that the evidence is not newly discovered, or if the facts alleged show that it is improbable that the defendant was ignorant of the existence of the evidence, if it in fact existed, a new trial should be denied. It should be made clearly to appear that the defendant was ignorant of the existence of the evidence at the time of the trial, and that such ignorance was not the result of a want of diligence on his part to discover it. *Robinson v. S.* 15 Tex. 311; *Dansby v. S.* 34 Tex. 362; *Brown v. S.* 16 Tex. 122; *Walker v. S.* 3 App. 70; *Williams v. S.* 4 App. 255; *Collins v. S.* 6 App. 72; *Thomason v. S.* 2 App. 550; *Duval v. S.* 8 App. 370; *Childs v. S.* 10 App. 183; *Koontz v. S.* 41 Tex. 570; *Poag v. S.* 43 Tex. 454; *Davidson v. S.* 33 Tex. 247; *Wheeler v. S.* 15 App. 607; *Mackinson v. S.* 16 App. 133; *McVey v. S.* 23 App. 659; *Smith v. S.* 22 App. 350.

The motion as to this ground must be sworn to by the defendant, or by his counsel, and when sworn to by his counsel must negative the defendant's knowledge of the existence of the evidence at the time of the trial, and show that the defendant could not have discovered it in time for the trial by the use of ordinary diligence. *Tuttle v. S.* 6 App. 556; *Campbell v. S.* 29 Tex. 490; *Williams v. S.* 7 App. 163.

Where the defendant prevented his counsel from interposing the defense of insanity, and on the trial some evidence was elicited tending to support that defense, and a motion for new trial exhibited material and newly discovered evidence of the same character, it was held that a new trial should have been granted, notwithstanding no diligence had been used to obtain the newly discovered evidence. *Schuessler v. S.* 19 App. 472.

Where a state's witness recanted what she had testified against the defendant, and it was shown that she was unreliable by the affidavit of her mother, it was held that this was newly discovered evidence for which a new trial should have been granted. *Mann v. S.* 44 Tex. 642. But where the defendant's guilt is sufficiently established by other testimony than that of a recanting witness, it seems a new trial should not, for such cause, be granted. *Young v. S.* 7 App. 461. See, also, in this connection, *Brown v. S.* 13 App. 59, where it was held that a new trial should have been granted on account of an explanation made by a state's witness of his testimony given on the trial.

If a co-defendant be tried and acquitted, or the prosecution against him be dismissed, after the defendant's conviction, a new trial will be granted the defendant to obtain the testimony of his co-defendant, if it be made to appear that such testimony is competent, material, and would probably change the result on another trial. But the state may show that such testimony is not credible, and would not be likely to change the result. *Helm v. S.* 20 App. 41; *Rucker v. S.* 7 App. 549; *Williams v. S.* 4 App. 5; *Huebner v. S.* 3 App. 458; *Jones v. S.* 23 App. 501; *Lyles v. S.* 41 Tex. 172; *Rich v. S.* 1 App. 206; *Howell v. S.* 10 App. 298; *Ellis v. S.* *Id.* 540.

When considered in the light of the testimony adduced on the trial, if the newly discovered evidence is not probably true, and would not be likely to change the result on another trial, a new trial should be refused. *Lewis v. S.* 15 App. 647; *Cole v. S.* 16 App. 461; *Caldwell v. S.* 12 App. 302; *Jones v. S.* 23 App. 501; *McVey v. S.* *Id.* 659. But when it is doubtful how it would affect the verdict, the doubt should be resolved in favor of the defendant. *Lindley v. S.* 11 App. 283.

When a motion based upon the ground of newly discovered evidence has been contested by the state in the trial court, and testimony heard thereon, the refusal of the motion will not be revised on appeal, unless it clearly appears that such ruling was erroneous. *White v. S.* 19 App. 343.

Newly discovered evidence may entitle a defendant to a new trial, although it may merely tend to show that he has been convicted of a higher grade of offense than the one he actually committed. *Moore v. S.* 18 App. 212.

It is not a ground for new trial that since the trial it has been discovered that the place of the offense was not within the county of conviction. *Henderson v. S.* 12 Tex. 525.

See the following cases in which it was held, on appeal, that new trials should have been granted upon the ground of newly discovered evidence: *Bell v. S.* 1 App. 598; *Strickland v. S.* 13 App. 364; *Hecken v. S.* 14 App. 606; *Bird v. S.* 16 App. 529; *Trimble v. S.* *Id.* 115; *Moore v. S.* 18 App. 212; *Montressor v. S.* 19 App. 281; *Helm v. S.* 20 App. 41; *McCleaveland v. S.* 24 App. 202; *Roy v. S.* *Id.* 369; *Hart v. S.* 21 App. 163; *Bullock v. S.* 12 App. 42.

§2545-7.—Where jury has received other testimony, etc.—It is well settled that misconduct of a jury will not be ground for a new trial, unless it is shown to be such as has affected the fairness and impartiality of the trial. *Austin v. S.* 42 Tex. 355; *Johnson v. S.* 27 Tex. 758; *Jack v. S.* 26 Tex. 1; *Anschicks v. S.* 6 App. 524; *Allen v. S.* 17 App. 637; *Jack v. S.* 20 App. 656; *McDonald v. S.* 15 App. 493. A mere statement made by one juror to another in reference to the character of the defendant is not, *per se*, ground for a new trial. *Austin v. S.* 42 Tex. 355. Nor is a statement made by one juror to the others that he had once been robbed by a porter, the defendant being a porter and on trial for theft, it appearing that such statement did not influence the verdict. *Jack v. S.* 20 App. 656. But if the verdict was probably influenced by the statement of a juror to his fellows as to the character for credibility of a witness for the defendant, a new trial should be granted. *Anschicks v. S.* 6 App. 524. Or if the juror stated to the jury a material fact within his knowledge, but which was not in evidence, it might be cause for a new trial. *Wyers v. S.* 13 App. 57.

Conversation had by a juror with another than a member of the jury, in order to vitiate the verdict, must be such as was calculated to impress upon the mind of the juror a view of the case different from that made by the evidence, to the probable injury of the defendant. *March v. S.* 44 Tex. 64; *Nance v. S.* 21 App. 457. The refusal of a juror to talk with an outside party is not "conversing." *Johnson v. S.* 27 Tex. 758; see, *ante*, §§2375, 2376.

The fact that a bailiff was present with the jury during their deliberations is not, *per se*, a ground for a new trial. But such violation of duty may be attended with circumstances that would entitle the defendant to a new trial. *Slaughter v. S.* 24 Tex. 410; *Dansby v. S.* 34 Tex. 392; *Martin v. S.* 9 App. 293; see, also, *ante*, §2378.

Prior to the adoption of the code the mere drinking of ardent spirits by a juror was sufficient to vitiate the verdict. *Jones v. S.* 13 Tex. 168. But now, to entitle the defendant to have the verdict set aside and a new trial granted him upon this ground, it must appear that such misconduct probably influenced the verdict. *Jack v. S.* 26 Tex. 1; *March v. S.* 44 Tex. 64; *Webb v. S.* 5 App. 596; *Tuttle v. S.* 6 App. 556; see, also, *ante*, §2374.

As to separation of the jury, see, *ante*, §§2371, 2372.

§2546-8.—Misconduct of the jury.—See the decisions and references in the preceding section. Mere hesitation of a juror on being polled, or answering conditionally, and with doubts, is not cause for a new trial, if he finally answered that it was his verdict. *Gose v. S.* 6 App. 121. When a jury is being polled the defendant cannot interrogate a juror as to the misconduct of the jury. *Bassham v. S.* 38 Tex. 622; *ante*, §§2400, 2401. That two of the jurors agreed to the verdict upon the agreement that the jury would sign a petition for the pardon of the defendant, is not such conduct as will authorize a new trial. *Montgomery v. S.* 13 App. 74.

§2547-9.—Verdict contrary to law and evidence.—Convictions cannot be sustained upon mere suspicions and possibilities. There must be evidence of the defendant's guilt such as the law demands, and if there is not, a new trial should be granted. *Willis v. S.* 15 App. 118; *Buntain v. S.* *Id.* 490; *Voight v. S.* 13 App. 21; *Wyers v. S.* *Id.* 57; *Harris v. S.* *Id.* 309; *Hogan v. S.* *Id.* 319; *Holden v. S.* *Id.* 601.

When the only evidence against the defendant is that of the private prosecutor, and his testimony is directly contradicted in material points by other witnesses, a new trial should be granted. *Owens v. S.* 35 Tex. 361. And where the principal witness against the defendant stultified himself, and there were other circumstances favorable to the defendant, it was

held that a new trial should have been granted. *Hasselmeier v. S.* 1 App. 690; *see, also, Spears v. S.* 4 App. 244; *Jones v. S.* 4 App. 436; *Jones v. S.* 7 App. 457.

Notwithstanding juries are the exclusive judges of the facts, and of the weight of the evidence, and the credibility of the witnesses, yet the court, on a motion for a new trial, must set aside the verdict if it is contrary to the evidence, or is not supported by it. If the court is not satisfied that the evidence is sufficient to warrant the verdict, it should grant a new trial. *Loza v. S.* 1 App. 488; *Tollett v. S.* 44 Tex. 95; *Gazley v. S.* 19 App. 267.

Where the evidence supporting the conviction was contradictory in material respects, and there was a decided and unmistakable preponderance of evidence in favor of the defendant's innocence, it was held that a new trial should have been granted. *Spears v. S.* 2 App. 244.

A new trial should be awarded in all cases when the evidence is insufficient to support the conviction. *Saltillo v. S.* 16 App. 249; *Zollicoffer v. S.* *Id.* 312; *Morrison v. S.* 17 App. 34; *Hardin v. S.* 13 App. 192; *Hernandez v. S.* 20 App. 151.

As to the sufficiency of evidence to support a conviction, *see, also, ante, §§2426-2428.*

**§2548—Other causes for new trial.**—The refusal of an application for a continuance or postponement of the trial, is a statutory ground for a new trial in some instances. *See, ante, §§2162-2169, 2186,* for the statute and decisions with reference to such ground.

Artifice, trickery and fraud on the part of a prosecuting officer, whereby a defendant has been induced to go to trial to his injury, are held to constitute ground for a new trial. *Eldridge v. S.* 12 App. 208; *March v. S.* 44 Tex. 64. And so may be such conduct on the part of a state's witness. *Adams v. S.* 10 App. 677.

A new trial can be awarded only upon some one or more of the grounds specified in the statute. Illegal organization of the trial jury is not statutory ground for new trial. *McMahon v. S.* 17 App. 321; *Buie v. S.* 1 App. 452; *Madden v. S.* *Id.* 204; *Henderson v. S.* *Id.* 432; *Childs v. S.* 10 App. 133; *Johnson v. S.* 27 Tex. 759; *Rosborough v. S.* 43 Tex. 570. A defendant is not entitled to a new trial upon the ground that under the influence of coercion and insanity he had pleaded guilty, especially when the issue of insanity had been tried and found against him. *Branch v. S.* 1 App. 99. It is not a ground for new trial that the jury was summoned by a state's witness, unless it be shown that the defendant was not aware of the fact, and could not, by reasonable diligence, have known it in time to exercise his right of challenge, and unless it be further shown that he was probably prejudiced thereby. *Allen v. S.* 4 App. 581; *see, also, Baker v. S.* *Id.* 223.

Where it was shown that immediately after the verdict was rendered the prosecuting witness secretly paid another state's witness a sum of money, and there was no explanation made of this transaction, it was held that a new trial should have been granted. *Bostick v. S.* 10 App. 705.

**§2549—ART. 778.—In misdemeanors, granted, when.**—New trials, in cases of misdemeanor, may be granted for any of the causes specified in the preceding article, except that contained in subdivision one of said article. [Added in revising.]

**§2550—ART. 779.—Must be applied for within two days, except.**—A new trial must be applied for within two days after the conviction, but for good cause shown the court, in cases of felony, may allow the application to be made at any time before the adjournment of the term at which the conviction was had. When the court adjourns before the expiration of two days from the conviction, the motion shall be made before the adjournment. [Added in revising.]

**§2551—Decisions under preceding article.**—If the motion was made after the expiration of two days, and no sufficient excuse is shown for its delay, it should not be entertained. But if entertained upon its merits by the trial court, it will be presumed, on appeal, that good cause was shown why it was not filed in time. *Valentine v. S.* 6 App. 439; *Hart v. S.* 21 App. 163; *Hernandez v. S.* 18 App. 134.

The preceding article confides to the discretion of the trial judge the determination of applications made after the expiration of two days, and the exercise of that discretion will not be revised on appeal, unless it has been abused to the defendant's prejudice. *White v. S.* 10 App. 167; *Bullock v. S.* 12 App. 42; *Smith v. S.* 15 App. 139; *Hernandez v. S.* 18 App. 134; *Leache v. S.* 22 App. 279.

**§2552—ART. 780.—Motions for new trial shall be in writing.**—All motions for new trials shall be in writing, and shall set forth distinctly the grounds upon which the new trial is asked. [Added in revising.]

For forms of such motions, *see Willson's Cr. Forms, 744.*

**§2553—ART. 781.—State may controvert truth of causes set forth, etc.**—The state may take issue with the defendant upon the truth of the causes set forth in the motion for a new trial, and in such case the judge

shall hear evidence by affidavit or otherwise, and determine the issue. [Added in revising.]

See Willson's Cr. Forms, 745.

**§2554—Decisions under preceding article.**—The preceding article seems to have been the practice before its adoption. *Dignowitty v. S. 17 Tex. 521; Reynolds v. S. 7 App. 516.*

When issue has been joined on the truth of the causes assigned in the motion, the trial judge is required to hear evidence by "affidavit or otherwise," and this authorizes him to hear oral evidence. *Childs v. S. 10 App. 183; Reynolds v. S. 7 App. 516; Rucker v. S. Id. 549; Wilson v. S. 17 App. 525.*

On motion for a new trial the state may controvert the application for a continuance as to diligence, when the refusal of such application is made a ground for new trial, although the application was not controverted upon this ground in the first instance. *Walker v. S. 13 App. 618.*

It is only when the state has taken issue with the defendant on the truth of the matters set forth in the motion for a new trial, that the trial judge is required or authorized to hear evidence by affidavit or otherwise. And when not controverted by the state, no supporting affidavit is required, except where the ground of the motion is newly discovered evidence, in which case the supporting affidavit of the proposed witness is required, if it can be obtained. *Stanley v. S. 16 App. 392.* And also that of the defendant. *Terry v. S. 3 App. 236.*

Where in a motion for a new trial, verified by the affidavit of the defendant, it was alleged that the defendant had entered the plea of guilty without being admonished by the court of the consequences of said plea, and under improper influences, it was held that the new trial should have been granted, notwithstanding the judgment entry recited that the defendant "in open court duly entered his plea of guilty," the state not having controverted the truth of said ground. *Harris v. S. 17 App. 559.*

In a trial for the theft of hogs, where the value of the hogs was a material issue, and the evidence upon that issue was uncertain, the defendant moved for a new trial upon the ground of newly discovered evidence, which tended strongly to show that the hogs were of less value than twenty dollars, the conviction being for a felony, which motion was accompanied by the affidavits of witnesses, and showed diligence, etc., and was sworn to by the defendant, and not controverted by the state, it was held that the new trial should have been granted. *Moore v. S. 18 App. 212.*

**§2555—ART. 782.—Judge shall not discuss the evidence, etc.**—In granting or refusing a new trial the judge shall not sum up, discuss, or comment upon the evidence in the case, but shall simply grant or refuse the motion, without prejudice to either the state or the defendant. [Added in revising.]

A disregard of the preceding article will not afford a ground for reversal, unless prejudice to the defendant thereby be shown. But the provision, in the interest of justice, should be strictly observed. *Rains v. S. 7 App. 588.*

**§2556—ART. 783.—Effect of a new trial.**—The effect of a new trial is to place the cause in the same position in which it was before any trial had taken place. The former conviction shall be regarded as no presumption of guilt, nor shall it be alluded to in the argument. [O. C. 674.]

**§2557—Decisions under preceding article.**—The effect of a new trial is plainly laid down in the preceding article, and entering a plea in the former trial does not preclude a motion to set aside, exceptions, or any dilatory plea, on the subsequent trial. *Cox v. S. 7 App. 495.*

The court should not allude to the former conviction in its charge, though it is not improper, in an offense of degrees, to inform the jury in the charge that the defendant had been acquitted of a higher grade of the offense, and was on trial only for the lower grade. *West v. S. 7 App. 150; Pharr v. S. 10 App. 485; ante, §2339.*

A former conviction must not be alluded to in the argument. *Hatch v. S. 8 App. 414; Moore v. S. 21 App. 666; ante, §2321.*

Where, on appeal, a new trial is ordered, the case stands in the same condition as if the new trial had been granted in the trial court. *Cox v. S. 7 App. 495.*

**§2558—Suggestions to trial judges as to new trials.**—Trial courts have both the jury and the witnesses before them, and whenever it appears that justice has not been done; that the verdict is unsupported by the evidence, or is against the weight of the evidence, such courts should, without hesitation, grant a new trial. Much delay and expense would be saved to the parties and the state, and the ends of justice would the more likely be attained, if the trial courts would adopt a more liberal practice in granting new trials than at present prevails. Cases frequently go before the appellate court in which the weight of the evidence is clearly against the verdict, or in which the evidence is so weak and uncertain as to leave every sound and correct mind in doubt of the guilt of the defendant. In all such cases the trial courts should grant new trials. The discretion confided by the law to trial courts to grant new trials is almost the only protection to the citizen against illegal or oppressive verdicts of prejudiced, careless or ignorant juries. The appellate court cannot always set aside a wrong verdict, but the trial court can. Where the evidence is conflicting, but there is sufficient, if credible, to

support the conviction, the appellate court must affirm the conviction, but this is not necessarily the rule with the trial court in passing upon a motion for a new trial. The trial judge may pass upon the credibility of the witness in determining the motion, but this the appellate court cannot do. While the enforcement of the criminal law is absolutely demanded for the protection of private and public rights, the protection of the citizen from the effects of law illegally administered is equally demanded by every sentiment of justice and principle of law. The refusal of a trial judge to grant a new trial in a proper case cannot be fully corrected by appeal, and these considerations should have proper weight with trial judges in the exercise of their discretion upon motions for new trial. *S. v. Webb*, 41 Tex. 67; *Turner v. S.* 38 Tex. 166; *Mullins v. S.* 37 Tex. 337; *Owens v. S.* 35 Tex. 361.

When a trial court entertains a reasonable doubt in regard to the right of the defendant to a new trial, where the ground of the motion is the overruling of an application for a continuance, the doubt should be resolved in favor of the defendant. *Miller v. S.* 18 App. 232. But where the ground of the motion is newly discovered evidence, and the trial court has a doubt upon the point of diligence to discover the evidence, or as to its character, materiality, etc., the new trial should be refused. *Bronson v. S.* 2 App. 46.

**§2559—Practice as to motions for new trial.**—A motion for a new trial may be entertained after a motion in arrest of judgment has been made and overruled. *Mathews v. S.* 33 Tex. 102. The case of *S. v. Mann*, 13 Tex. 62, holding to the contrary, having ceased to be authority since the adoption of the Code.

A motion for new trial must be disposed of at the term at which it was made. *Wilcox v. S.* 31 Tex. 586.

Where there is no entry in the trial court disposing of a motion for a new trial, it will be presumed on appeal that the motion was abandoned and not acted upon. *Laird v. S.* 15 Tex. 317.

The ruling of the trial court refusing a new trial will not be revised on appeal, unless it shall appear that such court has not exercised its discretion according to the established rules of law. *Shultz v. S.* 5 App. 390.

Where matters of fact are involved in the ruling upon a motion for new trial, they must be properly presented in the record by bill of exceptions or statement of facts, or they cannot be considered on appeal. *Jordan v. S.* 10 App. 479; *Short v. S.* 36 Tex. 644; *Sharp v. S.* 6 App. 650.

If, after conviction, the presiding judge exchanges with another, the latter may hear and determine the motion for a new trial. *S. v. Womack*, 17 Tex. 237.

When a motion for new trial is granted, the cause may be again tried at the same term, but the defendant should not be unduly hurried to his prejudice. *Lott v. S.* 41 Tex. 121.

A motion for new trial is not essential to the right of a defendant to have his case considered on appeal both as to questions of law and of fact. *Cotton v. S.* 29 Tex. 186; *Malay v. S.* 33 Tex. 599; *Babb v. S.* 8 App. 173.

**§2560—ART. 784.—When new trial is refused, statement of facts, etc.**—If a new trial be refused, a statement of facts may be drawn up and certified and placed in the record as in civil suits. Where the defendant has failed to move for a new trial he is, nevertheless, entitled, if he appeals, to have a statement of the facts certified and sent up with the record. [O. C. 673.]

See Willson's Cr. Forms, 814, 815. For the rules governing in civil cases, see Sayles' Civ. Stat., Ch. 18, Title 29.

**§2561—Statement of facts—Defendant's right to a.**—A convicted defendant, whether he moves for a new trial or not, has a right, if he appeals, to have a statement of the facts certified and incorporated in the record. It is the duty of counsel engaged in the trial of the cause for the state and for the defendant to aid the court in according to the defendant this legal right, and when necessary, the court may, and should, require counsel to prepare and submit their respective statements of the facts within the proper time, and should punish them for contempt of court upon their refusal to do so. *Babb v. S.* 8 App. 173; *Longley v. S.* 3 App. 611.

A judgment of conviction will be reversed on appeal, if it be made to appear that without fault on the part of the defendant, or of his counsel, he has been deprived of a statement of facts. *Henderson v. S.* 20 App. 304; *Ruston v. S.* 15 App. 336; *Ruston v. S.* *Id.* 377; *Trammell v. S.* 1 App. 121; *Babb v. S.* 8 App. 173; *Sara v. S.* 22 App. 639; *Johnson v. S.* 16 App. 372.

Where a statement of facts has not been filed in time, it may, nevertheless, be considered on appeal, if it be shown to the satisfaction of the court of appeals that the defendant used due diligence to have the same authenticated and filed in time, and that the failure to file the same in time was not due to the fault or laches of the defendant or his attorney, but was the result of causes beyond their control. Sayles' Civ. Stat., Art. 1379a.

**§2562—Same—Preparation and authentication of.**—When a defendant appeals, if he desires a statement of facts to go up in the record, it is his duty, or that of his counsel, to make out a written statement of the facts given in evidence on the trial, and submit the same to the prosecuting counsel for inspection and agreement. If the statement be agreed upon, the attorneys for the state, and the defendant or his attorney, shall sign the same, and it shall

then be submitted to the judge, who shall, if he find it correct, approve and sign it, and it shall be filed with the clerk of the court. If the statement is not agreed upon, or if the judge will not approve it as agreed upon, the parties may submit their respective statements to the judge, who shall, from his own knowledge, with the aid of such statements, make out and sign and file with said clerk a correct statement of the facts proven on the trial. The trial judge is not required in the first instance, of his own motion, to make out the statement, but it devolves upon the defendant to take the initiative steps and use diligence to obtain the statement. Sayles' Civ. Stat., Arts. 1377, 1378; Longley v. S. 3 App. 611; Turner v. S. 22 App. 42; Carter v. S. 5 App. 458.

Without the signature of the trial judge there can be no statement of facts. A document signed only by the counsel for the state and the defendant, though purporting to be a statement of facts, will not be considered on appeal, and is of no avail for any purpose. Bennett v. S. 16 App. 236; White v. S. 9 App. 41; Myers v. S. 9 App. 157; Lawrence v. S. 7 App. 192; Hemanus v. S. *Id.* 372; Owens v. S. 4 App. 153; Long v. S. *Id.* 81; Wakefield v. S. 3 App. 39; Gindrat v. S. *Id.* 573; Trevinio v. S. 2 App. 90; Brooks v. S. *Id.* 1; Johnson v. S. 29 Tex. 492; Opperman v. S. 35 Tex. 364.

The judge before whom the case was tried is the only person who can authenticate the statement of facts. Graham v. S. 10 App. 684; Myers v. S. 9 App. 157.

"Signing" is synonymous with "subscribing," and the judge must sign the statement of facts at the conclusion thereof. A certificate signed by the judge preceding the statement of the facts, that "the following is a correct statement of the facts proven on the trial," is not a sufficient authentication to entitle the document to be considered as a statement of facts. Wade v. S. 22 App. 256. A certificate signed by the judge at the conclusion of the statement of facts that such statement is "a correct statement of the facts proven," is sufficient. It need not certify that it is a correct statement of *all* the facts proven. And the fact that the statement of facts was approved and certified by the judge after it had been filed by the clerk was a mere irregularity which did not affect its validity. Kerrigan v. S. 21 App. 487.

When the statement is signed by the judge, but not by the parties, he need not certify that the parties failed to agree to such statement, though it is the common practice to so certify. Bowden v. S. 2 App. 56; Williams v. S. 4 App. 178. And where the statement of facts is signed by the judge, though signed by but one of the parties, it is sufficiently authenticated. Trammell v. S. 1 App. 121.

The statement of facts in another case cannot even by agreement be adopted as or made a part of the statement in the case at bar. Trevinio v. S. 2 App. 90.

The certificate of the judge is conclusive as to the matters contained in the statement, and such statement cannot be impugned by affidavits *dehors* the record, or in any other extraneous manner. Rainey v. S. 20 App. 473; Crist v. S. 21 App. 361.

§2563—Same—Judge may correct statement.—It is the duty of the judge to see that the statement of facts is in all respects correct, and he may, at any time before it is certified and filed, add to or take from the same, so as to correct it according to the truth of the matter. But after the statement has been agreed to, certified and filed, a correction should never be made except in a most palpable case of error, or upon the most satisfactory proof of same. Stephens v. S. 10 App. 120; Diggs v. S. 7 App. 359; Courtney v. S. 3 App. 257; King v. Russell, 40 Tex. 124.

§2564—Same—Time of filing, etc.—A statement of facts must be authenticated and filed during the term of court at which the trial was had, unless during such term an order was made allowing the same to be certified and filed within ten days after the adjournment of the term. Durley v. S. 11 App. 172; Brown v. S. 16 App. 245; Brown v. S. *Id.* 197. Where an order has been made authorizing the filing of a statement of facts within ten days after the adjournment of the court, such order must appear in the transcript sent up on appeal, or a statement of facts filed after adjournment of the court will not be considered. And when such order has been made and appears in the transcript, a statement of facts filed after the expiration of the time allowed by such order will not be considered. Holt v. S. 20 App. 271; Henderson v. S. *Id.* 304; Gerrold v. S. 13 App. 345.

If the statement be not filed in time, and it be shown satisfactorily that the defendant used due diligence to have it authenticated and filed in time, and that the failure to file it in time was not due to the fault or laches of him or his attorney, but was the result of causes beyond their control, it will be considered on appeal as if it had been filed in due time. Sayles' Civ. Stat., Art. 1379a.

The court, of its own motion, may make and have entered the order allowing time after adjournment for the term to prepare, certify and file a statement of facts, such time not to exceed ten days after the adjournment. Henderson v. S. 20 App. 304; Babb v. S. 8 App. 173.

The ten days' time which may be allowed after the adjournment of the court for filing a statement of facts, are ten days exclusive of the day of adjournment. Moore v. S. 7 App. 42.

§2565—Same—In habeas corpus case.—In a *habeas corpus* case, on appeal, a statement of facts will not be considered unless it be authenticated and filed as in other cases. *Ex parte* Cole, 14 App. 579; *Ex parte* Barber, 16 App. 369.

§2566—Same—Contents of.—The statement of facts must contain a full and complete statement of all facts in evidence on the trial of the cause, including copies of all papers, documents and exhibits adduced in evidence, also the proof of venue and identification of the defendant. Rule 116 for District Courts, 2 App. 679. Commissions, notices and interrogatories in depositions adduced in evidence, must not be incorporated in the statement of facts. Rule 75 for District Courts, 2 App. 679; Ballinger v. S. 11 App. 323. Nor should



certificates authenticating depositions or testimony taken before examining courts or coroners' inquests be incorporated in a statement of facts. *Kirby v. S.* 23 App. 13. Exceptions to evidence *admitted* over the defendant's objection may be embraced in a statement of facts in connection with the evidence objected to, but exceptions to evidence rejected or excluded cannot be embraced in a statement of facts. Rule 56 for District Courts. 2 App. 666; *McWhorter v. S.* 13 App. 523; *Green v. S.* 12 App. 51; *Keeton v. S.* 10 App. 686; *Cooper v. S.* 7 App. 194; *Castanedo v. S.* *Id.* 582.

§2567—**Same—Absence of on appeal.**—In the absence of a statement of facts in the record, on appeal, the court will only consider the sufficiency of the indictment, the applicability of the charge of the court thereunder, with respect to any state of facts which could legally have been proved, and such bills of exception, if there be any, as can be determined without a full knowledge of all the evidence in the case. It will be presumed that all the material averments in the indictment were proved by competent and sufficient evidence, and that the charge of the court conformed to the evidence, and gave all the law demanded by the evidence. *Branch v. S.* 1 App. 99; *Mahl v. S.* *Id.* 127; *Talley v. S.* *Id.* 688; *Brooks v. S.* 2 App. 1; *Bertroug v. S.* *Id.* 160; *Davis v. S.* *Id.* 162; *Grant v. S.* *Id.* 163; *Tirrell v. S.* *Id.* 399; *Mitchell v. S.* *Id.* 404; *Edwards v. S.* *Id.* 525; *Robson v. S.* 3 App. 497; *Longley v. S.* *Id.* 612; *Nettles v. S.* 4 App. 337; *Gross v. S.* *Id.* 249; *Owens v. S.* *Id.* 153; *Booker v. S.* *Id.* 564; *Carlson v. S.* 5 App. 194; *Carter v. S.* *Id.* 458; *Davis v. S.* 6 App. 196; *Hemanus v. S.* 7 App. 372; *Lawrence v. S.* *Id.* 192; *Kaskie v. S.* *Id.* 202; *Castanedo v. S.* *Id.* 582; *Keef v. S.* 44 Tex. 582; *McDonald v. S.* 33 Tex. 339; *Kindred v. S.* 32 Tex. 609; *Barrett v. S.* 25 Tex. 605; *Chandler v. S.* 2 Tex. 305; *Ashworth v. S.* 9 Tex. 490; *Early v. S.* 9 App. 476; *Gerrold v. S.* 13 App. 345; *Thompson v. S.* 16 App. 74; *Brown v. S.* *Id.* 197; *Henderson v. S.* 20 App. 304; *Wade v. S.* 22 App. 256; *Wade v. S.* 23 App. 308; *Banks v. S.* 24 App. 559.

The materiality of newly discovered evidence cannot be determined without a statement of facts. *Augustine v. S.* 20 Tex. 450; *Brooks v. S.* 2 App. 1; *Bertroug v. S.* *Id.* 160.

Nor can the materiality and probable truth of absent testimony, for which application for a continuance was made, be determined without a statement of facts. *Trevinlo v. S.* 2 App. 90; *Close v. S.* 30 Tex. 631; *ante*, §2187.

## CH. 2.—ARREST OF JUDGMENT.

ART.	SEC.	ART.	SEC.
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§2568—**ART. 785.—Definition of "motion in arrest of judgment."**—A "motion in arrest of judgment" is a suggestion to the court on the part of the defendant that judgment has not been legally rendered against him. The motion may be made orally or in writing, and the record must show the grounds of the motion. [O. C. 675.]

See Willson's Cr. Forms, 746.

§2569—**ART. 786.—Must be made in two days, etc.**—The motion must be made within two days after the conviction; or, if the court adjourn before the expiration of two days from such conviction, then it may be made at any time before the final adjournment of the court for the term. [O. C. 676.]

§2570—**ART. 787.—Shall be granted for what cause.**—A motion in arrest of judgment shall be granted upon any ground which would be good upon exception to an indictment or information for any substantial defect therein. [O. C. 678.]

**§2571—ART. 788.—Shall not be, etc.—**No judgment shall be arrested for want of form. [O. C. 679.]

**§2572—Grounds of motion in arrest of judgment—Decisions as to.**—A motion in arrest brings in review the sufficiency as to matter of substance of the indictment to support a judgment, but does not raise the question as to the want of evidence or its sufficiency. It is a suggestion merely that judgment cannot be legally rendered on the verdict. *Washington v. S. 41 Tex. 583; Berliner v. S. 6 App. 181; West v. S. Id. 485.*

A motion in arrest of judgment reaches substantial defects only. It is not available to reach defects of form in the indictment, or clerical mistakes. It can be based upon no other ground than such as would be good upon exception to an indictment or information for a substantial defect therein. And such ground must be apparent of record. *S. v. Vahl. 20 Tex. 779; Peter v. S. 11 Tex. 762; Reynolds v. S. Id. 120; Terrill v. S. 41 Tex. 464; Gibbs v. S. Id. 491; Long v. S. 43 Tex. 467; Mathews v. S. 44 Tex. 376; Golden v. S. 32 Tex. 737; Spence v. S. 1 App. 541; Coats v. S. 2 App. 16; Houillion v. S. 3 App. 537; Jinks v. S. 5 App. 541; West v. S. 6 App. 485; Wilson v. S. Id. 154; Friedlander v. S. 7 App. 204; Hulto v. S. Id. 44; Johnson v. S. Id. 210; Douglass v. S. 8 App. 520; Beardall v. S. 9 App. 263; Rountree v. S. 10 App. 110; Johnson v. S. 14 App. 306; Walker v. S. Id. 609; Ogden v. S. 15 App. 454; Branch v. S. Id. 96; Cowell v. S. 16 App. 57; Lott v. S. 18 App. 627; Niland v. S. 19 App. 166; Williams v. S. Id. 276; Weaver v. S. Id. 547; Williams v. S. 20 App. 357; Rangel v. S. 22 App. 642; McDaniel v. S. 24 App. 552; Jefferson v. S. Id. 535.*

As to distinction between substantial defects and defects of form in indictments and informations, see, *ante*, §§2127-2129.

Where the indictment or information is substantially defective, a motion in arrest of judgment should be sustained. See the following instances: *Strickland v. S. 19 App. 518; Longenotte v. S. 22 App. 61; Hickman v. S. Id. 441; Anderson v. S. 20 App. 595; Trimble v. S. 16 App. 115.*

Where there is a material variance between the allegations of an information and the complaint upon which it is based, the judgment should be arrested on motion. *Lanham v. S. 9 App. 232; Smith v. S. Id. 475.*

Where the verdict is insufficient to support a judgment, a motion in arrest of judgment is proper and should be sustained. *Howell v. S. 10 App. 298.*

**§2573—ART. 789.—Effect of arresting a judgment.**—The effect of arresting a judgment is to place the defendant in the same position he was before the indictment or information was presented; and if the court be satisfied from the evidence that he may be convicted upon a proper indictment or information, he shall be remanded into custody, or bailed, as the case may require. [O. C. 680.]

See *Calvin v. S. 25 Tex. 789.*

**§2574—ART. 790.—Court may discharge defendant, when.**—Where the court is not satisfied from the proof that upon a proper indictment or information the defendant may be convicted, he shall be discharged. [O. C. 681.]

## CH. 3.—JUDGMENT AND SENTENCE.

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## I. IN CASES OF FELONY.

§2575—ART. 791.—Definition of "judgment."—A final judgment is the declaration of the court entered of record, showing—

1. The title and number of the case.
2. That the case was called for trial and that the parties appeared.
3. The plea of the defendant.
4. The selection, impannelling and swearing of the jury.
5. The submission of the evidence.
6. That the jury was charged by the court.
7. The return of the verdict.
8. The verdict.
9. In the case of a conviction that it is considered by the court that the defendant is adjudged to be guilty of the offense as found by the jury; or, in case of acquittal, that the defendant be discharged.
10. That the defendant be punished as it has been determined by the jury in cases where they have the right to determine the amount or the duration and the place of punishment in accordance with the nature and terms of the punishment prescribed in the verdict. [Added in revising.]

See Willson's Cr. Forms, 747-782.

§2576—Judgment final—What constitutes, etc.—An appeal can be taken by a defendant only from a final judgment of conviction, and unless such final judgment has been entered and appears of record, the appeal will be dismissed. *Post*, Art. 837 and notes.

A final judgment of conviction may be said to consist of two parts: 1. The facts judicially ascertained, together with the manner of ascertaining them, entered of record. 2. The recorded declaration of the court pronouncing the legal consequences of the facts thus judicially ascertained. Both of these parts are equally essential. In the first part there should be set forth the title and number of the case; the calling of the case for trial; the appearance of the parties, the plea of the defendant, and, if "not guilty," the selection, impannelling and swearing of the jury, the submission of the evidence, the charge of the court, the return of the verdict and the finding of the jury. In the second part it should be declared upon the record, in connection with the verdict, that it is considered by the court that the defendant is adjudged to be guilty of the offense as found by the jury, and that the defendant be punished as it has been determined by the jury, setting forth the amount, or the duration and place of punishment, in accordance with the nature and terms of the punishment prescribed in the verdict. *Mayfield v. S.* 40 Tex. 289. The preceding article was framed by the revisers from the decision above quoted. See, also, *Butler v. S.* 1 App. 638; *Young v. S.* *Id.* 64; *Trimble v. S.* 2 App. 303; *Choate v. S.* *Id.* 302; *Anschicks v. S.* 43 Tex. 587; *Calvin v. S.* 23 Tex. 578; *Shultz v. S.* 13 Tex. 403; *Labbait v. S.* 4 App. 169; *Keeller v. S.* *Id.* 527; *Pennington v. S.* 11 App. 281; *Gaither v. S.* 21 App. 527; *Ellis v. S.* 10 App. 324.

A judgment overruling a motion for a new trial, or in arrest of judgment, or disposing of exceptions to an indictment, is not a final judgment. *S. v. Paschal*, 22 Tex. 584; *Roberts v. S. 3 App. 47*; *S. v. Thornton*, 32 Tex. 104.

An entry, "it is, therefore, ordered, adjudged and decreed by the court that the sheriff take the defendant in custody until the fine and costs are paid," is not a final judgment. *Butler v. S. 2 App. 529*.

**§2577—Same—Requisites of entry of.**—The judgment must follow the indictment, even as to the defendant's name. *Schutze v. S. 30 Tex. 508*. A misrecital therein as to the date of the verdict is immaterial. *Alexander v. S. 4 App. 261*; see, also, *Stewart v. S. 4 App. 419*; *Mills v. S. Id. 263*, for instances of other immaterial errors. It need not recite the names of the jurors who tried the case, nor the exact oath which was administered to the jury. The usual form is, "thereupon a jury, to-wit: A. B., and eleven others, was duly selected, impanelled and sworn," and this is sufficient. If the entry undertakes to set forth the names of the jurors, it must set forth the legal number, no more and no less, or the judgment will be set aside. If it undertakes to recite the oath administered to the jury, and recites a different oath than that prescribed by the law, the judgment will be bad. *Ante*, §§2290-2293.

The proper practice is to make the judgment entry, immediately preceding the plea, set forth the fact that the indictment was read to the jury; but this is not one of the statutory requisites of the judgment, and its omission will not invalidate the judgment. *White v. S. 13 App. 57*.

In capital felonies the record must show an arraignment and plea, but these are usually shown by a separate entry upon the minutes, and not in the judgment entry, though it would be sufficient to set them forth in the judgment entry. See the usual forms in such cases, *Willson's Cr. Forms*, 686, 687, 688; *Smith v. S. 21 App. 277*; *ante*, §2108.

If the record on appeal fails to show that a plea was entered, the judgment will be reversed, and the proper place to show such fact is in the judgment entry, in all felonies less than capital. *Ante*, §2110.

In a capital conviction the judgment need not declare the manner in which the death penalty shall be executed. *Steagald v. S. 22 App. 464*. Nor should it adjudge costs against the defendant. *Lanham v. S. 7 App. 126*; *post*, Art. 1061.

In entering a verdict upon the minutes the clerk should copy it *verbatim et literatim*, and should so transcribe it into the transcript on appeal. It is an unwarranted tampering with the record for him to do otherwise. *Crockett v. S. 14 App. 226*.

In felony cases the judgment must be entered in the presence of the defendant and preceding the pronouncing of the sentence, and the judgment entry should show a compliance with this requirement. *Mapes v. S. 13 App. 85*; *Gordon v. S. Id. 196*; *ante*, §§2227, 2418.

In case of a plea of "guilty" in a felony case, the record, on appeal, must show that the plea was received in accordance with article 518, *ante*, and the usual practice is to recite the facts essential to the validity of such plea in the judgment entry. *Ante*, §§2111, 2112; *Willson's Cr. Forms*, 760.

**§2578—Same—When to be entered.**—The judgment should be rendered and entered upon the minutes as soon as practicable after the verdict has been received, except that it cannot be entered on Sunday, though a verdict may be received on Sunday. *McKinney v. S. 8 App. 626*; *ante*, §§2399, 2418; *post*, Art. 797.

**§2579—Duty of district and county attorneys as to judgments.**—It is made the duty of district and county attorneys to see that the judgments in criminal cases are properly entered by the clerks, and, when practicable, they should be present when the minutes are read. Rule 120 for District Courts, 2 App. 680.

**§2580—ART. 792.—Definition of "sentence."**—A "sentence" is the order of the court, made in the presence of the defendant, and entered of record, pronouncing the judgment and ordering the same to be carried into execution in the manner prescribed by law. [Added in revising.]

*Pennington v. S. 11 App. 281*; *Johnson v. S. 14 App. 306*; *Mayfield v. S. 40 Tex. 289*; *Nathan v. S. 28 Tex. 326*. For forms of sentence, see *Willson's Cr. Forms*, 749, 770.

**§2581—ART. 793.—Judgment and sentence, when.**—If a new trial is not granted, nor the judgment arrested, in cases of felony, the sentence shall be pronounced in presence of the defendant at any time after the expiration of the time allowed for making the motion for a new trial or the motion in arrest of judgment. [O. C. 682.]

Sentence follows the judgment, and cannot properly be pronounced until after the judgment has been entered, and it must be pronounced in the presence of the defendant. *Mapes v. S. 13 App. 85*.

**§2582—ART. 794.—In cases of appeal sentence shall be pronounced.**—When an appeal is taken in cases of felony, where the verdict prescribes the death penalty, sentence shall not be pronounced, but shall be suspended until the decision of the court of appeals has been received. In all other cases of felony sentence shall be pronounced before the appeal is taken;

and, upon the affirmance of the judgment by the court of appeals, the clerk thereof shall at once transmit the mandate of the court to the clerk of the court from which the appeal was taken, there to be duly recorded in the minute book of said court, and a certified copy of this record, under the seal of the court, shall be sufficient authority to authorize and require the sheriff to execute the sentence without further delay. [O. C. 683; amended Act 1879, p. 70.]

**§2583—Decisions under preceding article.**—Before the enactment of the preceding article, when the defendant appealed, sentence was in all cases suspended until after the affirmance of the judgment of conviction in the appellate court. *Smith v. S.* 41 Tex. 352; *Bozier v. S.* 5 App. 221; *Brown v. S. Id.* 546; *Pate v. S.* 21 App. 190. Under the preceding article the sentence must in all except capital felonies, where the death penalty is assessed, be pronounced before an appeal is taken, and unless the record on appeal shows affirmatively that the sentence was pronounced, the appeal will be dismissed for the want of jurisdiction in the court of appeals to sustain it, as the sentence, in all felonies except capital ones, in which the death penalty is assessed, is essential to give that court jurisdiction of the appeal. *Hart v. S.* 14 App. 323; *Taylor v. S. Id.* 340; *Walters v. S.* 18 App. 8; *Pate v. S.* 21 App. 190.

**§2584 — ART. 795. — Where two days do not intervene before adjournment.**—In cases where a conviction takes place so late in the term of the court as not to allow the two days' time for making a motion for a new trial, or in arrest of judgment, the sentence may be pronounced at any time before the court finally adjourns; *provided*, that in every case at least six hours shall be allowed for making either of these motions. [O. C. 684.]

**§2585—ART. 796.—Same subject.**—If, at the time a verdict is returned into court, there be less than six hours remaining before the court by law must adjourn, it shall be lawful and shall be the duty of the district judge to sit during the whole of Saturday night and Sunday for the purpose of enabling the defendant to move for a new trial or in arrest of judgment and prepare his cause for the court of appeals. This article shall not require the district judge to sit longer than six hours after verdict rendered, if a motion for a new trial or in arrest of judgment shall not have been filed. [O. C. 685.]

But a verdict cannot be received on Sunday the day after the term of the court has legally expired. Such a verdict is a nullity, and will not support a judgment and sentence. *Harper v. S.* 43 Tex. 431.

**§2586 — ART. 797. — Where there has been a failure to enter judgment, etc.**—Where, from any cause whatever, there is a failure to enter judgment and pronounce sentence upon conviction during the term, the judgment may be entered and sentence pronounced at any succeeding term of the court, unless a new trial has been granted, or the judgment arrested, or an appeal has been taken. [O. C. 686.]

**§2587—Decisions under preceding article.**—If an appeal has been taken, but no final judgment has been entered, and the appeal is dismissed, it is the proper practice to cause the final judgment to be entered at a subsequent term in the court *a quo, nunc pro tunc*, and from such judgment the defendant may again prosecute an appeal. Where the state desires to have a judgment *nunc pro tunc* entered, a motion for that purpose must be filed, and notice of such motion must be served upon the defendant at least three days before the motion is acted upon, and the defendant must be personally present when such motion is disposed of, unless the defendant, in person, should waive such notice and personal presence. *Madison v. S.* 17 App. 479; *Mapes v. S.* 13 App. 85; *Vestal v. S.* 3 App. 648.

A defendant may also cause final judgment to be entered *nunc pro tunc* and appeal therefrom, even when a former appeal was dismissed because of his escape. *Smith v. S.* 1 App. 408-516.

A special judge, who tried the case equally with the regular judge, may enter the judgment *nunc pro tunc* even at a subsequent term. *Pennington v. S.* 11 App. 281.

For forms relating to a judgment *nunc pro tunc*, see Willson's Cr. Forms 789-792.

**§2588—ART. 798.—Before sentence, defendant shall be asked, etc.**—Before pronouncing sentence in a case of felony the defendant shall be asked whether he has anything to say why the sentence should not be pronounced against him. [O. C. 687.]

It is not essential that the record on appeal should affirmatively show that, before pronouncing sentence, the defendant was asked if he had anything to say why the sentence

should not be pronounced against him. If the record be silent as to this, it will be presumed that the trial court performed its duty and asked the defendant the statutory question. *Bohaunon v. S.* 14 App. 471. To authorize the reversal of a conviction for non-compliance with the preceding article, it must be made to appear that the trial judge refused to ask the defendant the statutory question, and thereby deprived him of his legal right to be heard in bar thereof. *Johnson v. S.* 14 App. 306.

**§2589—ART. 799.—Reasons which will prevent the sentence.**—The only reasons which can be shown on account of which sentence cannot be pronounced are:

1. That the defendant has received a pardon from the proper authority, on the presentation of which, legally authenticated, he shall be discharged.

2. That the defendant is insane; and if sufficient proof be shown to satisfy the court that the allegation is well founded, no sentence shall be pronounced. And where there is sufficient time left a jury may be impanelled to try the issue. Where sufficient time does not remain the court shall order the defendant to be confined safely until the next term of the court, and shall then cause a jury to be impanelled to try such issue.

3. Where there has not been a motion for a new trial, or a motion in arrest of judgment made, the defendant may answer that he has good grounds for either or both of these motions, and either or both motions may be immediately entered and disposed of although more than two days may have elapsed since the rendition of the verdict.

4. When a person who has been convicted of felony escapes after conviction and before sentence, and an individual supposed to be the same has been arrested, he may, before sentence is pronounced, deny that he is the person convicted, and an issue be accordingly tried before a jury as to his identity. [O. C. 688.]

See Willson's Cr. Forms, 773-776. In addition to the above statutory matters, which will bar the sentence, an objection that there is no indictment in the case charging him with an offense, is a valid bar to sentence. *Pate v. S.* 21 App. 191; *Beardall v. S.* 4 App. 631; *Beardall v. S.* 9 App. 262.

**§2590—ART. 800.—Two or more convictions of same defendant at same term.**—When the same defendant has been convicted in two or more cases, and the punishment assessed in each case is confinement in the penitentiary, or the county jail for a term of imprisonment, judgment and sentence shall be rendered and pronounced in each case in the same manner as if there had been but one conviction, except that the judgment in the second and subsequent convictions shall be, that the punishment shall begin when the judgment and sentence in the preceding conviction have ceased to operate, and the sentence and execution thereof shall be accordingly. [Added in revising, and amended by Act of February 12, 1883, p. 8.]

See Willson's Cr. Forms, 772. Prior to the enactment of the preceding article cumulative punishment could not be assessed and adjudged against a defendant. *Baker v. S.* 11 App. 262; *Hannahan v. S.* 7 App. 664; *Prince v. S.* 44 Tex. 480. The preceding article does not conflict with section 13 of the Bill of Rights, and is not unconstitutional. *Lillard v. S.* 17 App. 114; see, also, *Shumaker v. S.* 10 App. 117.

**§2591—ART. 801.—Sentence of death.**—Where the sentence of death is pronounced against a convict, a time shall be set for the execution of the same, not earlier than thirty days from the date of the sentence. [O. C. 689.]

See Willson's Cr. Forms, 749.

**§2592—Practice on appeal—Reforming judgment and sentence.**—Under authority of Article 869, *post*, the court of appeals, in a proper case, will reform either the judgment or sentence or both, so as to make them conform to each other and to the verdict. *Rivers v. S.* 10 App. 177; *Hill v. S.* *Id.* 673; *McDonald v. S.* 14 App. 504; *Short v. S.* 23 App. 312; *Robinson v. S.* 24 App. 4.

**§2593—ART. 802.—Warrant for execution of death penalty.**—The clerk of the district court shall issue a warrant for the execution of the sentence of death, which shall recite the fact of conviction, setting forth specifically the offense and the judgment of the court, the time fixed for its execution and the manner in which it is to be executed. [O. C. 690.]

See Willson's Cr. Forms, 793.

**§2594—ART. 803.—Another warrant may issue, when.**—When from any cause the warrant provided for in the preceding article cannot be executed at the time specified therein for the execution of the same, the sheriff shall forthwith return such warrant to the clerk who issued the same, indorsing thereon the reason why the same has not been executed, and shall at the same time report, in writing, to the judge of the district court having jurisdiction over the case, either in term time or in vacation, the fact that such warrant has not been executed, and the reason why the same was not executed, and such judge shall thereupon fix another time for the execution of such sentence, and shall issue his written order to the proper clerk, directing such clerk to issue another warrant for the execution of such sentence, specifying in such order the time fixed for the execution thereof, and the clerk shall file such order among the papers in the case, and immediately issue a warrant accordingly, and the execution of such warrant shall proceed as in the first instance. [Added in revising.]

See Willson's Cr. Forms, 794-797.

## II. JUDGMENT IN CASES OF MISDEMEANOR.

**§2595—ART. 804.—May be rendered in absence of defendant.**—The judgment in cases of misdemeanor may be rendered in the absence of the defendant. [O. C. 691.]

See Mapes v. S. 13 App. 85; Cain v. S. 15 App. 41.

**§2596—ART. 805.—Judgment when the punishment is fine only.**—When the punishment assessed against a defendant is a pecuniary fine only, the judgment shall be that the State of Texas recover of the defendant the amount of such fine and all the costs of the prosecution, and that the defendant, if present, be committed to jail until such fine and costs are paid, or if the defendant be not present, that a *capias* forthwith issue commanding the sheriff to arrest the defendant and commit him to jail until such fine and costs are paid. Also, that execution may issue against the property of such defendant for the amount of such fine and costs. [Added in revising.]

See Willson's Cr. Forms, 784; *post*, Art. 809.

**§2597—ART. 806.—Judgment when the punishment is other than fine.**—When the punishment assessed is any other than a pecuniary fine, the judgment shall specify it and shall order its enforcement by the proper process. It shall also adjudge the costs against the defendant and order the collection thereof, as in other cases. [Added in revising.]

See Willson's Cr. Forms, 786, 787.

**§2598—Judgment in misdemeanors—Decisions as to.**—The requisite of a final judgment of conviction prescribed in the ninth clause of Art. 791, *ante*, that the defendant "is adjudged to be guilty of the offense as found by the jury," has reference to felony cases, and does not apply in misdemeanor cases. Hill v. S. 11 App. 379.

Where the defendant did not appear on the trial in person, but by attorney, and the judgment was that "execution or commitment issue" for the fine and costs, it was held that it was not a valid final judgment; that the judgment should have been that *capias* issue for the arrest of the defendant, commanding his detention in jail until the payment of the fine and costs, and that execution issue against his property for the fine and costs, and for want of a final judgment the appeal was dismissed. Heatherly v. S. 14 App. 21.

The judgment must conform to the statute, or the appeal therefrom will be dismissed. If the defendant be present when it is rendered, it must command that he be committed to jail until the payment of the fine and costs. Braden v. S. 14 App. 22.

The requisites of a judgment in a misdemeanor case are the same as those prescribed for felony cases by Art. 791, *ante*, except the tenth and eleventh clauses of that article, which are not essential in misdemeanor cases. Want v. S. 14 App. 24.

A judgment for a pecuniary fine only, in a misdemeanor case, where the punishment might have been imprisonment also, is not void because the defendant was not present in person at the trial, but was allowed to appear by attorney. Cain v. S. 15 App. 41.

In a misdemeanor case, as in a civil case, the court has full control over its judgment until the adjournment of the trial term, and may, upon its own motion, set aside or reform the same, or grant a new trial according to the justice of the case, upon the merits as well as matters of form. Metcalf v. S. 21 App. 174. But this power does not extend to cases where punishment has already been inflicted in whole or in part under the judgment rendered. See an instance in which it was held that the power could not legally be exercised: Grisham v. S. 19 App. 504.

## CH. 4.—EXECUTION OF JUDGMENTS.

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## I. COLLECTION OF PECUNIARY FINES.

§2599—ART. 807.—How judgment for fine satisfied and defendant discharged.—When the judgment against a defendant is for a pecuniary fine and the costs of prosecution, he shall be discharged from the same—

1. When the amount of such fine and costs have been fully paid.
  2. When the same have been remitted by the proper authority.
  3. When the defendant has remained in custody the length of time required by law to satisfy the amount of such judgment, as hereinafter provided.
- [Added in revising.]

Governor may remit fines. *Post*. Art. 981. Discharge by imprisonment. *Post*, Art. 816.

§2600—ART. 808.—Recognizances, etc., payable in lawful money.—All recognizances, bail-bonds and undertakings of any kind, whereby a party becomes bound to pay money to the state, and all fines and forfeitures of a pecuniary character, shall be collected in the lawful money of the United States, only. [O. C. 702.]

A promissory note cannot be accepted in payment of a fine. *Clark v. S.* 3 App. 338. Confederate money was not receivable in payment of a fine. *Boone v. S.* 31 Tex. 557. A fine is not a *debt*, and a judgment therefor does not bear interest. *Dixon v. S.* 2 Tex. 481; *S. v. Steen*, 14 Tex. 396.

§2601—ART. 809.—When judgment is fine and defendant is present.—When judgment has been rendered against a defendant for a pecuniary fine, if he is present, he shall be imprisoned in jail until discharged as provided in article 805, and a certified copy of such judgment shall be sufficient to



authorize such imprisonment without further warrant or process. [O. C. 694, 695.]

This means actual imprisonment within the four walls of the jail, and if the defendant be permitted to go at large, the officer, to whose custody he was committed, is liable to prosecution for an escape, and the defendant may be re-taken and re-committed. Luckey v. S. 14 Tex. 400.

**§2602—ART. 810.—When defendant is not present, *capias* shall issue.**—When a pecuniary fine has been adjudged against a defendant, and he is not present, a *capias* shall forthwith issue for his arrest, and the sheriff shall execute the same by placing the defendant in jail until he is legally discharged. [Added in revising.]

**§2603—ART. 811.—*Capias* shall recite what.**—Where a *capias* issues, as provided in the preceding article, it shall state the rendition and amount of the judgment and the amount unpaid thereon, and command the sheriff to take the body of the defendant and place him in jail until the amount due upon such judgment, and the further costs of collecting the same are paid, or until the defendant is otherwise legally discharged. This writ is sufficient authority to justify the commitment of the defendant to jail. [O. C. 700.]

See Willson's Cr. Forms, 589.

**§2604—ART. 812.—*Capias* may issue to any county in the state, etc.**—The *capias* provided for in this chapter may be issued to any county in the state, and shall be executed and returned as in other cases, except that no bail shall be taken in such cases. [Added in revising.]

**§2605—ART. 813.—Execution may issue for fine and costs.**—In all cases of pecuniary fine an execution may issue for the fine and costs, notwithstanding a *capias* may have issued for the defendant, and a *capias* may issue for the defendant, notwithstanding an execution has been issued against his property. The execution shall be collected and returned as in civil actions. [O. C. 695.]

See, ante, §2596.

**§2606—ART. 814.—When execution is satisfied, etc.**—When the execution has been collected the defendant shall be at once discharged, and whenever the fine and costs have been legally discharged in any way, the execution shall forthwith be returned satisfied, and the defendant discharged. [Added in revising.]

See *Ex parte Price*, 11 App. 538.

**§2607—ART. 815.—Further enforcement of the judgment.**—When a defendant has been committed to jail in default of the fine and costs adjudged against him, the further enforcement of such judgment shall be in accordance with the law of this state relating to county convicts. [Added in revising.]

For the law relating to county convicts, see Sayles' Civ. Stat., Title 71, Chapters 9 and 10.

**§2608—ART. 816.—Judgment for fine, etc., may be discharged by imprisonment, when.**—When a defendant is convicted of a misdemeanor, and his punishment is assessed at a pecuniary fine, if he make oath in writing that he is unable to pay the fine and costs adjudged against him, he may be hired out to manual labor, or be put to work in the manual labor work-house, or on the manual labor farm, or public improvements of the county; or, in case there be no such work-house, farm or improvements, and in case the county authorities fail to hire out such convict in accordance with the law regulating county convicts, he shall be imprisoned in the county jail for a sufficient length of time to discharge the full amount of the fine and costs adjudged against him, rating such punishment at three dollars for each day thereof. [O. C. 694, 848; amended in revising.]

It is only when there is no work-house or farm, and no public improvements upon which the convict can be put to work, and when the county authorities have failed to hire him out, that the convict can claim the benefit of the preceding article. *Bogle v. S.* 20 App. 127. For form of oath to be made by county convict, see Willson's Cr. Forms, 806; see, also, *Ex parte Stubblefield*, 1 App. 757. A county convict, who is also confined on an accusation of felony, cannot be discharged from custody under the preceding article, nor can he be hired out. *Ex parte Godfrey*, 11 App. 34. When a county convict has been put to labor on a county farm, he is entitled to receive a credit against the fine and costs adjudged against him of one dollar per day for each day he labors, and when such fine and costs have been satisfied at said rate, he is entitled to be discharged. *Ex parte Dampier*, 24 App. 561.

## II. ENFORCING JUDGMENT IN MISDEMEANORS WHERE THE PUNISHMENT IS IMPRISONMENT.

§2609—ART. 817.—**Copy of judgment sufficient authority for imprisonment.**—When, by the judgment of the court, a defendant is to be imprisoned in jail, the sheriff shall execute the same by imprisoning the defendant for the length of time required by the judgment, and for this purpose a certified copy of such judgment shall be sufficient authority for the sheriff. [O. C. 704.]

§2610—ART. 818.—**Capias, when punishment is imprisonment.**—When a *capias* is directed to be issued for the apprehension and commitment of a person convicted of a misdemeanor, the penalty of which, or any part thereof, is imprisonment in jail, the writ shall recite the judgment and command the sheriff to place the defendant in jail, to remain the length of time therein fixed, and this writ shall be sufficient to authorize the sheriff to enforce such judgment. [O. C. 705.]

See Willson's Cr. Forms, 803.

§2611—ART. 819.—**Defendant shall be discharged, when.**—When a defendant has remained in jail the length of time required by the judgment he shall be discharged, and the sheriff shall then return the copy of the judgment, or the *capias* under which the defendant was imprisoned, to the proper court, stating how the same has been executed. [Added in revising.]

## III. ENFORCING JUDGMENT IN FELONIES LESS THAN CAPITAL.

§2612—ART. 820.—**Convict shall be conveyed to penitentiary, etc.**—Immediately after final sentence shall have been pronounced the convict shall be conveyed to the penitentiary by the sheriff of the county where the conviction took place, at the expense of the state; *provided*, that when there are more convicts than one to be transported at the same term of the court, they shall all be conveyed at one time, unless for good cause shown, the court shall order otherwise. [O. P. C. 90.]

§2613—ART. 821.—**Sheriff shall employ guard, etc.**—The sheriff shall employ sufficient guard, under the direction of the district judge, whose certificate shall be sufficient evidence to authorize the proper officer of the penitentiary to allow, and the comptroller to audit, the same; and the sum allowed, together with the compensation provided by law for the sheriff for such service, shall be paid by the state out of the appropriation for that purpose. [O. P. C. 91.]

§2614—ART. 822.—**Clerk shall furnish sheriff with copy of judgment, etc.**—The clerk of the court, in which any conviction has been had, shall furnish the sheriff with a certified copy of the judgment and sentence of the court, which shall be sufficient to authorize the sheriff to convey such convict and deliver him to the proper officer of the penitentiary. [O. P. C. 93; O. C. C. P. 706.]

See Willson's Cr. Forms, 800.

§2615—ART. 823.—**Shall also furnish certificate of age, etc., of convict.**—The clerk shall also at the same time furnish the sheriff with a certificate, under his official seal, showing the name, age and previous occupation, if known, of the convict. [O. P. C. 93.]

See Willson's Cr. Forms, 801.

§2616—ART. 824.—**Sheriff shall deliver convict, etc., and take receipt.**—The sheriff shall deliver the convict, together with the certified copy of the judgment and sentence, and the certificate of the clerk as provided for in the two preceding articles, to the superintendent of the penitentiary, who shall receipt the sheriff, in writing, for such convict, and the sheriff shall deliver such receipt to the clerk of the court before which the conviction was had, and the same shall be filed and safely kept among the papers in the case. [O. P. C. 93.]

See Willson's Cr. Forms, 802.

§2617—**Conveyance of convicts, etc.—**Preceding articles upon the subject superseded, etc.—The preceding articles, relating to the conveyance of convicts to the penitentiary, have been superseded by subsequent legislation, and convicts are now conveyed under contract. See the law now in force in Sayles' Civ. Stat., article 3515, sections 1-10. The statutes relating to convicts and penitentiaries were formerly embraced in the Penal Code, but, in revising, they were placed in the Civil Statutes. The reference O. P. C., used at the end of some of the preceding articles, means "Old Penal Code," that is, the Penal Code as it was before revision.

§2618—ART. 825.—**Further execution of judgment, etc.**—The further execution of the judgment and sentence shall be in accordance with the provisions of the law governing the penitentiaries of the state. The term shall commence from the time of sentence, or, in case of appeal, from the time of the affirmance of the sentence by the court of appeals. [Added in adopting the revision.]

The preceding article has been construed to mean that when a party is condemned to the penitentiary for any term, he must be imprisoned in the penitentiary, but, after he has reached and been actually imprisoned in said penitentiary, the term of his imprisonment is to be estimated to begin from the date of the sentence, in a case where no appeal has been taken. *Sartain v. S.* 10 App. 651. For the law governing the penitentiaries, see Sayles' Civ. Stat., Title 71.

#### IV. ENFORCING JUDGMENT IN CAPITAL CASES.

§2619—ART. 826.—**Death warrant to be executed, when.**—The warrant for the execution of the sentence of death may be carried into effect at any time after eleven o'clock, and before sunset, on the day stated in such warrant. [O. C. 708.]

§2620—ART. 827.—**Executed, how.**—The sentence of death shall be executed by hanging the convict by the neck until he is dead. [O. C. 709.]

§2621—ART. 828.—**Shall take place within the walls of the jail, when.**—Where there is a jail in the county, and it is so constructed that a gallows can be erected therein, the execution of the sentence of death shall take place within the walls of the jail. [O. C. 710.]

See Sayles' Civ. Stat., Art. 3004.

§2622—ART. 829.—**Who shall be present.**—Where the sentence of death is executed within the walls of the county jail, the sheriff shall notify any number of physicians or surgeons, not exceeding six, any number of justices of the peace of his county, not exceeding four, and any number of freeholders in the county, not exceeding six, any or all of whom may be present, together with such deputies of the sheriff as he may require to be in attendance when the penalty of death is executed. [O. C. 711.]

§2623—ART. 830.—**Reasonable request of convict.**—The sheriff shall comply with any reasonable request of the convict; and where the execution takes place within the walls of the county jail, shall permit such persons to be present (not exceeding five) as he may name. [O. C. 712.]

§2624—ART. 831.—**No torture shall be inflicted.**—No torture, or ill-treatment, or unnecessary pain shall be inflicted upon a prisoner to be executed under the sentence of the law. [O. C. 713.]

§2625—ART. 832.—**Sheriff may order military company to aid.**—The sheriff may, when he supposes there will be a necessity, order such number of citizens of his county, or any military or militia company, to aid in preventing the rescue of a prisoner, or to prevent persons not authorized to be present from intruding themselves within the place of execution. [O. C. 715.]

§2626—ART. 833.—**When execution cannot take place in jail.**—When the execution cannot take place in the county jail the sheriff shall select some other place in the county for the purpose, and such place shall be as private as he can conveniently find, and publicity in the execution shall be avoided as far as practicable. [Added in revising.]

§2627—ART. 834.—**Body of convict shall be buried, how.**—The body of a convict shall be decently buried at the expense of the county, unless demanded by his relatives or friends, in which case it shall be given to them, and shall never, unless by consent of the convict himself, before execution, be delivered to any person for dissection. [O. C. 716.]

§2628—ART. 835.—**Sheriff shall return the warrant, stating, etc.**—The sheriff shall immediately return the warrant, stating in his return, indorsed thereon, or attached thereto—

1. The fact, time, place and mode of execution.

2. If the execution do not take place within the jail, the return shall state that there is no jail, or that it is not so constructed that a gallows could have been erected therein.

3. If the execution take place within the jail, the return shall state the names of the physicians, justices of the peace, and freeholders present, and the names of all other persons present, if any, and the authority by which they were present.

4. If the execution do not take place within the jail, the return shall state the names of five freeholders of the county who were present.

5. That the body of the convict was decently buried, or delivered to his relatives or friends, naming them, or to some other person, by consent of the convict, naming such person, and naming two or more witnesses to the fact that the convict consented that his body might be delivered to such person. [O. C. 717.]

See Willson's Or. Forms, 798, 799.

## TITLE 10.—APPEAL AND WRIT OF ERROR.

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§2629—ART. 836.—State cannot appeal.—The state shall have no right of appeal in criminal actions. [Const. art. 5, sec. 26, added in revising.]

This denial of the right of appeal to the state embraces proceedings on forfeited recognizances and bail-bonds. *Ante*, §2028; *post*, §2702.

**§2630—ART. 837.—Defendant may appeal.**—A defendant in any criminal action, upon conviction, has the right of appeal under the rules hereinafter prescribed. [Added in revising.]

**§2631—Appeal—Right of defendant to.**—The right of a convicted defendant to appeal exists independent of statute, being given by the constitution; and even if rules are not provided by legislation for its exercise, or impossible conditions are imposed upon its exercise, yet the right will be sustained. *R. v. Smith, Dallam 407; Laturner v. S. 9 Tex. 451.* The right of appeal must be exercised in conformity with the law in force at the time of the conviction. *Brill v. S. 13 Tex. 79.* But see *Smyrl v. S. 40 Tex. 121*, where an appeal was sustained, although it had not been perfected in conformity with the law in force at the time it was taken.

The right of appeal exists only when a judgment final of conviction has been rendered and entered against the defendant. *Ante*, §§1523, 2576. Nor can an appeal be prosecuted from a judgment of conviction which has been satisfied. *Payne v. S. 12 App. 160.*

An appeal does not lie in cases of contempt. *Floyd v. S. 7 Tex. 215; Jordan v. S. 14 Tex. 436; Crow v. S. 24 Tex. 12; Casey v. S. 25 Tex. 380; S. v. Thurmond, 37 Tex. 340.* A fine against a defaulting juror is a proceeding for contempt, and an appeal does not lie in such case. *Ex parte Kilgore, 3 App. 247; Carter v. S. 4 App. 165.*

An attempted appeal before final judgment has been entered is nugatory and will not prevent an appeal after a final judgment has been entered in the trial court. *Smith v. S. 1 App. 516; Downs v. S. 7 App. 483.*

Where an appeal has been dismissed for the want of a recognizance, or because the recognizance is insufficient, or because notice of appeal was not given and entered upon the minutes, a second appeal is not allowable. *Ex parte Jones, 7 App. 365; Peterson & Fitch v. S. 32 Tex. 477.*

A motion for a new trial is not essential to the defendant's right to appeal. *Cotton v. S. 29 Tex. 186.*

**§2632—ART. 838.—From district and county to court of appeals.**—Appeals from judgments rendered by the district or county court, in criminal actions, shall be heard by the court of appeals. [Added in revising.]

See, *ante*, §1522.

**§2633—ART. 839.—From justices of the peace to county court.**—Appeals from judgments rendered by justices of the peace and other inferior courts, in criminal actions, shall be heard by the county court, except in counties where there is a criminal district court, in which counties such appeals shall be heard by such criminal district courts. [Added in revising.]

See, *ante*, §§1547, 1548; *post*, Arts. 939, 940.

When the fine assessed in the county court in a case appealed from an inferior court does not exceed one hundred dollars, the judgment of the county court is conclusive, and no appeal from it can be entertained by the court of appeals. *Ante*, §1527; *Richardson v. S. 3 App. 69; Gerald v. S. 4 App. 308; Cherry v. S. Id. 4.*

**§2634—ART. 840.—Defendant need not be present in court of appeals.**—The defendant to a criminal action need not be personally present upon the hearing of his cause in the court of appeals; but he may appear in person in cases where, by law, he is not committed to jail upon appeal. [O. C. 740.]

See *Tooke v. S. 23 App. 10.*

**§2635—ART. 841.—In case of felony.**—Where the defendant appeals in any case of felony, he shall be committed to jail until the decision of the court of appeals can be made and received. [O. C. 721.]

See *Tooke v. S. 23 App. 10.* Where the indictment charges a felony, the punishment of which may be by fine, and the jury assess a fine as the punishment, the case is, nevertheless, a felony, and the defendant, if he appeals, must remain in jail pending his appeal. He cannot prosecute an appeal in such case upon recognizance. *Campbell v. S. 22 App. 262, overruling Sisk v. S. 9 App. 90.* He is not entitled to bail after conviction. *Ex parte Ezell, 40 Tex. 451.*

**§2636—ART. 842.—If no jail in the county, etc.**—If the jail of the county is unsafe, or there be no jail, the judge of the district court may, either in term time or in vacation, order the prisoner to be committed to the jail of the nearest county in his district which is safe. [O. C. 721; Act Aug. 21, 1876, p. 217.]

**§2637—ART. 843.—Appeal may be prosecuted immediately.**—An appeal in a felony case may be prosecuted immediately to the term of the court of appeals pending at the time the appeal is taken, or to the first term of such court after such appeal, without regard to the law governing appeals in other cases; and it shall be the duty of the clerk, upon the application of either the state or the defendant, to make out and forward, without delay, to the court of appeals, wherever it may be in session, or, if not in session, to the clerk of said court where it will next be in session, a transcript of the case. [Act Aug. 21, 1876, p. 217.]

If the application be in writing it need not be incorporated in the transcript. A certified copy thereof accompanying the transcript will be sufficient. If it be oral in term time, the better practice is for the transcript to contain it. *Ayres v. S.* 12 App. 450; *Reynolds v. S.* 8 App. 209; see, also, *Blum v. Wettermark*, 58 Tex. 125. Under the original act the defendant only was accorded the right to prosecute the appeal immediately. *Meyer v. S.* 3 App. 219; *Powell v. S.* *Id.* 630.

**§2638—ART. 844.—When the transcript may be filed.**—The transcript may be filed in the court of appeals, and the case tried and determined in said court, while the district court in which the conviction was had is yet in session; and upon an affirmance of the judgment of conviction by the court of appeals, sentence may be pronounced by the district court at the same term at which the conviction was had, or any term thereafter. [Act Aug. 21, 1876, p. 217.]

In all except capital felonies, where the punishment assessed is death, the sentence must be pronounced before an appeal is taken. *Ante*, Art. 794; see, also, *Knight v. S.* 7 App. 206.

**§2639—ART. 845.—Where defendant escapes pending appeal.**—In case the defendant, pending an appeal in a felony case, shall make his escape from custody, the jurisdiction of the court of appeals shall no longer attach in the case; and, upon the fact of such escape being made to appear, the court shall, on motion of the attorney-general, or attorney representing the state, dismiss the appeal; but the order dismissing the appeal shall be set aside, if it shall be made to appear that the accused had voluntarily returned to the custody of the officer from whom he escaped, within ten days. [Act Aug. 21, 1876, p. 217; Rule 77 for Court of Appeals.]

**§2640—Decisions under preceding article.**—Before the enactment of the preceding article, the practice in such cases was not uniform, and the escape of the defendant did not forfeit his appeal, but only his right to prosecute it while at large. *Ex parte Copland*, 26 Tex. 386; *Moore v. S.* 44 Tex. 595. Under the preceding article, if the defendant, after conviction and pending his appeal, escapes, the court of appeals is thereby ousted of jurisdiction of such appeal, and jurisdiction thereof can be re-invested only by the voluntary return of the defendant into the custody of the officer from whom he escaped, within ten days. If the defendant be recaptured before the lapse of ten days, his escape, nevertheless, divests the court of appeals of jurisdiction of the appeal. A recapture within ten days, while preventing a voluntary return of the defendant into custody, will not restore jurisdiction of the appeal. *Lunsford v. S.* 10 App. 118; *Ex parte Wood*, 19 App. 46; *Loyd v. S.* *Id.* 137. The word "escape," as used in the preceding article, means that the prisoner has "actually and completely withdrawn himself from custody, and has got free and gone at large." *Loyd v. S.* 19 App. 137. The preceding article is not in violation of sections 10 and 19 of article 1 of the constitution. Said sections have no application to proceedings had after conviction. *Loyd v. S.* 19 App. 137; see, also, *Brown v. S.* 5 App. 126; *Young v. S.* 3 App. 384; *Gresham v. S.* 1 App. 458, as to constitutionality of such legislation. When a defendant escapes after conviction, but before sentence has been pronounced, and is recaptured and sentenced, he may then appeal, and his escape before sentence will not affect his right of appeal. *Pate v. S.* 21 App. 191; *Walters v. S.* 18 App. 8.

**§2641—ART. 846.—Sheriff shall report escape, etc.**—When any such escape of a prisoner occurs the sheriff who had him in custody shall immediately report the fact, under oath, to the district or county attorney of the county in which the conviction was had, who shall forthwith forward such report to the attorney-general at the court to which the transcript was sent; and such report shall be sufficient evidence of the fact of such escape to authorize the dismissal of the appeal. [Added in revising.]

See Willson's Cr. Forms, 950; see *Loyd v. S.* 19 App. 137; *Ex parte Wood*, *Id.* 46.

**§2642—ART. 847.—Appeal may be taken, when.**—An appeal may be taken by the defendant at any time during the term of the court at which the conviction is had. [O. C. 725.]

It may also be taken from a final judgment of conviction entered *nunc pro tunc* at a subsequent term. *Scott v. S.* 26 Tex. 116; *O'Connell v. S.* 18 Tex. 343; *Smith v. S.* 1 App. 408-516; *Madison v. S.* 17 App. 479; *Mapes v. S.* 13 App. 85; *Gordon v. S.* *Id.* 196; see, also, *post*, §2646.

**§2643—ART. 848.—Appeal is taken, how.**—An appeal is taken by giving notice thereof in open court, and having the same entered of record. [O. C. 726.]

See Willson's Cr. Forms, 807, 808.

**§2644—Notice of appeal—Decisions as to.**—The notice of appeal is essential to attach jurisdiction of the appeal. It must be given in open court, and the record on appeal must show affirmatively that such notice was given and was entered of record. There is no prescribed form for such notice, but a mere entry upon the judge's docket that notice of appeal was given is not sufficient; nor does the existence in the record of a recognizance supply the notice. Such notice must be entered upon the minutes of the court, and unless it appears affirmatively from the record that this was done, the appeal will be dismissed. The notice may be given and entered of record at any time during the term after conviction. *Lawrence v. S.* 14 Tex. 432; *Hughes v. S.* 33 Tex. 683; *Solari v. S.* 3 App. 482; *Long v. S.* *Id.* 321; *Bozier v. S.* 5 App. 220; *Johnson v. S.* 8 App. 671; *Wilson v. S.* 12 App. 481; *Fairchild v. S.* 23 Tex. 178.

**§2645—ART. 849.—Effect of appeal.**—The effect of an appeal is to suspend and arrest all further proceedings in the case in the court in which the conviction was had until the judgment of the appellate court is received by the court from which the appeal was taken; *provided*, that in cases where, after notice of appeal has been given, the record or any portion thereof is lost or destroyed, it may be substituted in the lower court, if said court be then in session, and when so substituted the transcript may be prepared and sent up as in other cases. In case the court from which the appeal is taken be not then in session, the court of appeals shall postpone the consideration of such appeal until the next term of said court from which said appeal was taken, and the said record shall be substituted at said term, as in other cases. [O. C. 727.]

Amended by act March 30, 1885, p. 72. Again amended as above by act of April 1, 1887, p. 94. See, *ante*, §§2005, 2006, 2352.

Prior to the amendment of article 849 the record could not be amended or substituted after appeal, as the appeal divested the trial court of all further jurisdiction over the case. *Turner v. S.* 16 App. 318; *Knight v. S.* 7 App. 206; *Hill v. S.* 4 App. 559; *Gerard v. S.* 10 App. 690.

**§2646—ART. 850.—Appeal in felony case after sentence.**—Where the defendant in a felony case fails to appeal until after sentence has been pronounced, the appeal shall, nevertheless, be allowed, if demanded, and has the effect of superseding the execution of the sentence and all other proceedings as fully as if taken at the proper time. [O. C. 728.]

See, *ante*, Art. 793.

**§2647—ART. 851.—When defendant appeals in misdemeanor, must give recognizance.**—When the defendant appeals in any case of misdemeanor from the judgment of the district or county court, he shall, if he be in custody, be committed to jail, unless he enter into recognizance to appear as hereinafter required; and if he be not in custody, his notice of appeal shall have no effect whatever until he enter into recognizance. [O. C. 722.]

If the defendant is unable to give recognizance, he may, nevertheless, prosecute his appeal, but he must be confined in jail pending his appeal, and the record on appeal must affirmatively show either a recognizance or that the defendant is confined in jail, or the appeal will be dismissed. *White v. S.* 11 Tex. 769; *Alexander v. S.* 12 Tex. 540; *Lawrence v. S.* 14 Tex. 432; *Hicklin v. S.* 31 Tex. 492; *S. v. Watson*, 33 Tex. 337; *Crow v. S.* 41 Tex. 468; *Harris v. S.* 2 App. 134; *Young v. S.* 8 App. 81; *Evans v. S.* *Id.* 671; Willson's Cr. Forms, 808. A defendant convicted of a felony, although the punishment assessed be fine only, cannot appeal on a recognizance. *Ante*, §2635.



**§2648—ART. 852.—Form of recognizance on appeal.**—In appeals in cases of misdemeanor, the following form of recognizance shall be considered sufficient:

“STATE OF TEXAS,

vs.

} No.....

A..... B..... } This day came into open court, A..... B....., defendant in the above entitled cause, who, together with C..... D..... and E..... F....., his sureties, acknowledge themselves severally indebted to the State of Texas in the penal sum of.....dollars; *conditioned*, that the said A..... B....., who stands charged in this court with the offense of....., and who has been convicted of said offense in this court, shall appear before this court from day to day, and from term to term of the same, and not depart without leave of this court, in order to abide the judgment of the court of appeals of the State of Texas in this case.”

The amount of such recognizance shall be fixed by the court in which the judgment was rendered, and the sufficiency of the security thereon shall be tested, and the same proceedings had, in case of forfeiture, as in other cases of recognizance. [Act April 26, 1871, p. 61.]

See Willson's Cr. Forms, 591.

**§2649—ART. 853.—Appeal not entertained without recognizance.**—The court of appeals shall not entertain jurisdiction of any case in which a recognizance is required by law unless such recognizance shall comply substantially with the form presented in the preceding article. [Act April 21, 1871, p. 61.]

**§2650—Recognizance on appeal—Decisions as to.**—A *bond* will not answer the purpose of a recognizance. *Jones v. S. 1 App. 485; Herron v. S. 27 Tex. 337; Bacon v. S. 10 Tex. 98; Arnold v. S. 3 App. 437; Cook v. S. 8 App. 671.* A recognizance must be entered into by the defendant in person; his attorney cannot enter into it for him. *Chaney v. S. 23 Tex. 23; Ferrill v. S. 29 Tex. 489.* Unless the defendant is confined in jail, and the record shows that fact affirmatively, a recognizance is essential to the jurisdiction of the court of appeals, and unless a sufficient recognizance appears in the record, the appeal will be dismissed. *Holman v. S. 10 Tex. 558; S. v. Paschall, 22 Tex. 584; Harris v. S. 1 App. 614; Bine v. S. 1 App. 58; Taylor v. S. Id. 663.* But notwithstanding the record fails to show a recognizance, it may be shown by proof *dehors* the record, that in fact a sufficient recognizance was entered into, and in such case the appeal will be entertained. *Craddock v. S. 15 App. 641.*

The preceding article, 852, prescribes a form for a recognizance on appeal in a misdemeanor case, and a failure to conform to it is an inexcusable dereliction of official duty. *Mathena v. S. 15 App. 460.* To be valid, the recognizance must comply substantially with the form so presented. But a substantial compliance with the form is all that is required. *Freeman v. S. 36 Tex. 254; Taylor v. S. 1 App. 663; Bule v. S. Id. 58.*

The recognizance must state the offense with which the defendant is charged and of which he has been convicted. If the offense be one *eo nomine*, as murder, robbery, rape, theft, swindling, etc., it will be sufficient to designate it by name. But, if it be not an offense *eo nomine*, then the essential elements of the offense must be stated. *Turner v. S. 41 Tex. 549; Killingsworth v. S. 7 App. 28; see, ante, §1794.* The rules governing recognizances entered into for the appearance of the defendant for trial, are also applicable to a recognizance on appeal. *Ante, §1808; Buie v. S. 1 App. 58; S. v. Stout, 28 Tex. 327; Horton v. S. 30 Tex. 191; Payne v. S. Id. 397; Bennett v. S. Id. 446; Hicklin v. S. 31 Tex. 492.* For those rules see, *ante*, Ch. 4, Title 5, Sub. 2, of this Code.

The recognizance must require the defendant “to abide the judgment of the court of appeals.” But it is sufficient if it requires him “to abide the judgment of the appellate court.” *Wilson v. S. 7 App. 38; Allen v. S. 1 App. 514.* A recognizance conditioned to appear “until his said appeal has been decided by the court of appeals, then to be null and void,” is fatally defective. *Taylor v. S. 1 App. 663.*

The recognizance must not only show that the defendant stands charged with an offense against the law, but it must show that he has been convicted of an offense. *Jones v. S. 8 App. 366; Wells v. S. Id. 671.* It must bind the defendant to “appear” before the *trial* court not the court of appeals. An omission of the word “appear” is fatal. *Manes v. S. 20 Tex. 38; Carroll v. S. 6 App. 463.* The recognizance must be perfected during the term, and cannot be amended, or entered *nunc pro tunc*, at a subsequent term. *Grant v. S. 8 App. 432; Clark v. S. 3 App. 33; Harris v. S. 2 App. 134; Peterson v. S. 32 Tex. 477.*

For other decisions applicable to a recognizance on appeal, see, *ante*, §§1793-1798.

§2651—ART. 854.—**Appeals from justices' and other inferior courts.**—In appeals from the judgments of justices of the peace and other inferior courts to the county court, the defendant shall, if he be in custody, be committed to jail, unless he give bond, with good and sufficient security, to be approved by the court from whose judgment the appeal is taken, in an amount not less than double the amount of the fines and costs adjudged against him; *conditioned*, that he shall prosecute his appeal with effect, and shall pay such fine and costs as shall be adjudged against him by the county court, as well as other costs that may have been adjudged against him in the court below. [Act Aug. 17, 1876, p. 167; §§37, 38.]

See Willson's Cr. Forms, 810.

§2652—**Appeal-bond—Decisions as to.**—The right of appeal in the cases mentioned in the preceding article is not available to a defendant, unless he files with the court in which the judgment was rendered a valid statutory appeal-bond, such as is enforceable against him and his sureties. A bond which contains a condition not required by law is not a valid bond, and will not sustain an appeal. *Watson v. S. 20 App. 382.* It is not required that an appeal-bond shall name the offense of which the defendant has been convicted. *Miller v. S. 21 App. 275.* It is not essential to the validity of an appeal-bond that the signature of the defendant should appear at the end of it. *(If he writes his name in any part of it, for the purpose of giving authenticity to it, the signature is sufficient. Taylor v. S. 16 App. 514.)*

An appeal-bond must be approved by the court from whose judgment the appeal is prosecuted, in an amount equal at least to double the amount of the fine and costs adjudged against the appellant. *(The appellate court cannot approve an appeal-bond.) Miller v. S. 21 App. 275.* The requirement that the justice of the peace shall approve an appeal-bond is directory, and the bond is not a nullity because he neglects to indorse his approval upon it. His approval may be inferred from his return of the bond to the appellate court. *Taylor v. S. 16 App. 514; Dyches v. S. 24 Tex. 266; Dougherty v. S. 33 Tex. 1; Cundin v. S. 38 Tex. 641.* If the appeal-bond conforms substantially to the requirements of the preceding article, it is sufficient, although it may not comply literally therewith. *Cyechawach v. S. 23 App. 430.* An appeal-bond which correctly describes the judgment appealed from as to the number of the cause, the court before which the cause was tried, and the amount of the judgment, although it omits the date of the rendition of the judgment, is sufficiently certain to support an appeal. *Eichman v. S. 22 App. 137.*

§2653 — ART. 855.—**Appeal-bond shall be given within what time.**—If the defendant is not in custody, a notice of appeal shall have no effect whatever until the required appeal-bond has been given and approved; and such appeal-bond shall, in all cases, be given within ten days after the judgment of the court, refusing a new trial, has been rendered, and not afterward. [Added in revising.]

§2654—ART. 856.—**Trial in county court shall be de novo.**—In all appeals to justices' and other inferior courts, to the county court, the trial shall be *de novo*, in the county court, the same as if the prosecution had been originally commenced in that court. [Const. Art. 5, §16; added in revising.]

Where a trial *de novo* was not had in the county court, but the appeal was dismissed, an appeal lies to the court of appeals if the judgment of the court *a quo* amounts to more than twenty dollars, although it may not exceed one hundred dollars. *Taylor v. S. 16 App. 514; Pevito v. Rodgers, 52 Tex. 581.*

§2655—ART. 857.—**Original papers, etc., shall be sent up.**—In appeals from justices' and other inferior courts, all the original papers in the case, together with the appeal-bond, if any, and together with a certified transcript of all the proceedings had in the case before such court, including a bill of the costs, shall, without delay, be delivered to the clerk of the county court of the county in which the conviction was had, who shall file the same and docket the case immediately. [Added in revising.]

See Willson's Cr. Forms, 813.

§2656—ART. 858.—**Witnesses need not be again summoned, etc.**—In the cases mentioned in the preceding article the witnesses who have been already summoned or attached to appear in the case before the court below, shall appear before the county court without further process, and in case of their failure to do so the same proceedings may be had as if they had

been originally summoned or attached to appear before the county court. [Added in revising.]

**§2657—ART. 859.—Rules governing the taking, etc., of appeal-bonds.**—The rules governing the taking and forfeiture of bail-bonds shall govern appeal-bonds, and the forfeiture and collection of such appeal-bonds shall be in the county court to which such appeal is taken. [Added in revising.]

Where a defendant appeals to the county court from a judgment of an inferior court imposing a fine merely, he may appear either in person or by attorney on the trial *de novo*, and a forfeiture of his appeal-bond cannot be taken when he appears by attorney only, until he has failed to discharge the fine and costs which may have been adjudged against him in the county court. Page v. S. 9 App. 466.

**§2658—ART. 860.—Clerk shall prepare transcript in all cases appealed.**—It is the duty of the clerk of a court from which an appeal is taken, to prepare, as soon as practicable, a transcript in every case in which an appeal has been taken, which transcript shall contain all the proceedings had in the case, and shall conform to the rules governing transcripts in civil cases. [O. C. 729.]

**§2659—What the transcript shall contain.**—In preparing transcripts the following order shall be observed, to-wit:

*First.* The index, which must refer to the proceedings in the order they appear in the record.

*Second.* The caption, which shall be as follows: "The State of Texas, County of..... At a term of the..... Court, begun and holden within and for the County of..... at ..... on the..... day of....., A. D. 18.., and which adjourned on the..... day of..... A. D. 188.., the Hon....., judge thereof, presiding, the following cause came on for trial, to-wit:

No..... {	<i>The State of Texas,</i>
	vs.
	<i>A. B.....</i>

*Third.* The time and manner of the presentation of indictment. *Fourth.* The indictment or information. *Fifth.* The pleas of defendant. *Sixth.* The verdict and judgment. *Seventh.* The statement of facts. *Eighth.* The charge of the court. *Ninth.* The charges refused. *Tenth.* Bills of exception. *Eleventh.* Motion for new trial, and motion in arrest of judgment, and notice of appeal. *Twelfth.* Such other pleas, motions and orders as are made during the trial of the cause. *Thirteenth.* Final judgment [or in a misdemeanor case the recognizance, or statement that defendant is in jail]. *Fourteenth.* Assignment of errors, if any are filed, and request, if any, to send transcript to a branch of the court other than that to which the appeal is returnable. *Fifteenth.* Certificate of the clerk under the seal of the court, which shall certify that the transcript contains a true copy of all the proceedings had in the cause. [Rule 113 for District Courts.]

See Willson's Cr. Forms, 811.

When the prosecution is by information, the transcript must contain a copy of the complaint as well as the information. *Ante*, §1999. The file mark of each paper, together with the clerk's signature thereto, should be shown. *Krebs v. S. 3 App. 348; Brown v. S. Id. 294; Harrison v. S. Id. 558; Thompson v. S. 4 App. 44; Dishough v. S. Id. 158; Doyle v. S. Id. 253; Hill v. S. Id. 559; Krantz v. S. Id. 534; Hunt v. S. Id. 53.* When a case is tried by a special judge, the manner of the selection or appointment of such judge, together with the reasons therefor, and the fact that the oath of office was administered to him, must appear in the transcript. *Ante*, §2194.

The original or a certified copy of the indictment or information must appear in the transcript. *Bundall v. S. 4 App. 631; Pierce v. S. 14 App. 365; Harwood v. S. 16 App. 416; Bridges v. S. 17 App. 579.* The transcript must show the plea of the defendant, and that the jury, if the case was tried by a jury, was sworn. *Ante*, §§2110-2112, 2290. In making out a transcript it is the duty of the clerk to copy the matter transcribed *verbatim et literatim*. He is not authorized to interpolate or omit sentences or words, but must follow the originals strictly. *Crockett v. S. 14 App. 226.*

Clerks should be careful to prepare transcripts in conformity to the statute and the rules of court. The ends of justice are frequently delayed and sometimes actually frustrated by their inexcusable neglect of this duty. *Mitchell v. S. 1 App. 725; Lockwood v. S. Id. 749.* When time has been granted to prepare and file a statement of facts, the transcript should contain the order to that effect. *Ante*, §2564. A separate certificate of the clerk to each proceeding contained in the transcript is unnecessary and improper. *Trevino v. S. 2 App. 90.* Because a pleading, etc., is stricken out, the clerk should not omit it from the transcript. All the proceedings should be sent up. *McWhorter v. S. 13 App. 523.*

**§2660—What it should not contain.**—Transcripts of the record, for the court of appeals, shall not be encumbered with copies of *captases*, bonds, recognizances, *subpoenas*, attachments for witnesses, or any of the proceedings had on a former trial, where a new trial has

been granted, unless there is some question expressly raised on the trial with reference to such proceedings, which requires revision in the court of appeals, or in *scire facias* cases, on appeal or writ of error. [Rule 112 for District Courts.]

Ballinger v. S. 11 App. 324.

In preparing transcripts clerks should be careful to not insert any foreign or superfluous matter. *Ex parte* writings, attached to the transcript as addenda or explanatory notes, are no part of the record, and will be stricken out. Wheeler v. S. 15 App. 607; Rainey v. S. 20 App. 455.

**§2661—Original papers—How sent up.**—When original papers are ordered sent up they should not be incorporated in the transcript, but should be identified and verified by proper certificate of the clerk and sent with the transcript. S. v. Morris, 43 Tex. 372.

**§2662—Other requisites of transcripts.**—In preparing the transcript, the following directions must also be observed: It shall be written on good paper, on one side only, in a neat, legible hand, free from all erasures and interlineations, leaving a margin of sufficient width, in which margin the clerk shall note the name of each proceeding, and the time of its occurring or being filed, and at the left hand lower corner, mark the number of each page. At the end of each paper must be copied the file marks indorsed thereon, and a space should be left between the record of each separate paper or proceeding. [Rule 114 for District Courts.]

The transcript must be fastened at the upper end with tape or ribbon, and sealed over the tie with the seal of the court, and folded and indorsed as follows:

A. B., appellant,

v.

The State of Texas, appellee.

From.....county district court (or county court), A. D., 18... [Rule 115 for District Courts.]

The transcript must be tied and sealed, and the seal must be *over* and not *under* the tie. Sweeney v. S. 5 App. 41; Holden v. S. 1 App. 225; *Ex parte* Barrier, 17 App. 585.

**§2663—ART. 861.—Transcript in felony case to be prepared first.**—The clerk shall prepare transcripts in felony cases that have been appealed in preference to cases of misdemeanor, and shall prepare the transcripts in all criminal cases appealed in preference to civil cases. [O. C. 729.]

**§2664—ART. 862.—Clerks shall forward transcript.**—As soon as a transcript is prepared, the clerk shall forward the same, by mail or other safe conveyance, charges paid, inclosed in an envelope, securely sealed, directed to the proper clerk of the court of appeals. [O. C. 731.]

**§2665—Rules as to forwarding transcripts.**—The transcript of the record, where defendant has been convicted of a misdemeanor, must be delivered to the party appealing, or his counsel, but if not applied for before the twentieth day before the commencement of the term of the court of appeals to which the appeal is returnable, the clerk shall transmit the same by mail, paying the postage thereon, to the clerk of the court of appeals. [Rule 117 for District Courts.]

See Rush v. S. 14 App. 19.

Transcripts of the record, where defendants have been convicted of a felony, shall be prepared within twenty days after the adjournment of the court, and sent by mail, post-paid, to the clerk of the court of appeals, at the branch to which the appeal is returnable. But, where the defendant or his counsel directs the transcript to be sent to a branch of the court where the term is held before the term to which the appeal is returnable by law, the clerk shall so transmit it, and send with such transcript a certified copy of such order or direction. [Rule 118 for District Courts.]

In felony cases transcripts must be forwarded by mail, and may not be delivered to the defendant or his counsel. Lockwood v. S. 1 App. 749.

**§2666—Certiorari to perfect transcript.**—*Certiorari* will be granted to perfect a transcript defective through carelessness or neglect. Mitchell v. S. 1 App. 725; Brown v. S. 3 App. 295. A defective transcript can only be perfected by *certiorari*, or by agreement of the parties. Chiles v. S. 1 App. 28. The *certiorari* is directed to the clerk and not the court below, and he must embody in his return, not omissions, but the proceedings. Hill v. S. 4 App. 559. Where the clerk failed to authenticate a transcript, he was ordered to make out and send up a complete transcript properly authenticated. Cox v. S. 7 App. 1. The record entry of the impanelling of the grand jury which returned the indictment is no part of a transcript, and a *certiorari* to supply such record will not be awarded. Fuller v. S. 19 App. 380.

For form of motion for *certiorari* to perfect transcript, see Willson's Cr. Forms, 948; see, also, Rule 76 for Court of Appeals; Rule 108 for District Courts; Rule 11 for Appellate Courts.

**§2667—ART. 863.—A list of appealed cases shall be made by the clerk, and shall show, etc.**—The clerk shall, immediately after the adjournment of the court, at which appeals in criminal actions may have been

taken, make out a certificate under his seal of office, exhibiting a list of all such causes which have been decided, and in which the defendant has appealed. This certificate shall show the style of the cause upon the docket—the offense of which the defendant stands accused—the day on which judgment was rendered, and the day on which the appeal was taken—which certified list he shall transmit, post-paid, to the clerk of the court of appeals, at the proper place. [O. C. 732.]

See Willson's Cr. Forms, 812; Rule 119 for District Courts.

§2668—ART. 864.—**Clerk of court of appeals shall file list, etc.**—The clerk of the court of appeals shall file the certificate provided for in the preceding article, and notify the attorney-general that the same has been received. [O. C. 733.]

§2669—ART. 865.—**When transcript is not received, the proper clerk shall be notified.**—When it appears by the certificate provided for in the preceding article that an appeal has been taken in any case, in which the transcript has not been received by the clerk of the court of appeals, within the time required by law for filing transcripts in civil actions, the clerk of the court of appeals shall immediately notify the clerk of the proper court, by mail, that such transcript has not been received. [O. C. 734, 735.]

§2670—ART. 866.—**Another transcript shall be forwarded, when.**—The clerk receiving notification, as provided in the preceding article, shall, without delay, prepare and forward another transcript of the case, as in the first instance, and shall notify the clerk of the court of appeals, by letter sent by mail, of the fact that such transcript has been forwarded, and the day on which and the manner in which the same was forwarded. [O. C. 735.]

§2671—ART. 867.—**Transcript filed, etc., as in civil actions, except, etc.**—The clerk of the court of appeals shall receive, file and docket appeals in criminal actions, under the same rules which govern appeals in civil actions; except, in cases of felony, a transcript may be filed and the case heard and determined at any time during the term to which the appeal is taken. [O. C. 739]

Rust v. S. 14 App. 19. For rules governing in civil cases, see Sayles' Civ. Stat., Art. 1034; Rules for the Appellate Courts, 2 to 6.

§2672—ART. 868.—**Appeals shall be heard, etc., when.**—The court of appeals shall hear and determine appeals in criminal actions at the earliest time it may be done with due regard to the rights of parties and a proper administration of justice. [O. C. 741.]

Rust v. S. 14 App. 19.

§2673—ART. 869.—**Court of appeals may do what.**—The court of appeals may affirm the judgment of the court below, or may reverse and remand for a new trial, or may reverse and dismiss the case, or may reform and correct the judgment as the law and the nature of the case may require. [O. C. 742.]

§2674—ART. 870.—**Cause shall be remanded, when.**—The court of appeals may revise the judgment in a criminal action, as well upon the law as upon the facts; but, when a cause is reversed for the reason that the verdict is contrary to the weight of evidence, the same shall, in all cases, be remanded for a new trial. [O. C. 744.]

§2675—**Practice on appeal—Dismissing the appeal.**—An appeal will be dismissed in the following instances: 1. When it is taken from a judgment of the county court in a case appealed to that court from an inferior court, and the judgment is for a fine only, and does not exceed one hundred dollars. *Ante*, §§1527, 2633. 2. When taken in a proceeding for contempt. *Ante*, §2631. 3. When a final judgment of conviction has not been rendered and entered. *Ante*, §§1523, 2576, 2631. 4. When in a felony case, except a capital case where the death penalty is assessed, the sentence has not been pronounced. *Ante*, §2583. 5. When notice of

appeal has not been given and entered of record. *Ante*, §2644. 6. When, in a misdemeanor, it does not appear from the transcript that the defendant has entered into a recognizance, or is in jail. *Ante*, 2646. 7. When, pending the appeal, the defendant has escaped, and has not voluntarily returned into custody within ten days. §§2639. 2640. 8. When the defendant dies pending his appeal, and in such case the appeal is not only dismissed but the prosecution is abated. *March v. S.* 5 App. 450. 9. When a defendant in person, by written application duly authenticated by the clerk of the trial court, requests that his appeal be dismissed. But an appeal will not be dismissed upon request of defendant's attorney. *Paul v. S.* 17 App. 583; Nor will an appeal be dismissed after the judgment has been reversed and the prosecution dismissed, merely because the defendant desires such action. *Maddox v. S.* 14 App. 447.

**§2676—Same—Presumptions indulged.**—A defendant seeking to reverse a judgment must bring up the case so as to present the particular points decided of which he complains, and it must appear that the error complained of was in a matter material to the issue. If the record is silent as to the grounds of complaint, and no error is apparent of record, the judgment will not be disturbed. *Drummond v. S.* 2 Tex. 156; *Chandler v. S.* *Id.* 305; *Bailey v. S.* *Id.* 202; *McKissick v. S.* 22 Tex. 356; *Gorman v. S.* *Id.* 592; *Mercedith v. S.* 40 Tex. 480; *Escareno v. S.* 16. App. 86. It must appear from the record that the conviction is wrong or unjust, or it will not be set aside. *Thompson v. S.* 1 App. 56. By the record alone is a cause determinable on appeal. *Brown v. S.* 11 App. 45; *Rainey v. S.* 20 App. 473. Regularity in the proceedings in the trial court will be presumed in the absence of any showing in the record to the contrary. *English v. S.* 4 Tex. 125; *Carter v. S.* 12 Tex. 500; *Farrar v. S.* 5 App. 489; *Carr v. S.* *Id.* 153; *Yanez v. S.* 6 App. 429; *Handline v. S.* *Id.* 347; *Montgomery v. S.* 4 App. 140; *Nash v. S.* 2 App. 362; *Escareno v. S.* 16 App. 85.

In the absence of a statement of facts in the record, it will be presumed that sufficient legal evidence was adduced on the trial to sustain the conviction, and that the charge of the court conformed to the evidence. *Ante*, §2567. The plea of the defendant must be shown by the record, and cannot be supplied by presumption. *Ante*, §§2110-2112. Where the trial was by a jury the record must show that it was a legal jury, and that such jury was duly sworn. These essentials will not be presumed. *Ante*, §§2290-2293.

In a capital conviction the record must show an arraignment, but if it shows that the defendant pleaded "not guilty," it will be presumed that an arraignment was waived. *Ante*, §2108. When a motion for new trial, filed after the expiration of two days from the conviction, has been entertained by the trial court, it will be presumed that good cause was shown why it should have been entertained. *Ante*, §2551. When the record does not show action upon a motion for a new trial, it will be presumed that the motion was abandoned. *Ante*, §2559.

See under appropriate heads for other presumptions not here noted.

**§2677—Same—Reversing judgment and dismissing prosecution.**—When an indictment or information is substantially defective, a conviction had upon it will be set aside and the prosecution will be dismissed, although such defect was not presented in the trial court. But when the defect in an indictment or information is one of form merely, it will not be considered when presented primarily on appeal, nor will the prosecution be dismissed because of the same, although presented in the trial court. *Ante*, §2127. *Morris v. S.* 13 App. 65; *Woolsey v. S.* 14 App. 57. But, if a new indictment or information would be barred by limitation, the prosecution will be dismissed, although the defect be one of form merely. *Ante*, §2147; *Ridfield v. S.* 24 Tex. 133. In a capital case, however, the prosecution will not be dismissed, but it will be ordered that the defendant be committed to await the action of the next grand jury. *Calvin v. S.* 25 Tex. 789. When an information is defective, but the complaint upon which it is founded is sufficient, the prosecution will not be dismissed, but the cause will be remanded so that a sufficient information may be presented. *Piltman v. S.* 14 App. 576.

**§2678—Same—Reversing and remanding.**—When there is no indictment or information in the record, the judgment will be reversed and the cause remanded. *Harwood v. S.* 16 App. 416; *Bridges v. S.* 17 App. 579; *Pierce v. S.* 14 App. 365; *Beardall v. S.* 4 App. 631. When the record fails to show that the defendant pleaded to the indictment or information, the judgment will be reversed and the cause remanded. §§2110-2112. A denial of any legal right, in a felony case, which is calculated to injure the defendant, is ordinarily cause for reversal and for remanding the case for a new trial. A conviction must be in accordance with law, or it cannot be affirmed on appeal, is a general rule to which the exceptions are few. *Pridgen v. S.* 31 Tex. 420; *Rich v. S.* 1 App. 206; *Luusford v. S.* *Id.* 448.

See under the heads of the different offenses, and under other appropriate heads for errors for which a judgment will be reversed and the cause remanded.

**§2679—Same—Reversing and reforming.**—In a proper case the judgment or sentence, or both, will be reformed so as to make them conform to each other and to the verdict, without remanding the cause for another trial. *Ante*, §2592.

**§2680—Same—Rehearing—Motion for, etc.**—See *Sayles' Civ. Stat. Ch. 9, Title 26; Rules for the Supreme Court, 67, 67a; Rules for Court of Appeals, 76; Willson's Cr. Forms, 949; Bailey v. S.* 11 App. 140; *Ayres v. S.* 12 App. 450; *Craddock v. S.* 15 App. 641.

**§2681—ART. 871.—Duty of clerk of court of appeals when judgment is rendered.**—As soon as the judgment of the court of appeals is rendered, the clerk shall make out the proper certificate of the proceedings

had and judgment rendered, and transmit the same by mail to the clerk of the proper court, or deliver the mandate to the defendant or his counsel, when the decision is favorable to the defendant, if requested to do so, unless he is instructed by the court to withhold the mandate to any particular time. [O. C. 743.]

§2682—ART. 872.—**Mandate shall be filed, etc.**—When the certificate of the judgment and proceedings in the court of appeals shall be received by the proper clerk, he shall file the same with the original papers of the cause and note the same upon the docket of the cause. [O. C. 746.]

§2683—ART. 873.—**Sentence shall be pronounced in felony case, when.**—In cases of felony, where the judgment is affirmed, if the district court be in session when the mandate is received, that court shall proceed to pronounce sentence during the term at which the mandate is received; or, in case sentence cannot then be pronounced, it may be pronounced at the next or any subsequent term of such court. [O. C. 747.]

See, *ante*, §§2582, 2583, 2586, 2587.

§2684—ART. 874.—**Same subject.**—If the mandate be received in vacation, and the judgment in a case of felony has been affirmed, sentence shall be pronounced during the term of the court next succeeding the time at which the same was received; or, in case it cannot be pronounced, at any subsequent term of the court. [O. C. 748.]

See, *ante*, §§2582, 2583, 2586, 2587.

§2685—ART. 875.—**In cases of misdemeanor, when judgment has been affirmed.**—In cases of misdemeanor, where the judgment has been affirmed, no proceedings need be had after filing the mandate, except to forfeit the recognizance of the defendant, or to issue a *capias* for the defendant, or an execution against his property to enforce the judgment of the court, whether of fine or imprisonment, or both, in the same manner as if no appeal had been taken. [O. C. 749.]

See *Thompson v. S.* 17 App. 318; *Wells v. S.* 21 App. 594.

§2686—ART. 876.—**When court of appeals awards a new trial.**—Where the court of appeals awards a new trial to the defendant, the cause shall stand as it would have stood in case the new trial had been granted by the court below. [Added in revising.]

See, *ante*, §§2556, 2557; *Wells v. S.* 21 App. 594; *Beardall v. S.* 9 App. 262.

§2687—ART. 877.—**Where motion in arrest should have been sustained.**—Where the defendant's motion in arrest of judgment was overruled, and it is decided on appeal that the same ought to have been sustained, the cause shall stand as if the motion had been sustained, unless the court of appeals, in its judgment, direct the cause to be dismissed and the defendant wholly discharged. [O. C. 751.]

See, *ante*, §§2573, 2574.

§2688—ART. 878.—**When case is dismissed, defendant shall be discharged.**—Where the court of appeals reverses a judgment and directs the cause to be dismissed, the defendant, if in custody, must be discharged; and the clerk of the court of appeals shall transmit to the officer having custody of the defendant an order to that effect. [O. C. 753.]

§2689—ART. 879.—**When felony case is reversed, etc., defendant entitled to bail, etc.**—When a felony case upon appeal is reversed and remanded for a new trial, the defendant shall be released from custody upon his giving bail as in other cases where he is entitled to bail, and the clerk of the court of appeals shall transmit to the officer having custody of the defendant an order to that effect. [Added in revising.]

If defendant was on bail before conviction he is not required to give new bail. *Ex parte Guffee*, 8 App. 409.

**§2690—ART. 880.—Court of appeals may make rules, etc.**—The court of appeals may make rules of procedure as to the hearing of criminal actions upon appeal; but in every case at least two counsels for the defendant shall be heard, if they desire it, either by brief or by oral or written argument, or by both, as such counsel shall deem proper. [O. C. 745; see *Rules of Court*.]

By rule of the court of appeals the defendant or his counsel is entitled to open the argument, and is allowed one hour's time for that purpose. The state's counsel is allowed one hour's time in reply, and the defendant or his counsel is allowed twenty minutes' time to conclude the argument. Oral argument, on a motion for rehearing, is not allowed unless requested by the court. Written argument may be filed in any case, and copies thereof need not be filed. There are no rules prescribing the requisites, etc., of briefs in criminal cases.

**§2691—ART. 881.—Appeal in case of habeas corpus.**—When the defendant appeals from the judgment rendered on the hearing of an application under *habeas corpus*, a transcript of the proceedings in the cause shall be made out and certified to, together with all the testimony offered, and shall be sent up to the court of appeals for revision. This transcript, when the proceeding takes place before a court in session, shall be prepared and certified by the clerk thereof; but when had before a judge in vacation the transcript may be prepared by any person under the direction of the judge and certified by such judge. [O. C. 754.]

The rules governing the transmission of transcripts in other criminal cases do not govern in *habeas corpus* appeals. *Ex parte Kramer*, 19 App. 123; see, also, *Ex parte Barrier*, 17 App. 585.

**§2692—ART. 882.—Defendant need not be present.**—The defendant need not be personally present upon the hearing of an appeal in cases of *habeas corpus*. [O. C. 752.]

**§2693—ART. 883.—Habeas corpus cases heard at the earliest, etc.**—Cases of *habeas corpus* taken to the court of appeals, by appeal, shall be heard at the earliest practicable time. [O. C. 757.]

See *Ex parte Lynn*, 19 App. 120.

**§2694—ART. 884.—Shall be heard upon the record, etc.**—The appeal in a *habeas corpus* case shall be heard and determined upon the law and the facts arising upon the record, and no incidental question, which may have arisen on the hearing of the application before the court below, shall be revised. The only design of the appeal is to do substantial justice to the party appealing. [O. C. 755, 756.]

See *Ex parte Rothschild*, 2 App. 560; *Parker v. S.* 5 App. 579.

**§2695—ART. 885.—Court of appeals may enter such judgment, etc.**—The court of appeals shall enter such judgment and make such orders as the law and the nature of the case may require, and may make such order relative to the costs in the case as may seem right, allowing costs and fixing the amount, or allowing no costs at all. [O. C. 755-758.]

In such appeals the cause is not remanded, but the court of appeals acts originally. *Ex parte Erwin*, 7 App. 288; *Ex parte Foster*, 5 App. 625.

**§2696—ART. 886.—Judgment of court of appeals conclusive, etc., except, etc.**—The judgment of the court of appeals, in appeals under *habeas corpus*, shall be final and conclusive, and no further application in the same case can be made for the writ, except in cases specially provided for in this Code. [O. C. 759.]

See, *ante*, §§1674, 1675, 1676.

**§2697—ART. 887.—Officer failing to obey mandate—Penalty for.**—If an officer, holding a person in custody, fails to obey the mandate of the court of appeals, he is guilty of an offense and punishable according to the provisions of the Penal Code. [O. C. 760.]

See, *ante*, §893.



**§2698—ART. 888.—Where appellant in a case of habeas corpus is detained by, etc.**—If the appellant, in a case of *habeas corpus*, be detained by any person other than an officer, the sheriff shall, upon receiving the mandate of the court of appeals, immediately cause the person so held to be discharged, and the mandate shall be sufficient authority therefor. [O. C. 761.]

**§2699—ART. 889.—Clerk shall certify the judgment, etc.**—The judgment of the court of appeals shall be certified by the clerk thereof to the officer holding the defendant in custody, or, when he is held by any person other than an officer, to the sheriff of the proper county. [O. C. 759.]

**§2700—ART. 890.—When bail bond is required, who shall take it, etc.**—When by the judgment of the court of appeals, upon cases of *habeas corpus*, the applicant is ordered to give bail, such judgment shall be certified to the officer holding him in custody; and if such officer be the sheriff the bail-bond may be executed before him; if any other officer, he shall take the person detained before some magistrate, who may receive a bail-bond, and shall file the same in the proper court of the proper county, and such bond shall have the same force and effect as a recognizance, and may be forfeited and enforced in the same manner. [O. C. 763.]

**§2701—ART. 891.—Appeal from judgment on recognizance, etc.**—An appeal may be taken either by the state or defendant from every final judgment rendered upon a recognizance, bail-bond or bond taken for the prevention or suppression of offenses, where such judgment is for twenty dollars or more, exclusive of costs, but not otherwise, and the proceedings in such cases shall be regulated by the same rules which are prescribed in other civil suits. [O. C. 738a.]

**§2702—ART. 892.—Defendant entitled also to writ of error.**—The state or the defendant may also have any such judgment as is mentioned in the preceding article, and which may have been rendered in the district or county court, revised upon writ of error as in other civil suits. [O. C. 738b.]

**§2703—ART. 893.—Same rules govern as in civil suits.**—In the cases provided for in the two preceding articles the proceedings shall be regulated by the same rules that govern the other civil actions where an appeal is taken or a writ of error is sued out. [O. C. 738a.]

See, *ante*, §2028.

**§2704—State is not entitled to appeal or writ of error.**—Notwithstanding the preceding provisions, the state is not entitled to an appeal or a writ of error in the cases specified in article 891. *ante*. In so far as the three preceding articles grant the right of appeal and the right to prosecute a writ of error to the state, they are unconstitutional and inoperative. But the defendant, in such cases, may prosecute an appeal or a writ of error. *Ante*, §§2028, 2629.

## TITLE II.—OF PROCEEDINGS IN CRIMINAL ACTIONS BEFORE JUSTICES OF THE PEACE, MAYORS AND RECORDERS.

## CH.

## 1. GENERAL PROVISIONS.

## 2. OF THE ARREST OF THE DEFENDANT.

## CH.

## 3. OF THE TRIAL AND ITS INCIDENTS.

## 4. OF THE JUDGMENT AND EXECUTION.

### CH. 1.—GENERAL PROVISIONS.

ART.	SEC.	ART.	SEC.
894. Mayors shall exercise criminal jurisdiction.	2705	897. Warrant issued by mayor, directed to whom.	2709
895. Mayors or recorders governed by same rules as justices of the peace.	2706	898. Warrant issued by mayor, etc., may be executed, where.	2710
896. Mayors and justices of the peace have concurrent jurisdiction.	2707	899. Justices, etc., shall keep a criminal docket, which shall show, etc.	2711
Ordinances—Validity of, etc.	2708	900. Justices, etc., shall file transcript of docket with clerk of district court, etc.	2712

**§2705—ART. 894.—Mayors shall exercise criminal jurisdiction.**—The mayor, or the officer by law exercising the duties usually incumbent upon the mayors of incorporated towns and cities, and recorders thereof, shall exercise, within the corporate limits of their respective towns or cities, the same criminal jurisdiction which belongs to justices of the peace within their jurisdiction, under the provisions of this Code. [O. C. 813.]

See, *ante*, §§1549-1553.

**§2706—ART. 895.—Mayors or recorders governed by same rules as justices of the peace.**—The proceedings before mayors or recorders shall be governed by the same rules which are prescribed for justices of the peace, and every provision of this Code, with respect to a justice, shall be construed to extend to mayors and recorders within the limits of their jurisdiction. [O. C. 814.]

See, *ante*, §1552. An offense against a municipal ordinance may be prosecuted in the name of the municipality when so ordained by such municipality. *Ex parte* Boland, 11 App. 159.

**§2707—ART.—896.—Mayors and justices of the peace have concurrent jurisdiction.**—The jurisdiction, given to mayors and recorders of incorporated towns and cities, shall not prevent justices of the peace from exercising the criminal jurisdiction conferred upon them; but in all cases where there is an incorporated town or city within the bounds of a county, the justice and the mayor, or recorder, shall have concurrent jurisdiction within the limits of such town or city. And no person shall be punished twice for the same act or omission, although such act or omission may be an offense against the penal laws of the state, as well as against the ordinances of such city or town; *provided*, that no ordinance of a city or town shall be valid which provides a less penalty for any act, omission or offense, than is prescribed by the statutes, where such act or omission is an offense against the state. [Acts 1879, extra session, chap. 19.]

See, *ante*, §2122.

**§2708—Ordinances—Validity of, etc.**—Municipal corporations, like all other corporations, derive their powers from legislative grant, and can do no act for which authority is not expressly given, or may not be reasonably inferred. *Flood v. S.* 19 App. 584; *Craddock v. S.* 18 App. 567. An ordinance to be valid, unless special legislative authority be given for its enactment, must not conflict with a statute, but must conform to the laws of the state, and to the municipal charter. *Flood v. S.* 19 App. 584; *Augerhoffer v. S.* 15 App. 613; *Ex parte* Staren, 3 App. 662; *Davis v. S.* 2 App. 425. A state law and a municipal ordinance may

stand together, and an act offending at the same time against both may be prosecuted under either, though a conviction under one will, since the enactment of the preceding article, bar a prosecution under the other, but prior to said article a conviction might be had under both. *Hamilton v. S.* 3 App. 643. An ordinance punishing the carrying of weapons, but which omitted to exempt travellers, etc., was held valid, but it was further held that such ordinance must be construed in subordination to the statute of the state excepting travellers, etc. *Ex parte Boland*, 11 App. 159.

For the rules governing the construction of ordinances, see *Ex parte Grace*, 9 App. 381; *Flood v. S.* 19 App. 584; *Ex parte Gregory*, 20 App. 210. When the charter of a municipality authorizes it to make laws consistent with the constitution and state laws, it may make it an offense to be drunk within the corporate limits. *Ex parte Oliver*, 3 App. 345. When a municipality is authorized to enact ordinances by a two-thirds vote of the city council, it means a two-thirds vote of a quorum of a council present and voting. *English v. S.* 7 App. 171.

The effect of article 391 of the Revised Statutes is to confer upon city councils the power to enact ordinances declaring what hours on Sunday drinking houses, etc., shall be closed, but it cannot be construed to empower city councils to enact ordinances regulating the hours on Sundays when goods, etc., may be sold. *Flood v. S.* 19 App. 584, overruling upon this point *Craddock v. S.* 18 App. 567; see, also, *Bohmy v. S.* 21 App. 597. For decisions as to ordinances with respect to disorderly houses, see *Ex parte Wilson*, 14 App. 592; *Hawley v. S.* 16 App. 444; *Davis v. S.* 2 App. 425. Charters and ordinances of municipal corporations are not matters of judicial cognizance, and when necessary to be known must be proved as other facts. *Ante*, §§2490-2506.

**§2709 — ART. 897. — Warrant issued by mayor, directed to whom.**—Warrants issued by a mayor or recorder are directed to the marshal or other proper officer of the town or city where the criminal proceeding is had; but in case there be no such officer the process issued by a mayor or recorder shall be directed to any peace officer within the city, town or county, and shall be executed by such officer. [O. C. 816.]

For forms of warrant, see Willson's Cr. Forms, 816-818.

**§2710—ART. 898.—Warrant issued by mayor, etc., may be executed, where.**—When the party, for whose arrest a warrant is issued by a mayor or recorder, is not to be found within the limits of the incorporation, the same may be executed anywhere within the limits of the county in which such incorporation is included by the marshal or other proper officer of such town or city, or by any peace officer of such county, and may be executed in any county in the state under the same rules governing warrants of arrest issued by a justice of the peace. [Added in revising.]

As to warrant of arrest, etc., see, *ante*, §1729 *et seq.*

**§2711—ART. 899.—Justices, etc., shall keep a criminal docket, which shall show, etc.**—Each justice of the peace, mayor and recorder shall keep a docket in which he shall enter the proceedings in all examinations and trials for criminal offenses had before him, which docket shall show—

1. The style of the action.
  2. The nature of the offense charged.
  3. The date of the issuance of the warrant and the return made thereon.
  4. The time when the examination or trial was had, and, if the same was a trial, whether it was by a jury or by himself.
  5. The verdict of the jury, if any.
  6. The judgment of the court.
  7. Motion for new trial, if any, and the action of the court thereon.
  8. Notice of appeal, if any.
  9. The time when, and the manner in which the judgment was enforced.
- [O. C. 817; Act Aug. 17, 1876, p. 156, §5.]

See, also, *post*, §2734.

**§2712—ART. 900.—Justices, etc., shall file transcript of docket with clerk of district court, etc.**—At each term of the district court each justice of the peace, mayor and recorder in each county shall, on the first day of the term of said court for their county, file with the clerk of said court a certified transcript of the docket kept by such justice, mayor or

recorder, as required by the preceding article, of all criminal cases examined or tried before him since the last term of such district court; and the clerk of such court shall immediately deliver such transcript to the foreman of the grand jury. [Added in revising.]

See Willson's Cr. Forms, 831.

## CH. 2.—OF THE ARREST OF THE DEFENDANT.

ART.	SEC.	ART.	SEC.
901. Warrant may issue without complaint, when.	2713	907. Witnesses may be fined, etc., for refusing to make statements, etc.	2719
902. When complaint is made, shall be reduced to writing, etc.	2714	908. How warrant is executed.	2720
903. What the complaint must state.	2715	909. Any person may be authorized to execute warrant.	2721
904. Warrant shall issue, when.	2716	910. Where an offense has been committed in another county, etc.	2722
905. Requisites of warrant of arrest.	2717		
906. Justices may summon witnesses to disclose crime, etc.	2718		

§2713 — ART. 901. — **Warrant may issue without complaint, when.**—Whenever a criminal offense, which a justice of the peace has jurisdiction to try, shall be committed within the view of such justice, he may issue his warrant for the arrest of the offender. [O. C. 819.]

See, *ante*, §1732; Willson's Cr. Forms, 816.

§2714—ART. 902.—**When complaint is made, shall be reduced to writing, etc.**—Upon complaint being made before any justice of the peace, or any other officer authorized by law to administer oaths, that an offense has been committed in the county which a justice of the peace has jurisdiction finally to try, the justice or other officer shall reduce the same to writing, and cause the same to be signed and sworn to by the complainant, and it shall be duly attested by such justice or other officer before whom it was made, and when made before such justice, or when returned to him, made before any other officer, the same shall be filed by him. [Act Aug. 17, 1876, p. 165, §29.]

§2715—ART. 903.—**What the complaint must state.**—Such complaint shall state:

1. The name of the accused, if known; and if unknown, shall describe him as accurately as practicable.

2. The offense with which he is charged shall be stated in plain and intelligible words.

3. It must appear that the offense was committed in the county in which the complaint is made.

4. It must show, from the date of the offense stated therein, that the offense is not barred by limitation. [Act Aug. 17, 1876, p. 165, §29.]

See, *ante*, §§1734, 1735; Willson's Cr. Forms, 817.

§2716—ART. 904.—**Warrant shall issue, when.**—Whenever the requirements of the preceding article have been complied with, the justice of the peace shall issue a warrant for the arrest of the accused and deliver the same to the proper officer to be executed. [O. C. 821; Act Aug. 17, 1876, p. 165, §29.]

§2717—ART. 905.—**Requisites of warrant of arrest.**—Said warrant shall be deemed sufficient if it contain the following requisites:

1. It shall issue in the name of the State of Texas.
2. It shall be directed to the proper sheriff, constable or marshal, or some other person specially named therein.
3. It shall command that the body of the accused be taken and brought before the authority issuing the warrant at a time and place therein named.
4. It must state the name of the person whose arrest is ordered, if it be known; and if not known, he must be described as in the complaint.
5. It must state that the person is accused of some offense against the laws of the state, naming the offense.
6. It must be signed by the justice, and his office named in the body of the warrant, or in connection with his signature. [O. C. 821; Act Aug. 17, 1876, p. 165, §29.]

See, *ante*, §§1730, 1731; Willson's Cr. Forms, 818.

2718—ART. 906.—**Justices may summon witnesses to disclose crime, etc.**—When a justice of the peace has good cause to believe that an offense has been, or is about to be committed against the laws of this state, he may summon and examine any witness or witnesses, in relation thereto; and if it shall appear from the statement of any witness or witnesses that an offense has been committed, the justice shall reduce said statements to writing, and cause the same to be sworn to by the witness or witnesses making the same, and thereupon such justice shall issue a warrant for the arrest of the offender, the same as if complaint had been made and filed against such offender. [Act Aug. 17, 1876, p. 166, §31.]

§2719—ART. 907.—**Witnesses may be fined, etc., for refusing to make statements, etc.**—Witnesses summoned under the preceding article who shall refuse to appear and make a statement of facts under oath, shall be guilty of a contempt of court, and may be fined not exceeding one hundred dollars, and may be attached and imprisoned until they make such statement. [Act Aug. 17, 1876, p. 166, §32.]

§2720—ART. 908.—**How warrant is executed.**—Any peace officer into whose hands a warrant may come shall execute the same by arresting the person accused and bringing him forthwith before the proper magistrate, or by taking bail for his appearance before such magistrate, as the case may be. [O. C. 822.]

See, *ante*, §§1746-1790.

§2721—ART. 909.—**Any person may be authorized to execute warrant.**—A justice of the peace may, when he deems it necessary, authorize any person other than a peace officer to execute a warrant of arrest by naming such person specially in the warrant, and in such case such person shall have the same powers and shall be subject to the same rules that are conferred upon and govern peace officers in like cases. [Act Aug. 17, 1876, p. 166, §33.]

See, *ante*, §1744; Willson's Cr. Forms, 816, note 2.

§2722—ART. 910.—**Where an offense has been committed in another county, etc.**—Whenever complaint is made before any justice of the peace that a felony has been committed in any other than the county in which the complaint is made, it shall be the duty of such justice to issue his warrant for the arrest of the accused, directed as in other cases, commanding that the accused be arrested and taken before the county judge, or any magistrate of the county where such felony is alleged to have been committed, forthwith, for examination, as in other cases. [Act Aug. 17, 1876, p. 167, §39.]

See, *ante*, §§1747, 1748; Willson's Cr. Forms, 821.

## CH. 3.—OF THE TRIAL AND ITS INCIDENTS.

ART.	SEC.	ART.	SEC.
911. Justice shall try cause without delay.	2723	928. Jury shall be kept together till they agree.	2740
912. Defendant may waive trial by jury.	2724	929. If the jury fail to agree, shall be discharged.	2741
913. Jury shall be summoned if defendant does not waive same.	2725	930. When court adjourns the defendant shall enter into bail.	2742
914. Juror may be fined, etc.	2726	931. When the jury have agreed upon a verdict.	2743
915. Complaint, etc., shall be read to defendant.	2727	932. Justice shall enter verdict.	2744
916. Defendant shall not be discharged by reason of informality, etc.	2728	933. Defendant may be placed in jail, when.	2745
917. Challenge of jurors.	2729	934. New trial may be granted defendant.	2746
918. Other jurors shall be summoned, when.	2730	935. Application must be made in one day.	2747
919. Oath to be administered to jury.	2731	936. When new trial is granted, another trial without delay.	2748
920. Defendant shall plead, etc.	2732	937. Only one new trial shall be granted.	2749
921. The only special plea.	2733	938. State not entitled to new trial.	2750
922. Pleadings are oral.	2734	939. Notice of appeal.	2751
923. Proceedings upon plea of guilty.	2735	940. Effect of appeal.	2752
924. When defendant refuses to plead, etc.	2736	941. Judgments, etc., shall be in open court.	2753
925. Witnesses examined, by whom.	2737		
926. Defendant may appear by counsel—Argument of counsel.	2738		
927. Rules of evidence.	2739		

§2723—ART. 911.—Justice shall try cause without delay.—When the defendant is brought before the justice he shall proceed to try the cause without delay, unless good ground be shown for a postponement thereof, in which case he may postpone the trial to any time not longer than five days, and may, if he deem proper, require the defendant to give bail for his appearance; and if, when required, he fails to give bail, he shall be kept in custody until the final determination of the cause. [O. C. 823.]

See, *ante*, §1553.

§2724—ART. 912.—Defendant may waive trial by jury.—The defendant, in case of misdemeanor of which a justice of the peace has jurisdiction to finally try and determine, may waive a trial by jury, and in such case the justice shall proceed to hear and determine the case without a jury. [Added in revising.]

See, *ante*, §§1455-1469.

§2725—ART. 913.—Jury shall be summoned, if defendant does not waive same.—If the defendant does not waive a trial by jury the justice shall issue a writ commanding the proper officer to summon forthwith a jury of six men, qualified to serve as jurors in the county; and said jurors, when so summoned, shall remain in attendance as jurors in all cases that may come up for hearing until discharged by the court. [O. C. 826; Act Aug. 17, 1876, p. 167, §3.]

See Willson's Cr. Forms, 824.

§2726—ART. 914.—Juror may be fined, etc.—Any person summoned as juror, who fails to attend, may be fined by the justice, as for contempt, not exceeding twenty dollars. [O. C. 826.]

§2727—ART. 915.—Complaint, etc., shall be read to defendant.—If the warrant has been issued upon a complaint made to the justice, the complaint and warrant shall be read to the defendant. If issued by the justice without previous complaint, he shall state to the defendant the accusation against him. [O. C. 824.]

§2728—ART. 916.—Defendant shall not be discharged by reason of informality, etc.—A defendant shall not be discharged by reason of any

informality in the complaint or warrant; and the proceeding before the justice shall be conducted without reference to technical rules. [O. C. 825.]

§2729—ART. 917.—**Challenge of jurors.**—In all trials by a jury, before a justice of the peace, the state and each of the defendants in the case shall be entitled to three peremptory challenges, and also to any number of challenges for cause, which cause shall be judged of by the justice. [Act Aug. 17, 1876, p. 160, §12.]

§2730—ART. 918.—**Other jurors shall be summoned, when.**—If from challenges, or any other cause, a sufficient number of jurors are not in attendance, the justice shall order the proper officer to summon a sufficient number of qualified persons to form the jury. [Act Aug. 17, 1876, p. 160, §12.]

§2731—ART. 919.—**Oath to be administered to jury.**—The following oath or affirmation shall be administered by the justice of the peace to the jury in each case: "You, and each of you, do solemnly swear (or affirm, as the case may be) that you will well and truly try the cause about to be submitted to you, and a true verdict render therein, according to the law and the evidence, so help you God." [O. C. 834; Act. Aug. 17, 1876, p. 160, §13.]  
See Willson's Cr. Forms, 825.

§2732—ART. 920.—**Defendant shall plead, etc.**—After impanneling the jury the defendant shall be required to plead, and he may plead "guilty" or "not guilty," or the special plea named in the succeeding article. [O. C. 829.]

§2733—ART. 921.—**The only special plea.**—The only special plea allowed is that of former acquittal or conviction for the same offense. [O. C. 830.]

See, *ante*, §§2121, 2122, 2707.

§2734—ART. 922.—**Pleadings are oral.**—All pleading in the justices' courts, in criminal actions, is oral; but the justice shall note upon his docket the nature of the plea offered. [O. C. 831.]

See, *ante*, §2711.

§2735—ART. 923.—**Proceedings upon plea of guilty.**—If the defendant plead "guilty," proof shall be heard as to the offense, and the punishment shall be assessed by the jury or by the justice when a jury has been waived by the defendant. [O. C. 832.]

See, *ante*, §2113.

§2736—ART. 924.—**When defendant refuses to plead, etc.**—If the defendant refuse to plead the justice shall enter the plea of "not guilty," and the cause proceed accordingly. [O. C. 833.]

§2737—ART. 925.—**Witnesses examined by whom.**—If the state be represented by counsel he may examine the witnesses and argue the cause; if the state is not represented the witnesses shall be examined by the justice. [O. C. 835.]

§2738—ART. 926.—**Defendant may appear by counsel—Argument of counsel.**—The defendant has a right to appear by counsel as in all other cases, but not more than one attorney shall conduct either the prosecution or defense, and the counsel for the state may open and conclude the argument. [O. C. 836.]

§2739—ART. 927.—**Rules of evidence.**—The rules of evidence which govern the trials of criminal actions in the district and county court shall apply also to such actions in justices' courts. [O. C. 837.]

See "EVIDENCE."

§2740—ART. 928.—**Jury shall be kept together till they agree.**—When the cause is submitted to the jury they shall retire in charge of some

officer and be kept together until they agree to a verdict or are discharged. [O. C. 838.]

**§2741—ART. 929.—If the jury fail to agree, shall be discharged.—**If a jury fail to agree upon a verdict, after being kept together a reasonable time, they shall be discharged; and if there be time left on the same day another jury shall be impaneled to try the cause; or the justice may adjourn for not more than two days and again impanel a jury for the trial of such cause. [O. C. 839.]

**§2742—ART. 930.—When court adjourns, the defendant shall enter into bail.—**In case of an adjournment the justice shall require the defendant to enter into bail for his appearance, and upon his failure to give bail the defendant may be held in custody. [O. C. 840.]

**§2743—ART. 931.—When the jury have agreed upon a verdict.—**When the jury have agreed upon a verdict they shall bring the same into court and the justice shall see that it is in proper form. [O. C. 842.]

See Willson's Cr. Forms, 732, 736, 737, 738, 739, 742.

**§2744—ART. 932.—Justice shall enter verdict.—**The justice shall enter the verdict upon his docket and render the proper judgment thereon. [O. C. 843.]

See, *ante*, §2711. For Forms of Judgments, see Willson's Cr. Forms, 826 *et seq.*

**2745—ART. 933.—Defendant may be placed in jail, when.—**Whenever, by the provisions of this title, the peace officer is authorized to retain a defendant in custody, he may place him in jail or any other place where he can be safely kept. [O. C. 844.]

**§2746—ART. 934.—New trial may be granted defendant.—**A justice may, for good cause shown, grant the defendant a new trial, whenever such justice shall consider that justice has not been done the defendant in the trial of such case. [Act Aug. 17, 1876, p. 176, §17.]

**§2747—ART. 935.—Application must be made in one day.—**An application for a new trial must be made within one day after the rendition of judgment, and not afterward, and the execution of the judgment shall not be stayed until a new trial has been granted. [Added in revising.]

**§2748—ART. 936.—When new trial is granted, another trial without delay.—**When a new trial has been granted, the justice shall proceed, as soon as practicable, to try the case again. [Added in revising.]

**§2749—ART. 937.—Only one new trial shall be granted.—**Not more than one new trial shall be granted the defendant in the same case. [Added in revising.]

**§2750—ART. 938.—State not entitled to new trial.—**The state shall in no case be entitled to a new trial. [Added in revising.]

See, *ante*, §2537.

**§2751—ART. 939.—Notice of appeal.—**When a defendant appeals from a judgment in a criminal action he shall give notice of such appeal in open court, and the justice shall enter such notice upon his docket. [Added in revising.]

See, *ante*, §§2643, 2644

**§2752—ART. 940.—Effect of appeal.—**When a defendant gives notice of an appeal and files the appeal-bond required by law with the justice, all further proceeding in the case in the justice's court shall cease. [Added in revising.]

See, *ante*, §§2645, 2651 to 2653. If the justice's court has no jurisdiction of the case, an appeal confers none upon the county court. *Billingsly v. S.* 3 App. 686.

**§2753—ART. 941.—Judgments, etc., shall be in open court.—**All judgments and final orders of a justice of the peace in a criminal action, shall



be rendered in open court and entered upon his docket. [Act Aug. 17, 1876, p. 162, §17.]

See, *ante*, §§1431, 1433, 1471.

## CH. 4.—OF THE JUDGMENT AND EXECUTION.

ART.	SEC.	ART.	SEC.
942. The judgment.	2754	945. Defendant may be discharged from jail, how.	2757
943. <i>Capias</i> for defendant, when.	2755	946. Peace officer bound to execute process.	2758
944. Execution shall issue.	2756		

§2754—ART. 942.—**The judgment.**—The judgment, in case of conviction in a criminal action before a justice of the peace, shall be that the State of Texas recover of the defendant the fine assessed and costs, and that the defendant remain in custody of the sheriff until the fine and costs are paid; and further, that execution issue to collect the same. [O. C. 845.]

See Willson's Cr. Forms, 826, 827, 828.

§2755—ART. 943.—**Capias for defendant, when.**—If the defendant be not in custody when judgment is rendered, or if he escapes from custody thereafter, a *capias* shall issue for his arrest and confinement in jail until the fine and costs are paid, or he is legally discharged. [Added in revising.]

See Willson's Cr. Forms 589.

§2756—ART. 944.—**Execution shall issue.**—In every case of conviction before a justice, and from which conviction no appeal is taken, there shall be issued an execution for the collection of the fine and costs, which shall be enforced and returned in the manner prescribed by law in civil actions before justices. [O. C. 849.]

§2757—ART. 945.—**Defendant may be discharged from jail, how.**—If a defendant be placed in jail, on account of failing to pay the fine and costs, he can be discharged on *habeas corpus* by showing—

1. That he is too poor to pay the fine and costs.
2. That he has not been afforded the opportunity by the commissioners' court of the county of discharging the fine and costs adjudged against him, as provided in the law relating to county convicts; and further—
3. That he has remained in jail a sufficient length of time to satisfy the fine and costs at the rate of three dollars for each day.

But the defendant shall in no case, under this article, be discharged until he has been imprisoned at least ten days; and a justice of the peace may discharge the defendant upon his showing the same cause, by written application, presented to such justice, and upon such application being granted the justice shall note the same on his docket. [Added in revising.]

See, *ante*, §2608.

§2758—ART. 946.—**Peace officer bound to execute process.**—Every peace officer is bound to execute all process directed to him from a justice of the peace. [O. C. 850.]

See, *ante*, §§331, 332, 1498, 1500, 1503.

## TITLE 12.—MISCELLANEOUS PROCEEDINGS.

**CH.**

1. OF INQUIRIES AS TO THE INSANITY OF THE DEFENDANT AFTER CONVICTION.
2. DISPOSITION OF STOLEN PROPERTY.
3. REPORTS OF OFFICERS CHARGED BY LAW WITH THE COLLECTION OF MONEY.

**CH.**

4. OF REMITTING FINES AND FORFEITURES, REPRIEVES, COMMUTATIONS OF PUNISHMENT AND PARDONS.

### CH. 1.—OF INQUIRIES AS TO THE INSANITY OF THE DEFENDANT AFTER CONVICTION.

ART.	SEC.	ART.	SEC.
947. Insanity after conviction.	2759	954. Court shall commit insane defendant, etc.	2766
948. Information as to insanity of defendant.	2760	955. Shall be confined in lunatic asylum, until, etc.	2767
949. Court shall impanel jury to try question of.	2761	956. When the defendant becomes sane.	2768
950. Defendant's counsel may open and conclude.	2762	957. Affidavit of sanity of defendant.	2769
951. Court shall appoint counsel, when.	2763	958. Proceedings upon affidavit.	2770
952. No special formality required on trial.	2764	959. When defendant is again found to be insane.	2771
953. When defendant is found insane, further proceedings suspended, until, etc.	2765	960. Conviction shall be enforced, when. Decisions under preceding chapter.	2772 2773

2759—ART. 947.—**Insanity after conviction.**—If it be made known to the court at any time after conviction, or if the court has good reason to believe that a defendant is insane, a jury shall be impanelled to try the issue. [O. C. 781.]

§2760—ART. 948.—**Information as to insanity of defendant.**—Information to the court as to the insanity of a defendant may be given by the written affidavit of any respectable person, setting forth that there is good reason to believe that the defendant has become insane. [O. C. 782.]

§2761—ART. 949.—**Court shall impanel jury.**—For the purpose of trying the question of insanity the court shall impanel a jury as in the case of a criminal action. [O. C. 783.]

§2762—ART. 950.—**Defendant's counsel may open, etc.**—The counsel for the defendant has the right to open and conclude the argument upon the trial of an issue as to insanity. [O. C. 786.]

§2763—ART. 951.—**Court shall appoint counsel, when.**—If the defendant has no counsel the court shall appoint counsel to conduct the trial for him. [O. C. 787.]

§2764—ART. 952.—**No special formality required on trial.**—No special formality is necessary in conducting the proceedings authorized by this chapter. The court shall see that the inquiry is conducted in such a manner as to lead to a satisfactory conclusion. [O. C. 784.]

§2765—ART. 953.—**When defendant is found insane.**—When, upon the trial of an issue of insanity, the defendant is found to be insane, all further proceedings in the case against him shall be suspended until he becomes sane. [O. C. 788, 789.]

§2766—ART. 954.—**Court shall commit insane defendant, etc.**—When a defendant is found to be insane the court shall make an order, and have the same entered upon the minutes, committing the defendant to the

custody of the sheriff, to be kept subject to the further order of the county judge of the county. [O. C. 793.]

§2767—ART. 955.—**Shall be confined in lunatic asylum, until, etc.**—When a defendant has been committed, as provided in the preceding article, the proceedings shall forthwith be certified to the county judge, who shall take the necessary steps, at once, to have the defendant confined in the lunatic asylum, as provided in the case of other lunatics, until he becomes sane. [Added in revising.]

§2768—ART. 956.—**When the defendant becomes sane.**—Should the defendant become sane, he shall be brought before the court in which he was convicted, and a jury shall again be impanelled to try the issue of his sanity, and should he be found to be sane, the conviction shall be enforced against him in the same manner as if the proceedings had never been suspended. [Added in revising.]

§2769—ART. 957.—**Affidavit of sanity of defendant.**—The fact that the defendant has become sane may be made known to the court in which the conviction was had by the official certificate, in writing, of the superintendent of the lunatic asylum where he is confined, or, if not confined in the lunatic asylum, by the affidavit, in writing, of any credible person. [Added in revising.]

§2770—ART. 958.—**Proceedings upon affidavit.**—When a certificate, or affidavit, such as is provided for in the preceding article, is presented to the judge, or court, either in vacation or in term time, such judge, or court, shall issue a writ, directed to the officer having the custody of such defendant, commanding such officer to bring the defendant before the court immediately, if the court be then in session, and if the court be not then in session, to bring the defendant before the court at its next regular term for the county in which the conviction was had, which writ shall be served and returned as in case of the writ of *habeas corpus*, and under like penalties for disobedience. [Added in revising.]

§2771—ART. 959.—**When defendant is again insane.**—Should the defendant again be found to be insane, he shall be remanded to the custody of the superintendent of the lunatic asylum, or other proper officer. [Added in revising.]

§2772—ART. 960.—**Conviction shall be enforced, when.**—When, upon the trial of an issue of insanity, it is found that the defendant is sane, the judgment of conviction shall be enforced as if no such inquiry had been made. [O. C. 791.]

§2773—**Decisions under preceding chapter.**—The provisions of the preceding chapter relate to insanity *after* conviction. *Guagando v. S.* 41 Tex. 626. The effect of the preceding article, 960, is to make the judgment of the trial court, adjudging the defendant to be sane, conclusive of that issue, and an appeal does not lie from such judgment. An appeal can be taken only from a judgment of conviction, and a judgment declaring the defendant to be sane is not a judgment of conviction. *Darnell v. S.* 24 App. 6; see further, as to Insanity, §§80-91.

## CH. 2.—DISPOSITION OF STOLEN PROPERTY.

ART.	SEC.	ART.	SEC.
961. Subject to order of proper court.	2774	969. Owner may recover proceeds of property sold, or money, etc.	2783
962. Restored on trial for theft to proper owner.	2775	970. When the property is a written instrument.	2783
963. Schedule of, to be filed by officer.	2776	971. Proceedings to recover written instrument.	2784
964. May be restored to owner, etc., when.	2777	972. Claimant shall pay charges on property.	2785
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§2774—ART. 961.—Subject to order of proper court.—When any property alleged to have been stolen comes into the custody of an officer, he must hold it subject to the order of the proper court or magistrate. [O. C. 794.]

See "SEARCH WARRANTS."

§2775—ART. 962.—Restored on trial for theft to proper owner.—Upon the trial of any criminal action for theft, or for any other illegal acquisition of property, which is by law a penal offense, the court before whom the trial takes place shall order the property to be restored to the person appearing by the proof to be the owner of the same. [O. C. 795.]

See Willson's Cr. Forms, 903.

§2776—ART. 963.—Schedule of, to be filed by officer.—When an officer seizes property alleged to have been stolen, it is his duty immediately to file a schedule of the same, and its value, with the magistrate or court having jurisdiction of the case, certifying that the property has been seized by him, and the reason therefor. [O. C. 796.]

See Willson's Cr. Forms, 900.

§2777—ART. 964.—May be restored to owner, etc., when.—Upon examination of a criminal accusation before a magistrate, if it is proved to the satisfaction of such magistrate that any person is the true owner of property alleged to have been stolen, and which is in the possession of a peace officer, he may, by written order, direct the property to be restored to such owner. [O. C. 797.]

See Willson's Cr. Forms, 904.

§2778—ART. 965.—When delivered, bond may be required.—If the magistrate have any doubt as to the ownership of the property, he may require of the person claiming to be the owner a bond, with security, for the re-delivery of the same in case the property should thereafter be shown not to belong to such claimant; or he may, in his discretion, direct the property to be retained by the sheriff until further orders respecting the possession thereof. [O. C. 798.]

See Willson's Cr. Forms, 905.

§2779—ART. 966.—Requisites of the bond, etc.—The bond provided for in the preceding article shall be made payable to the county judge of the county in which the property is in custody, and shall be in a sum equal to the value of the property, with good and sufficient security, to be approved by such county judge. Such bond shall be filed in the office of the clerk of the county court of such county; and, in case of a breach thereof, may be sued upon in such county before any court having jurisdiction of the amount thereof by any claimant of the property, or by the county treasurer of such county. [Added in revising.]

See Willson's Cr. Forms, 906.

§2780—ART. 967.—**Property shall be sold, when and how.**—If the property be not claimed within six months from the conviction of the person accused of illegally acquiring it, the same shall be by the sheriff sold for cash, after advertising for ten days, as under execution; and the proceeds of such sale, after deducting therefrom all expenses of keeping such property, and costs of sale, shall be paid into the treasury of the county where the defendant was convicted. [O. C. 800.]

§2781—ART. 968.—**Money—How disposed of.**—If the property stolen consist of money, the same shall be paid into the county treasury, if not claimed by the proper owner within six months. [O. C. 802.]

§2782—ART. 969.—**Owner may recover proceeds of property sold, or money, etc.**—The real owner of the property or money disposed of, as provided in the two preceding articles, shall have twelve months within which to present his claim to the commissioners' court of the county for the money paid to the county treasurer of such county; and if his claim be denied by such court he may sue the county treasurer in any court of such county having jurisdiction of the amount, and upon sufficient proof recover judgment therefor against such county. [O. C. 803.]

§2783—ART. 970.—**When the property is a written instrument.**—If the property be a written instrument the same shall be deposited with the clerk of the county court of the county where the proceedings are had, subject to the claim of any person who may establish his right thereto. [O. C. 804.]

§2784—ART. 971.—**Proceedings to recover written instrument.**—The claimant of any such written instrument shall file his claim thereto, in writing, and under oath before the county judge; and if such judge be satisfied that such claimant is the real owner of the written instrument, the same shall be delivered to him. The county judge may, in his discretion, require a bond of such claimant as in other cases of property claimed under the provisions of this chapter, and may also require the written instrument to be recorded in the minutes of his court before delivering it to the claimant. [O. C. 804.]

§2785—ART. 972.—**Claimant shall pay charges on property.**—The claimant of property, before he shall be entitled to have the same delivered to him, shall pay all reasonable charges for the safe keeping of the same while in the custody of the law, which charges shall be verified by the affidavit of the officer claiming the same, and determined by the magistrate or court having jurisdiction thereof; and in case said charges are not paid the property shall be sold as under execution, and the proceeds of sale, after the payment of such charges and costs of sale, paid to the owner of such property. [Added in revising.]

§2786—ART. 973.—**Charges of officer where property is sold.**—When property is sold and the proceeds of sale are ready to be paid into the county treasury, the amount of expenses for keeping the same and the costs of sale shall be determined by the county judge, and the account thereof shall be in writing and verified by the officer claiming the same, with the approval of the county judge thereto for the amount allowed; and the same shall be filed in the office of the county treasurer at the time of paying into his hands the balance of the proceeds of such sale. [Added in revising.]

§2787—ART. 974.—**Provisions of this chapter apply to what cases.**—All the provisions of this chapter relating to stolen property apply as well to property acquired in any manner which makes the acquisition a penal offense. [O. C. 805.]

CH. 3.—REPORTS OF OFFICERS CHARGED BY LAW WITH THE COLLECTION OF MONEY.

ART.	SEC.	ART.	SEC.
975. Report of moneys collected shall be made, etc.	2788	978. What officers shall make report.	2791
976. What the report shall state.	2789	979. Report to embrace all moneys, except taxes.	2792
977. Report of moneys collected for county.	2790	980. Money collected shall be paid to county treasurer.	2793

§2788—ART. 975.—**Report of moneys collected shall be made, etc.**—All officers charged by law with collecting moneys in the name or for the use of the state shall report in writing, under oath, to the respective district courts of their several counties, on the first day of each term, the amounts of money that may have come to their hands since the last term of their respective courts aforesaid. [Act May 1, 1874, p. 182, §2.]

See, *ante*, §389.

§2789—ART. 976.—**What the report shall state.**—The report required by the preceding article shall state:

1. The amounts collected.
2. When and from whom collected.
3. By virtue of what process collected.
4. The disposition that has been made of the money

5. If no money has been collected the report shall state that fact. [Act May 1, 1874, p. 182, §2.]

See Willson's Cr. Forms, 920, 921, 922.

§2790—ART. 977.—**Report of moneys collected for county.**—A report, such as is required by the two preceding articles, shall also be made of all money collected for the county, which report shall be made to each regular term of the commissioners' court for each county. [Act May 1, 1874, p. 182, §3.]

See, *ante*, §390.

§2791—ART. 978.—**What officers shall make report.**—The following officers are the officers charged by law with the collection of money within the meaning of the three preceding articles, and who are required to make the reports therein mentioned, viz: district and county attorneys, clerks of the district and county courts, sheriffs, constables, justices of the peace, mayors, recorders and marshals of incorporated cities or towns. [Act May 1, 1874, p. 182, §1.]

See, *ante*, §§389, 390, 393.

§2792—ART. 979.—**Report to embrace all moneys, except taxes.**—The moneys required to be reported embrace all moneys collected for the state or county other than taxes, but taxes are not included. [Act May 1, 1874, p. 182, §2.]

§2793—ART. 980.—**Money collected shall be paid to county treasurer.**—Money collected by an officer upon recognizances, bail-bonds and other obligations recovered upon in the name of the state under the provisions of this Code, and all fines, forfeitures, judgments and jury fees collected under any of the provisions of this Code, shall be forthwith paid over by the officers collecting the same to the county treasurer of the proper county, after first deducting therefrom the legal fees and commissions for collecting the same. [O. C. 806.]

See Title 4, Chap. 3, of Penal Code.

CH. 4.—OF REMITTING FINES AND FORFEITURES, REPRIEVES, COMMUTATIONS OF PUNISHMENT AND PARDONS.

ART.	SEC.	ART.	SEC.
981. Governor may remit fines, etc.	2794	985. May commute penalty of death, etc.	2798
982. May remit forfeitures.	2795	986. May delay execution of death penalty.	2799
983. Shall file reasons for his action in office of secretary of state.	2796	987. Governor's acts shall be under great seal of the state, etc.	2800
984. May pardon treason, when.	2797		

§2794—ART. 981.—**Governor may remit fines, etc.**—In all criminal actions, except treason and impeachment, the governor shall have power, after conviction, to remit fines, grant reprieves, commutations of punishment and pardons. [O. C. 809; Const. Art. 4, §11.]

The governor may remit a forfeiture at any time after final judgment, and a general remission includes the commissions of the prosecuting attorney. *S. v. Dyches*, 28 Tex. 535. But the costs cannot be remitted without consent of the parties to whom the same are due. The court has no authority to remit a penalty. *Luckey v. S.* 14 Tex. 400. A pardon obtained after affirmance of judgment on appeal, and before mandate issues, may be filed in the court of appeals, and, on application, the judgment will be made to conform to it. *Chamblless v. S.* 20 Tex. 197.

§2795—ART. 982.—**May remit forfeitures.**—The governor shall have power to remit forfeitures of recognizances and bail-bonds. [O. C. 809; Const. Art. 4, §11.]

§2796—ART. 983.—**Shall file reasons for his action.**—In all cases in which the governor remits fines or forfeitures, or grants reprieves, commutation of punishment or pardons, he shall file in the office of the secretary of state his reasons therefor. [O. C. 809; Const. Art. 4, §11.]

§2797—ART. 984.—**May pardon treason, when.**—With the advice and consent of the senate the governor may grant pardons in cases of treason, and to this end he may respite a sentence therefor until the close of the succeeding session of the legislature. [Const. Art. 4, §11; added in revising.]

§2798—ART. 985.—**May commute penalty of death, etc.**—The governor shall have authority to commute the punishment in every case of capital felony, except treason, by changing the penalty of death into that of imprisonment for life, or for a term of years, either with or without hard labor, which may be done by his warrant to the proper officer, commanding him not to execute the penalty of death, and directing him to convey the prisoner to the penitentiary, stating therein the time for which and the manner in which the prisoner is to be confined, which warrant shall be sufficient authority to the sheriff to deliver, and to the proper officers of the penitentiary to receive and imprison such prisoner. [O. C. 811.]

§2799—ART. 986.—**May delay execution of death penalty.**—The governor may also reprieve and delay the execution of the penalty of death to any day fixed by him in a warrant to the sheriff, and such warrant shall be executed and returned to the proper court by the sheriff in the same manner as if it had been issued from such court. [O. C. 812.]

§2800—ART. 987.—**Governor's acts shall be under great seal of the state, etc.**—All remissions of fines and forfeitures, and all reprieves, commutations of punishment and pardons, shall be signed by the governor and certified by the secretary of state, under the great seal of state, and shall be forthwith obeyed by any officer to whom the same may be presented. [Added in revising.]

## TITLE 13.—OF INQUESTS.

CH.

1. INQUESTS UPON DEAD BODIES.

CH.

2. FIRE INQUESTS.

## CH. 1.—INQUESTS UPON DEAD BODIES.

ART.	SEC.	ART.	SEC.
988. Inquests shall be held, by whom and in what cases.	2801	1005. Warrant shall be sufficient if, etc.	2814
989. Body may be disinterred.	2802	1006. If the justice find that a person killed the deceased.	2815
990. Upon what information justice may act.	2803	1007. Bail-bond shall be sufficient if, etc.	2816
991. Duty of sheriff, etc.	2804	1008. Warrant of arrest, when.	2817
992-996. Repealed articles.	2805	1009. Requisites of warrant.	2818
997. Justice shall issue <i>subpoenas</i> .	2806	1010. Peace officer shall execute warrant.	2819
998. Testimony of witnesses to be reduced to writing, etc.	2807	1011. Accused may be arrested, etc., pending inquest.	2820
999. Inquest may be held in private.	2808	1012. Justice shall certify proceedings to district court.	2821
1000. Proceedings shall not be interfered with.	2809	1013. Shall preserve all evidence.	2822
1001. Repealed article.	2810	1014. Witness may be required to give bail.	2823
1002. Justice shall keep a minute book, wherein he shall set forth, etc.	2811	Inquest proceedings — Competent evidence.	2824
1003. Where the killing was the act of any person.	2812		
1004. Peace officer shall execute warrant of arrest.	2813		

§2801—ART. 988.—Held by whom, and in what cases.—Any justice of the peace shall be authorized, and it shall be his duty, to hold inquests within his county in the following cases; *provided*, that all inquests shall be held by the justice of the peace without a jury:

1. When a person dies in prison.
2. When any person is killed, or from any cause dies an unnatural death, except under sentence of the law or in the absence of one or more good witnesses.
3. When the body of any human being is found and the circumstances of his death are unknown.
4. When the circumstances of the death of any person are such as to lead to suspicion that he has come to his death by unlawful means. [O. C. 851; amended by Act March 17, 1887, p. 31.]

§2802—ART. 989.—Body may be disinterred.—When a body upon which inquest ought to have been held has been interred, the justice of the peace may cause it to be disinterred for the purpose of holding such inquest. [O. C. 852.]

§2803—ART. 990.—Upon what information justice may act.—The justice of the peace shall act in such cases upon verbal or written information given him by any credible person, or upon facts within his own knowledge. [O. C. 853.]

§2804—ART. 991.—Duty of sheriff, etc.—It is the duty of the sheriff, and of every keeper of any prison, to inform the justice of the peace of the death of any person confined therein. [O. C. 854.]

§2805—Repealed articles.—The following articles of the Old Code of Criminal Procedure were repealed by the Act of March 17, 1887, p. 31, viz:—

ART. 992. The justice of the peace may summon a jury of inquest himself, or may direct an order to any peace officer for that purpose.

ART. 993. A jury of inquest shall consist of six men, citizens of the proper county, freeholders, householders and qualified electors.



ART. 994. A person summoned as a juror in such cases who ~~refuses~~ to obey the summons may be fined by the justice of the peace not exceeding ten dollars.

ART. 995. The justice of the peace shall, as soon as a jury is summoned, proceed with them to the place where the dead body may be, for the purpose of inquiring into the cause of the death.

ART. 996. The following oath shall be, by the justice of the peace, administered to the jury: "You swear that you will diligently inquire into the cause, manner, time and circumstances of the death of the person whose body lies before you, and that you will thereupon make presentment of the truth, the whole truth and nothing but the truth, so help you God."

§2806—ART. 997.—**Justice shall issue subpoenas.**—The justice of the peace shall have power to issue *subpoenas* to enforce the attendance of witnesses upon an inquest; and, in case of disobedience or failure to attend, may issue attachments for such witnesses. [O. C. 860.]

See Willson's Cr. Forms, 909, 910.

§2807—ART. 998.—**Testimony of witnesses to be reduced to writing, etc.**—Witnesses shall be sworn and examined by the justice, and the testimony of each witness shall be reduced to writing by the justice, or under his direction, and subscribed by the witness. [O. C. 861.]

See Willson's Cr. Forms, 911; *post*, §2821.

§2808—ART. 999.—**Inquest may be held in private.**—Should the justice deem proper, the inquest may be held in private; but in all cases where a person has been arrested, charged with having caused the death of the deceased, such person and his counsel shall have the right to be present at the inquest, and to examine witnesses and introduce evidence before the jury. [O. C. 862.]

There being now no jury in such cases, the words "before the jury" in the preceding article should have been stricken out.

§2809—ART. 1000.—**Proceedings shall not be interfered with.**—If any other persons than the justice, and the accused and his counsel, and counsel for the state, are present at the inquest, they shall not interfere with the proceedings, and no question shall be asked a witness except by the justice, the accused or his counsel, and the counsel for the state, and the justice of the peace may fine any person violating this article for contempt of court, not exceeding twenty dollars, and may cause such person to be placed in custody of a peace officer and removed from the presence of the inquest. [O. C. 862.]

Amended by Act Feb. 16, 1883, p. 12; again amended by Act March 17, 1887, p. 32.

§2810—**Repealed article.**—The following article was repealed by the Act of March 17, 1887, p. 31, viz:

ART. 1001. After having examined into the cause, time, manner and place of the death of the deceased, the jury shall form their verdict, setting forth distinctly the facts relating thereto, which they find to be true, which verdict shall not be valid unless signed by the justice of the peace and each of the jurors.

§2811—ART. 1002.—**Justice shall keep a minute book, wherein he shall set forth, etc.**—The justice of the peace shall keep a book in which he shall make a minute of all the proceedings relating to every inquest held by him. Such minute shall set forth:

1. The nature of the information given the justice of the peace and by whom given, unless he acts upon facts within his own knowledge.
2. The time and place, when and where, the inquest is held.
3. The name of the deceased, if known, or if not known as accurate a description of him as can be given.
4. The finding by the justice at the inquest.

5. If any arrest is made of a suspected person before inquest held, the name of the person and the fact of his arrest, as well as everything material which relates thereto, shall be noted. [O. C. 864; amended by Act March 17, 1887, p. 32.]

§2812—ART. 1003.—**Where the killing was the act of any person.**—When the justice has knowledge that the killing was the act of any person, or when an affidavit is made that there is reason to believe that such person has killed the deceased, a warrant may be issued for the arrest of the person accused, before inquest held, and the accused and his counsel shall have the right to be present when the same is held, and to examine the witnesses and introduce evidence before the jury. [Added in revising.]

§2813—ART. 1004.—**Peace officer shall execute warrant of arrest.**—Any peace officer to whose hands the justice's warrant of arrest shall come is bound to execute the same without delay; and he shall detain the person arrested until his discharge is ordered by the justice or other proper authority. [Added in revising.]

§2814—ART. 1005.—**Warrant shall be sufficient, if, etc.**—A warrant of arrest in such cases shall be sufficient if it issues in the name of "The State of Texas," recites the name of the accused, or describes him when his name is unknown, sets forth the offense charged in plain language and is signed officially by the justice. [Added in revising.]

§2815—ART. 1006.—**If the justice find that a person killed the deceased.**—If it be found by the justice of the peace, upon evidence adduced at the inquest, that a person already arrested did in fact kill the deceased, or was an accomplice or accessory to the death, the justice may, according to the facts of the case, commit him to jail or require him to execute a bail-bond with security for his appearance before the proper court to answer for the offense. [Added in revising, and amended by Act 17 March, 1887, p. 32.]

§2816—ART. 1007.—**Bail-bond shall be sufficient, if, etc.**—A bail-bond taken before a justice shall be sufficient if it recite the offense of which the party is accused, be payable to the State of Texas, be dated and signed by the principal and his surety; and such bond may be forfeited, and judgment recovered thereon, and the same collected as in the case of any other bail-bond. [Added in revising.]

See Willson's Cr. Forms, 594, 539.

§2817—ART. 1008.—**Warrant of arrest, when.**—When by the evidence adduced before a justice of the peace holding an inquest, it is found that any person not in custody killed the deceased, or was an accomplice or accessory to the death, the justice shall forthwith issue his warrant of arrest to the sheriff or other peace officer commanding him to arrest the person accused, and bring him before such justice, or before some other magistrate named in the writ. [O. C. 872; amended by Act March 17, 1887, p. 32.]

§2818—ART. 1009.—**Requisites of warrant.**—The warrant mentioned in the preceding article shall be sufficient if it run in the name of the State of Texas, give the name of the accused or describe him when his name is unknown, recite the offense with which he is charged, in plain language, and be dated and signed officially by the justice. [O. C. 873.]

See Willson's Cr. Forms, 816.

§2819—ART. 1010.—**Peace officer shall execute warrant.**—The peace officer into whose hands such warrant may come shall forthwith execute the same by arresting the defendant and taking him before the magistrate named in the warrant; and the magistrate shall proceed to examine the accusation, and the same proceedings shall be had thereon as in other cases where persons accused of offenses are brought before him. [O. C. 874.]

See, ante, §1760 et seq.

§2820—ART. 1011.—**Accused may be arrested, etc., pending inquest.**—Nothing contained in this title shall prevent proceedings from being had for the arrest and examination of an accused person before a magistrate pending the holding of an inquest. But when a person accused of an offense has been already arrested under a warrant from the justice he shall not be taken from the hands of the peace officer by a warrant from any other magistrate. [O. C. 877.]

§2821—ART. 1012.—**Justice shall certify proceedings to district court.**—When an inquest has been held the justice before whom the same was held shall certify to the proceedings, and shall enclose in an envelope the testimony taken, the finding of the justice, the bail-bonds if any, and all other papers connected with the inquest, and shall seal up such envelope and deliver it, properly indorsed, to the clerk of the district court without delay, who shall safely keep the same in his office subject to the order of the court. [O. C. 870; amended by Act March 17, 1887, p. 32.]

See Willson's Cr. Forms, 911.

§2822—ART. 1013.—**Shall preserve all evidence.**—It shall also be the duty of the justice to carefully preserve all evidence whatsoever that may come to his knowledge and possession which might, in his opinion, tend to show the real cause of the death, or the person, if any one, who caused such death, and shall deliver all such evidence to the clerk of the district court, who shall keep the same safely, subject to the order of the court. [Added in revising.]

§2823—ART. 1014.—**Witnesses may be required to give bail.**—The justice may, should he deem it proper, require bail of witnesses examined before the inquest to appear and testify before the next grand jury, or before an examining or other proper court as in other cases. [Added in revising.]

See Willson's Cr. Forms, 597, 840.

§2824—**Inquest proceedings—Competent evidence.**—See §§2534, 2535, as to testimony taken before an inquest. Under the statute providing for a jury in inquest cases, the verdict of the jury was held competent evidence on the trial of a person accused of the homicide, not as positive proof of what it contained, but simply as the opinion of the jury. *Ballew v. S.* 36 Tex. 98.

## CH. 2.—FIRE INQUESTS.

ART.	SEC.	ART.	SEC.
1015. Investigation shall be had upon complaint, etc.	2825	1019. Warrant shall issue for person charged, when.	2829
1016. Proceedings in such case.	2826	1020. Testimony of witnesses shall be reduced to writing, etc.	2830
1017. Verdict of jury.	2827	1021. Compensation of officers, etc.	2831
1018. Witnesses shall be bound over, when.	2828		

**§2825—ART. 1015.—Investigation shall be had upon complaint, etc.**—Whenever complaint in writing, under oath, is made by any credible person before any justice of the peace, that there is ground to believe that any building has been unlawfully set on fire or attempted to be set on fire, such justice of the peace shall, without delay, cause the truth of such complaint to be investigated. [Act June 2, 1873, p. 171, §1.]

See Willson's Cr. Forms, 913.

**§2826—ART. 1016.—Proceedings in such case.**—The proceedings in such case shall be governed by the same rules as are provided in the preceding chapter of this title concerning inquests upon dead bodies, and the officer conducting such investigation shall have the same powers as are conferred upon justices of the peace in the preceding chapter. [Act June 2, 1873, p. 171, §2.]

In proceedings under this chapter a jury has not been dispensed with, as in the case of inquests upon dead bodies, and the provisions of the preceding chapter relating to a jury, are still in force, and applicable in cases arising under this chapter, unless the repeal thereof, by the Act of March 17, 1887, p. 31, should be held to apply also to fire inquests.

**§2827—ART. 1017.—Verdict of jury.**—The jury after inspecting the place where the fire was, or was attempted, and after hearing the testimony, shall deliver to the justice of the peace holding such inquest their verdict in writing, signed by them, in which they shall find and certify how and in what manner such fire happened or was attempted, and all the circumstances attending the same, and who were guilty thereof, either as principal or accessory, and in what manner. But if such jury be unable to ascertain the origin and circumstances of such fire they shall find and certify accordingly. [Act June 2, 1873, p. 171, §3.]

**§2828—ART. 1018.—Witnesses shall be bound over, when.**—If the jury find that any building has been unlawfully set on fire, or has been attempted so to be, the justice of the peace holding such inquest shall bind over the witnesses to appear and testify before the next grand jury of the county in which such offense was committed. [Act June 2, 1873, p. 171, §4.]

See Willson's Cr. Forms, 597-840.

**§2829—ART. 1019.—Warrant shall issue for person charged, when.**—If the person charged with the offense, if there be any person so charged, be not in custody, the justice of the peace shall issue a warrant for his arrest, and when arrested such person shall be dealt with as in other like cases. [Act June 2, 1873, p. 171, §4.]

See Willson's Cr. Forms, 816.

**§2830—ART. 1020.—Testimony of witnesses shall be reduced to writing, etc.**—In all investigations had under this chapter the testimony of all witnesses examined before the jury shall be reduced to writing by the justice of the peace, or under his direction, and signed by the witnesses, and such testimony, together with the verdict of the jury and all bail-bonds taken in the case, shall be certified to and returned by the justice of the peace to the next district or criminal court of his county. [Act June 2, 1873, p. 171, §6.]

See Willson's Cr. Forms, 911.

**§2831—ART. 1021.—Compensation of officers, etc.**—The compensation of the officers and jury making the investigation provided for in this chapter shall be the same as that allowed for holding an inquest upon a dead body, so far as applicable, and shall be paid in the same manner. [Act June 2, 1873, p. 171, §5.]

See, *post*, Arts. 1077-1080. as to Fees.

## TITLE. 14.—OF FUGITIVES FROM JUSTICE.

ART.	SEC.	ART.	SEC.
1022. Fugitive from justice delivered up, when.	2832	1031. Shall also notify district or county attorney, who shall notify, etc.	2841
1023. Judicial and peace officers shall aid in the arrest of.	2833	1032. Secretary of state shall communicate information, etc.	2842
1024. Magistrate shall issue warrant for arrest of fugitive, when.	2834	1033. Accused shall be discharged, when.	2843
1025. Complaint shall be sufficient, if it recites, etc.	2835	1034. Shall not be arrested a second time, except, etc.	2844
1026. Warrant of arrest from magistrate shall direct, what.	2836	1035. Governor of the state can demand fugitive from justice, how.	2845
1027. Shall require bail or commit accused, when.	2837	1036. Reasonable pay to person commissioned, etc.	2846
1028. Certified transcript of indictment, evidence.	2838	1037. Governor may offer a reward, when.	2847
1029. Person arrested shall not be committed, or, etc.	2839	1038. Shall be published, how.	2848
1030. Magistrate shall notify secretary of state, etc.	2840	1039. Reward shall be paid by state. Decisions as to fugitives from justice.	2849 2850

## §2832—ART. 1022.—Fugitive from justice delivered up, when.—

A person charged in any other state or territory of the United States with treason, felony or other crime, who shall flee from justice and be found in this state, shall, on demand of the executive authority of the state or territory from which he fled, be delivered up, to be removed to the state or territory having jurisdiction of the crime. [O. C. 878.]

§2833—ART. 1023.—Judicial and peace officers shall aid in the arrest of.—It is declared to be the duty of all judicial and peace officers of the state to give aid in the arrest and detention of a fugitive from any other state or territory, that he may be held subject to a requisition by the governor of the state or territory from which he may have escaped. [O. C. 879.]

§2834—ART. 1024.—Magistrate shall issue warrant for arrest of fugitive, when.—Whenever complaint on oath is made to a magistrate that any person within his jurisdiction is a fugitive from justice from another state or territory, it is his duty to issue a warrant of arrest for the apprehension of the person accused. [O. C. 882.]

§2835—ART. 1025.—Complaint shall be sufficient, if it recite, etc.—The complaint shall be sufficient if it recite:

1. The name of the person accused.
2. The state or territory from which he has fled.
3. The offense committed by the accused.
4. That he has fled to this state from the state or territory where the offense was committed.

5. That the act alleged to have been committed by the accused is a violation of the penal law of the state or territory from which he fled. [O. C. 883.]

See Willson's Cr. Forms, 915.

§2836—ART. 1026.—Warrant of arrest from magistrate.—The warrant of a magistrate to arrest a fugitive from justice shall direct a peace officer to apprehend the person accused and bring him before such magistrate. [Added in revising.]

See Willson's Cr. Forms, 916.

§2837—ART. 1027.—Shall require bail or commit accused, when.—When the person accused is brought before the magistrate he shall hear proof, and if satisfied that the defendant is charged in another state or territory with the offense named in the complaint he shall require of him bail,

with good and sufficient security, in such amount as such magistrate may deem reasonable, to appear before such magistrate at a specified time, and in default of such bail he may commit the defendant to jail to await a requisition from the governor of the state or territory from which he fled. [O. C. 885.]

See Willson's Cr. Forms, 917, 918.

§2838—ART. 1028.—**Certified transcript of indictment, evidence.**—A properly certified transcript of an indictment against the accused shall be evidence to show that he is charged with the crime alleged. [O. C. 886.]

§2839—ART. 1029.—**Person arrested shall not be committed, or, etc.**—A person arrested under the provisions of this title shall not be committed or held to bail for a longer time than ninety days. [O. C. 887.]

§2840—ART. 1030.—**Magistrate shall notify secretary of state, etc.**—The magistrate by whose authority a fugitive from justice has been held to bail or committed, shall immediately notify the secretary of state of the fact, stating in such notice the name of such fugitive, the state or territory from which he is a fugitive, the crime with which he is charged and the date when he was committed or held to bail. Such notice may be forwarded either through the mail or by telegraph. [O. C. 888.]

See Willson's Cr. Forms, 919.

§2841—ART. 1031.—**Shall also notify district or county attorney, who shall notify, etc.**—The magistrate shall also immediately notify the district or county attorney of his county of the facts of the case, who shall forthwith give notice of such facts to the executive authority of the state or territory from which the accused is charged to have fled. [Added in revising.]

See Willson's Cr. Forms, 919.

§2842—ART. 1032.—**Secretary of state shall communicate information, etc.**—The secretary of state upon receiving information, as provided in article 1030, shall forthwith communicate such information by telegraph, when practicable, or, if not practicable, by mail, to the executive authority of the proper state or territory. [Added in revising.]

§2843—ART. 1033.—**Accused shall be discharged, when.**—If the accused is not arrested under a warrant from the governor of this state before the expiration of ninety days from the day of his commitment or the date of his bail-bond, he shall be discharged. [O. C. 889.]

§2844—ART. 1034.—**Shall not be arrested a second time, except, etc.**—A person who shall have been once arrested under the provisions of this title, and discharged under the provisions of the preceding article, or by *habeas corpus*, shall not be again arrested upon a charge of the same offense, except by a warrant from the governor of this state. [O. C. 890.]

§2845—ART. 1035.—**Governor of this state can demand fugitive from justice, how.**—Whenever the governor of this state may think proper to demand a person who has committed an offense in this state, and has fled to another state or territory, he may commission any suitable person to take such requisition; and the accused person, if brought back to the state, shall be delivered up to the sheriff of the county in which it is alleged he has committed the offense. [O. C. 881.]

§2846—ART. 1036.—**Reasonable pay to person commissioned, etc.**—The person commissioned by the governor to bear a requisition for a fugitive from justice to another state or territory, shall be paid out of the state treasury a reasonable compensation for his services, to be paid upon the

certificate of the governor specifying the services rendered and the amount allowed therefor. [O. C. 881.]

§2847—ART. 1037.—Governor may offer a reward, when.—The governor may, whenever he deems it proper, offer a reward for the apprehension of any person accused of a felony in this state and who is evading an arrest. [Added in revising.]

§2848—ART. 1038.—Shall be published, how.—When the governor offers a reward he shall cause the same to be published in such manner as, in his judgment, will be most likely to effect the arrest of the accused. [Added in revising.]

§2849—ART. 1039.—Reward shall be paid by state.—The person who may become entitled to such reward shall be paid the same out of the state treasury upon the certificate of the governor, stating the amount thereof, and that such person is entitled to receive the same, and the facts which so entitle such person to receive it. [Added in revising.]

§2850—Decisions as to fugitives from justice.—When a fugitive from justice is arrested on a requisition and warrant, he is not entitled to bail. *Ex parte Erwin*, 7 App. 238. A person extradited upon a requisition of the governor of this state from another state of the United States, may be tried for a different offense than that for which he was extradited. *Ham v. S.* 4 App. 645. But where a defendant was extradited from Mexico for theft, it was held that he could not be tried for embezzlement. *Blandford v. S.* 10 App. 627; see, also, *Kelley v. S.* 13 App. 158.

A warrant issued by the governor of this state for the arrest of a fugitive from justice of another state, should show on its face, by recital at least, that it was issued upon a requisition from such other state, accompanied by an indictment found, or affidavit made, charging the alleged fugitive with having committed a crime. *Ex parte Thornton*, 9 Tex. 635; see, also, *Hibber v. S.* 43 Tex. 197, and *Ex parte Stanley*, 25 App. 372. In the last cited cases the requisites of a governor's warrant are discussed, and the warrant involved held to be sufficient.

## TITLE 15.—OF COSTS IN CRIMINAL ACTIONS.

CH.

1. TAXATION OF COSTS.

2. OF COSTS PAID BY THE STATE.

CH.

3. OF COSTS PAID BY COUNTIES.

4. OF COSTS TO BE PAID BY DEFENDANTS.

### CH. 1.—TAXATION OF COSTS.

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§2851—ART. 1040.—**Certain officers shall keep fee books.**—Each clerk of a court, county judge, sheriff, justice of the peace, constable, mayor, recorder and marshal, in this state, shall keep a fee book, and shall enter therein all fees charged for service rendered in any criminal action or proceeding, which book shall be subject to the inspection of any person interested in such costs. [Act Aug. 23, 1876, p. 203, §22.]

§2852—ART. 1041.—**Fee book shall show, what.**—The fee book shall show the number and style of the action or proceeding in which the costs are charged, and each item of costs shall be stated separately; and it shall further name the officer or person to whom such costs are due. [Added in revising.]

§2853—ART. 1042.—**No cost not provided for by law.**—No item of costs in a criminal action or proceeding shall be taxed that is not expressly provided for by law. [Added in revising.]

Bonn v. S. 12 App. 100. For the offense of "Extortion," see, *ante*, §§372, 373, 374.

§2854—ART. 1043.—**Costs payable in lawful currency.**—All costs in criminal actions or proceedings shall be due and payable in the lawful currency of the United States. [Act Aug. 23, 1876, p. 284, §1.]

§2855—ART. 1044.—**No costs payable, until, etc.**—No costs shall be payable by any person whatsoever until there be produced, or ready to be produced, unto the person owing or chargeable with the same, a bill or account, in writing, containing the particulars of such costs, signed by the officer to whom such costs are due, or by whom the same are charged. [Act Aug. 23, 1876, p. 293, §23.]

§2856—ART. 1045.—**Bill of costs shall accompany case, when.**—Whenever a criminal action or proceeding is taken by appeal from one court to another, or whenever the same is in any other way transferred from one court to another, it shall be accompanied by a full and complete bill or account of all the costs that have accrued in such action or proceeding, which bill or account shall be certified to and signed by the proper officer of the court from which the same is forwarded. [Added in revising.]

§2857—ART. 1046.—**Costs shall not be taxed after defendant has paid.**—No further costs shall be taxed against a defendant or collected from him in a criminal case after he has paid the amount of costs taxed against him at the time of such payment, unless otherwise adjudged by the court upon a proper motion filed for that purpose. [Added in revising.]

§2858—ART. 1047.—**Costs may be retaxed, when and how.**—Whenever costs have been erroneously taxed against a defendant he may have



the error corrected and the costs properly taxed upon filing a motion, in writing, for that purpose in the court in which the case is then pending, or was last pending. Such motion may be made at any time within one year after the final disposition of the case in which the costs were taxed, and not afterward, and notice of such motion shall be given to the party or parties to be affected thereby as in the case of a similar motion in a civil action, and the court hearing the same shall render such judgment therein as the facts and the law may require. [Added in revising.]

§2859—ART. 1048.—**Fee book evidence, etc.**—The items of costs taxed in an officer's fee book shall be *prima facie* evidence of the correctness of such items, and the same shall be considered correct until shown by satisfactory evidence to be otherwise. [Added in revising.]

## CH. 2.—OF COSTS PAID BY THE STATE.

ART.	SEC.	ART.	SEC.
1049. Fees paid to attorney-general.	2860	1056. Fees of clerk of district court.	2868
1050. Fees of clerk of court of appeals.	2861	1057. Officer shall make out cost bill, and what it shall show.	2869
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1053. When there are several defendants.	2864	1060. No costs paid by state, when.	2872
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§2860—ART. 1049.—**Fees paid to attorney-general.**—The attorney-general shall receive from the state the following fees:

1. In each case of felony appealed to the court of appeals where the appeal is dismissed, or where the judgment of the court below is affirmed, the sum of twenty dollars.

2. In each case of *habeas corpus* heard before the court of appeals, when the applicant is charged with a felony, the sum of twenty dollars. [Act Aug. 23, 1876, p. 284, §2.]

§2861—ART. 1050.—**Fees of clerk of court of appeals.**—The clerk of the court of appeals, in every case of felony brought before such court by appeal, shall receive from the state the sum of ten dollars. [Act Aug. 23, 1876, p. 284, §5.]

§2862—ART. 1051.—**How fees allowed by two preceding articles are paid.**—The fees allowed the attorney-general and the clerk of the court of appeals by the two preceding articles shall be audited and paid out of the state treasury upon the certificate of the court of appeals, or of any one of the judges thereof, that the same is correct. [Added in revising.]

§2863—ART. 1052.—**Fees allowed district and county attorneys.**—The district or county attorney shall be allowed the following fees:

1. For all convictions in cases of felonious homicide when the defendant does not appeal or dies, or escapes after appeal and before final judgment of the court of appeals, or when upon appeal the judgment is affirmed, the sum of fifty dollars.

2. For all other convictions of felony when the defendant does not appeal or dies, or escapes after appealing and before final judgment of the court of appeals, or when upon appeal the judgment is affirmed, the sum of thirty dollars.

3. For representing the state in each case of *habeas corpus* where the defendant is charged with a felony, the sum of twenty dollars.

4. In no case shall the district, county or justice's court, allow a plea of guilty to a less grade of offense than the highest grade charged in the complaint, information or indictment. [Act Aug. 23, 1876, p. 286, §7.]

§2864—ART. 1053.—**When there are several defendants.**—If there be more than one defendant in a case, and they are tried jointly, but one fee shall be allowed the district or county attorney. If the defendants sever and are tried separately a fee shall be allowed for each trial in accordance with the provisions of the preceding article, except in *habeas corpus* cases, in which cases only one fee shall be allowed without regard to the number of defendants or whether they are tried jointly or separately. [Added in revising.]

§2865—ART. 1054.—**Fees allowed sheriff.**—To the sheriff or constable shall be allowed the following fees, in all cases where the charge is a felony, whether the defendant be convicted or acquitted, or the case be disposed of by *nolle prosequi*, or upon judgment of dismissal.

1. For executing each warrant of arrest or *capias*, or for making arrest without warrant, the sum of one dollar.

2. For summoning or attaching each witness, fifty cents.

3. For summoning jury, two dollars.

4. For executing death warrant, fifty dollars.

5. For removing a prisoner, for each mile going and coming, including guards and all other expenses, when traveling by railroad, fifteen cents, when traveling otherwise than by railroad, twenty-five cents; *provided*, that when an officer goes beyond the limits of the state after a fugitive, on requisition from the governor, he shall be allowed the same fees and mileage as for like services in this state. For each mile he may be compelled to travel in executing criminal process, summoning or attaching witnesses, five cents; for traveling in the service of process not otherwise provided for, the sum of five cents for each mile going and returning, if two or more persons are mentioned in the writ, he shall charge for the distance actually and necessarily traveled in the service of the same.

6. For conveying a witness attached by him to any court or grand jury out of his county, his actual necessary expenses by the nearest practicable public conveyances, the amount to be stated by him under oath, and approved by the judge of the court from which the attachment issued, such account to become due when so approved, and the sheriff or constable's return shall, in every instance, show the time and place of service.

7. For attending a prisoner on *habeas corpus*, where such prisoner is charged with a felony, for each day, two dollars, together with mileage as above, when removing such prisoner out of the county under proper authority, and all fees accruing under the provisions of this article to the sheriff or constable in cases where the charge is a felony shall become due at the close of each term of the district court. [Act April 7, 1887, p. 151.]

**§2866—ART. 1055.—When services are rendered by peace officer other than sheriff.**—When services have been rendered by any peace officer other than a sheriff, such as are enumerated in the preceding article, such officer shall receive the same fees therefor as are allowed the sheriff, and the same shall be taxed in the sheriff's bill of costs and noted therein as costs due such peace officer, and when received by such sheriff he shall pay the same to such peace officer. [O. C. 953, 954.]

**§2867—ART. 1055a.—Sheriff shall not charge fees, or mileage, when.**—That a sheriff shall not charge fees for arrests made by rangers, or mileage for prisoners transported by rangers, or mileage or other fees for transporting a witness under attachment issued from another county, unless such witness refuses to give bail for his appearance, or files an affidavit with such sheriff of his inability to give bail, and a witness who refuses to give bail or make affidavit of his inability to give bail shall not be entitled to fees, mileage or expenses. [Act March 31, 1885, p. 76.]

**§2868—ART. 1056.—Fees of clerk of district court.**—The clerk of the district court shall receive for each felony case tried in such court by jury, whether the defendant be convicted or acquitted, the sum of ten dollars; for each transcript on appeal ten cents for each one hundred words; for each felony case finally disposed of without trial five dollars; *provided*, that in felony cases where the fees for the work done by the clerk in any case estimated according to the schedule of fees provided in article 1093 of the Code of Criminal Procedure shall exceed the amount herein allowed, he shall receive one-half the excess, to be paid by the state; *provided further*, that when a felony case is removed from a court by change of venue, the clerk thereof shall receive from the state one-half of his fees estimated as aforesaid, for work done in the case before such removal; but in all such cases the clerk shall attach to his account, to form a part thereof, an exhibit setting forth each item charged supported by his affidavit that the same is correct; *provided further*, that when there are two or more defendants in the same indictment, the entire costs up to the time of trial shall be distributed among them equally, and in ascertaining the excess only a *pro rata* share shall be charged against each defendant. [Act April 12, 1883, p. 83.]

**§2869—ART. 1057.—Officer shall make out cost bill, and what it shall show.**—Before the close of each term of the district court, the district or county attorney, sheriff and clerk of said court shall each make out a bill or account of the costs claimed to be due them by the state, respectively, in the felony cases tried at that term; the bill, or account, shall show:

1. The style and number of cases in which the costs are claimed to have accrued.

2. The offense charged against the defendant.

3. The term of the court at which the case was disposed of.

4. The disposition of the case, and that the case was finally disposed of and no appeal taken.

5. The name and number of defendants, and, if more than one, whether they were tried jointly or separately.

6. Where each defendant was arrested or witness served, stating the county in which the service was made, giving distance and direction from county seat of county in which the process is served, and mileage shall be charged for distance by the most direct and practicable route from the court whence such process issued to the place of service.

7. In allowing mileage, the judge shall ascertain whether the process was served on one or more of the parties named therein on the same tour, and

shall allow mileage only for the number of miles actually traveled, and then only for the journey made at the time the service was perfected.

8. The court shall inquire whether there have been several prosecutions for an offense or transaction that is but one offense in law, and, if there is more than one prosecution for the same transaction, or a portion thereof that could have been combined in one indictment against the same defendant, the judge shall allow fees to sheriffs, clerks and district and county attorneys in but one prosecution.

9. Where the defendants in a case have severed on the trial, the judge shall not allow the charges for service of process and mileage to be duplicated in each case as tried, but only such additional fees shall be allowed as are caused by the severance. [Act 1879, Extra Session, Chap. 46.]

See Willson's Cr. Forms, 923, 924, 925.

§2870—ART. 1058.—**Duty of judge to examine bill, etc.**—It shall be the duty of the district judge, when any such bill is presented to him, to examine the same carefully, and to inquire into the correctness thereof, and approve the same in whole or part, or to disapprove the entire bill, as the facts and law may require; and such bill, with the action of the judge thereon, shall be entered on the minutes of said court, and immediately on the rising of said court, it shall be the duty of the clerk thereof to make a certified copy from the minutes of said court of said bill and the action of the judge thereon, and transmit the same by mail, in registered letter, to the comptroller of public accounts. [Acts, 1879, Extra Session, Chap. 46.]

See Willson's Cr. Forms, 926.

§2871—ART. 1059.—**Duty of comptroller on receipt of copy of bill.**—It shall be the duty of the comptroller, upon the receipt of such claim, and said certified copy of the minutes of said court, to closely and carefully examine the same, and, if correct, to draw his warrant on the state treasurer for the amount due, and in favor of the officer entitled to the same; *provided*, that, if the appropriation for paying such accounts is exhausted, the comptroller shall file the same away, if correct, and issue a certificate in the name of the officer entitled to the same, stating therein the amount of the claim and character of the services performed. And all such claims or accounts not transmitted to or placed on file in the office of comptroller of public accounts, within twelve months from the date of the final disposition of the case in which the services were rendered, shall be forever barred; *provided further*, that the owners of the claims or accounts that have been barred by the provisions of this article, requiring the same to be transmitted to or placed on file in the office of the comptroller of public accounts, in six months from the date of the final disposition of the case in which the services were rendered, shall have six months from and after the time this act shall take effect to present said claims; and all claims or accounts so presented shall be taken and considered by the comptroller as claims presented within the time allowed by law. [Acts, 1879, Extra Session, Chap. 46; amended by Act April 11, 1883, p. 75.]

§2872—ART. 1060.—**No costs paid by state, when, etc.**—In cases where the defendant is indicted for a felony and is convicted of an offense less than felony, no costs shall be paid by the state to any officer. [O. C. 952d.]

§2873—ART. 1061.—**Costs paid by state a charge against defendant, except.**—The costs and fees paid by the state under this title shall be a charge against the defendants in cases where they are convicted, except in cases of capital punishment or of sentence to the penitentiary for life, and when collected shall be paid into the treasury of the state. [O. C. 956.]

See, ante, §§124, 125, 2577.

**§2874—ART. 1061a.—Fees in examining courts, etc.**

§1. That county judges, justices of the peace, sheriffs, constables, district and county attorneys and district clerks shall be allowed the following fees:

§2. In all cases where county judges and justices of the peace shall sit as examining courts in felony cases, they shall be entitled to the same fees allowed by law for similar services in misdemeanor cases to justices of the peace, and ten cents for each one hundred words for writing down testimony, to be paid by the state, not to exceed three dollars for all his services in any one case.

§3. Sheriffs and constables serving process and attending any examining court in the examination of any felony case shall be entitled to such fees as are fixed by law for similar services, in misdemeanor cases, to be paid by the state, not to exceed four dollars in any one case.

§4. District and county attorneys, for attending and prosecuting any felony case before an examining court, shall be entitled to a fee of five dollars, to be paid by the state, for each case prosecuted by him before such court.

§5. The fees mentioned in sections 2, 3 and 4 of this act shall become due and payable only after the indictment of the defendant for the offense with which he was charged in the examining court, and upon an itemized account sworn to by the officers claiming such fees, and approved by the judge of the district court.

§6. Only one fee shall be allowed for an examining trial, though more than one defendant is joined in the complaint, and when defendants are proceeded against separately, who could have been proceeded against jointly, but one fee shall be allowed in all the cases that could have been so joined, and the account of the officer and the approval of the judge must show that the provisions of this article are complied with.

§7. In *habeas corpus* proceedings in felony cases, the clerks of the district courts shall be paid by the state, upon the certificate of the judge, the following fees, not to exceed ten dollars in any one case: for taking down the evidence, ten cents for every one hundred words; for entering the judgment of the court, one dollar; for making out transcript in case of appeal, ten cents for every one hundred words. [Act March 3, 1883, p. 22.]

See Willson's Cr. Forms, 927, 928.

**§2875—ART. 1061b.—Fees of attached witnesses in felony cases.—**

§1. That any witness who may have been recognized, or attached and given bond for his appearance before any court out of the county of his residence, to give testimony in a felony case, and who shall appear in compliance with the obligations of such recognizance or bond, shall be allowed his actual traveling expenses, not exceeding three cents per mile going to and returning from the court by the nearest practicable conveyance, and one dollar per day for each day he may be necessarily absent from home as a witness in such case.

§2. Witness fees shall be allowed to such state witnesses only as the district or county attorney shall state in writing are material for the state, and to witness for the defendant after he has made affidavit that the testimony of the witness is material to his defense, stating the facts which are expected to be proved by the witness, which certificate and affidavit must be made at the time of procuring the attachment for, or taking the recognizance of, the witness; *provided*, that the judge to whom an application for attachment is made may in his discretion grant or refuse such application when presented in term time. No attachment shall be issued in a felony case, until the state's attorney shall have first made the statement in writing, or the defendant shall have

made the affidavit, which will authorize the payment of the witness to be attached.

§3. Before the close of each term of the district court, the witness shall make affidavit in writing, stating the number of miles he will have traveled going to and returning from the court by the nearest practicable conveyance, and the number of days he will have been necessarily absent going to and returning from the place of trial, which affidavit shall be filed with the papers of the case; *provided*, no witness shall receive pay for his services as a witness in more than one case at any one term of the court; *provided, further*, that fees shall not be allowed to more than two witnesses to the same fact, unless the judge of the court, before whom the cause is tried, shall, after such case shall have been disposed of, certify that such witnesses claiming fees as herein provided were necessary in the cause, nor shall any witness, recognized or attached for the purpose of proving the general character of the defendant, be entitled to the benefits hereof.

§4. It shall be the duty of the district or criminal judge, when any such bill is presented to him, to examine the same carefully and to inquire into the correctness thereof, and to approve the same in whole or in part, or to disapprove the entire bill, as the facts and law may require, and said bill, with the action of the judge thereon, shall be entered on the minutes of said court; and immediately on the rising of said court, it shall be the duty of the clerk thereof to make a certified copy from the minutes of said court, of said bill, and the action of the judge thereon, and transmit the same by mail in registered letter to the comptroller of public accounts, for which service the clerk shall be entitled to a fee of twenty-five cents, to be paid by the witness.

§5. It shall be the duty of the comptroller, upon the receipt of such claim and said certified copy of the minutes of said court, to carefully examine the same, and if correct, to draw his warrant on the state treasurer for the amount due, and in favor of the witness entitled to the same; *provided*, if the appropriation for paying such accounts is exhausted, the comptroller shall file the same away if correct, and issue a certificate in the name of the witness entitled to the same, stating therein the amount of the claim; and all such claims or accounts, not transmitted to, or placed on file in, the office of the comptroller of public accounts, within twelve months from the date of the final disposition of the case in which the witness was attached or recognized to testify, shall be forever barred; and all laws, and parts of laws, in conflict with the provisions of this bill, are hereby repealed. [Act April 23, 1883, p. 117.]

See, *ante*, §§1438, 2079.

## CH. 3.—OF COSTS PAID BY COUNTIES.

ART.	SEC.	ART.	SEC.
1062. County shall be liable for what costs.	2876	1074a. Same, in case of change of venue.	2889
1063. Shall be responsible for food and lodging of jurors.	2877	1074b. Same subject.	2890
1064. Juror may pay his own expenses and draw scrip.	2878	1075. Fees of county judge.	2891
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1072. Commissioners' court shall examine account and order draft, etc.	2886	1082. If not sworn, not entitled to pay.	2899
1073. Expenses, etc., of prisoner from another county.	2887	1083. Pay of grand jurors.	2900
1074. Same subject.	2888	1084. Pay of bailiffs.	2901
		1085. Certificates for pay of jurors and bailiffs.	2902
		1086. Drafts and certificates receivable for county taxes.	2903
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§2876—ART. 1062.—County shall be liable for what costs.—Each county shall be liable for all the expenses incurred on account of the safe keeping of prisoners confined in their respective jails or kept under guard, except prisoners brought from another county for safe keeping, or from another county on *habeas corpus* or change of venue, in which cases the county from which the prisoner is brought shall be liable for the expense of his safe keeping. [O. C. 957.]

§2877—ART. 1063.—Shall be responsible for food and lodging of jurors.—Each county shall be liable for the expenses of food and lodging for jurors impanelled in a case of felony, but in such cases no scrip shall be issued or money paid to the jurors whose expenses are so paid. [O. C. 958.]

§2878—ART. 1064.—Juror may pay his own expenses and draw scrip.—A juror may pay his own expenses and draw his scrip, but the county is responsible in the first place for all the expenses incurred by the sheriff in providing suitable food and lodging for the jury, not to exceed, however, one dollar and twenty-five cents a day. [O. C. 959.]

§2879—ART. 1065.—Allowance to sheriff for prisoners.—For the safe keeping, support and maintenance of prisoners confined in jail or under guard, the sheriff shall be allowed the following charges:

1. For any number of prisoners not exceeding four he shall be paid for each prisoner, for each day, not exceeding forty-five cents.

2. For any number of prisoners exceeding four, for each prisoner, for each day, not exceeding thirty cents.

3. For necessary medical bill and reasonable extra compensation for attention to a prisoner during sickness, such an amount as the commissioners' court of the county where the prisoner is confined may determine to be just and proper.

4. The reasonable funeral expenses in case of death. [Act Aug. 23, 1876, p. 290, §11.]

§2880—ART. 1066.—Allowance for guards.—The sheriff shall be allowed for each guard necessarily employed in the safe keeping of prisoners

one dollar and fifty cents for each day, and there shall not be any allowance made for the board of such guard, nor shall any allowance be made for jailer or turnkey. [Act Aug. 23, 1876, p. 290, §11.]

See, *post*, §2904.

§2881—ART. 1067.—**Sheriff shall pay what expenses to be reimbursed by county.**—It is the duty of the sheriff to pay the expenses of jurors impanelled in cases of felony (except when they are paid by the juror himself), the expense of employing and maintaining a guard, and to support and take care of all prisoners, for all of which he shall be reimbursed by the proper county according to the rates fixed in the two preceding articles. [O. C. 961.]

§2882—ART. 1068.—**Sheriff shall present account to district judge.**—At each term of the district court of his county the sheriff may present to the district judge presiding his accounts for all expenses incurred by him for food and lodging of jurors in cases of trials for felony during the term at which his account is presented. Such account shall state the number and style of the case or cases in which the jurors were impanelled, and specify by name each juror's expenses paid by such sheriff, and the number of days the same were paid, and shall be verified by the affidavit of such sheriff. [O. C. 962.]

See Willson's Cr. Forms, 929.

§2883—ART. 1069.—**Judge shall examine account, etc.**—The account provided for in the preceding article shall be carefully examined by the district judge, and he shall approve the same, or so much thereof as he finds to be correct. He shall write his approval on said account, specifying the amount for which the same is approved, and shall date and sign the same officially and cause the same to be filed in the office of the clerk of the district court of the county liable therefor. [O. C. 983.]

See Willson's Cr. Forms, 930.

§2884—ART. 1070.—**Judge shall give sheriff draft upon county treasurer.**—The district judge shall give to the sheriff a draft upon the county treasurer of the proper county for the amount of each account allowed by him; and the same, when presented to the county treasurer, shall be paid out of any moneys in his hands not otherwise legally appropriated in the same manner as jury certificates are paid. [O. C. 964.]

See Willson's Cr. Forms, 931.

§2885—ART. 1071.—**Account for keeping prisoners.**—At each regular term of the commissioners' court the sheriff shall present his account to such court for the expenses incurred by him since the last account presented for the safe keeping, support and maintenance of prisoners, including guards employed, if any. Such account shall state the name of each prisoner, and each item of expense incurred on account of such prisoner, and the date of each item, the name of each guard employed, the length of time employed and the purpose of such employment, and shall be verified by the affidavit of the sheriff. [Added in revising.]

See Willson's Cr. Forms, 932.

§2886—ART. 1072.—**Commissioners' court shall examine account and order draft, etc.**—The commissioners' court shall examine the account named in the preceding article and allow the same, or so much thereof as may be reasonable and in accordance with law, and shall order a draft to be issued to the sheriff for the amount so allowed, upon the treasurer of the county, and such account shall be filed and safely kept in the office of the clerk of such court. [Added in revising.]

See Willson's Cr. Forms, 933.



§2887—ART. 1073.—**Expenses, etc., of prisoner from another county.**—If the expenses incurred are for the safe keeping, support and maintenance of a prisoner from another county, the sheriff shall make out a separate account therefor, such as is provided for in article 1071, and submit the same to the county judge of his county, who shall carefully examine the same and write thereon his approval thereof for such amount as he finds to be correct, stating the amount so approved by him, and shall date and sign such approval officially and return the same to the sheriff. [Added in revising.]

See Willson's Cr. Forms, 934.

§2888—ART. 1074.—**Same subject.**—The account mentioned in the preceding article shall then be presented to the commissioners' court of the county liable for the same, at a regular term of such court, and such court shall, if the charges therein be in accordance with law, order a draft to issue upon the treasurer of such county, in favor of the sheriff to whom the same is due, for the amount allowed. [Added in revising.]

See Willson's Cr. Forms, 935.

§2889—ART. 1074a.—**Same, in case of change of venue.**—In all cases where indictments have been presented against persons in one county, charging them with any offense against the Penal Code, and such causes have been removed by change of venue to another county, and tried therein, the county from which such cause is removed shall be liable for all expenses incurred for pay of jurors in trying such causes. [Act March 18, 1881, p. 52.]

§2890—ART. 1074b.—**Same subject.**—That it shall be the duty of the county commissioners of each county in the state, at each regular meeting, to ascertain whether, since their last regular meeting, any person has been tried for crime upon a change of venue from any other county, and if they shall find such to be the case, it shall be their duty to make out an account against such county from which such cause was removed, showing the number of days the jury in such case was employed therein, and setting forth the amount paid for such jury service; such account shall then be certified to as correct by the county judge of such county, under his hand and seal, and be by him forwarded to the county judge of the county court of the county from which the said cause was removed, which account shall be paid in the same manner as accounts for the safe keeping of prisoners, in article 1074 of this Code. [Act March 18, 1881, p. 52.]

See Willson's Cr. Forms, 936.

§2891—ART. 1075.—**Fees of county judge.**—There shall be paid to the county judge, by the county, the sum of three dollars for each criminal action tried and finally disposed of before him. [Acts 1879, Extra Session, Ch. 44.]

§2892—ART. 1076.—**How collected.**—The county judge shall present to the commissioners' court of his county, at a regular term thereof, an account, in writing, specifying each criminal action in which he claims the fee allowed by the preceding article, which account shall be certified to be correct by such judge; and the same shall be filed with the clerk of the county court. The commissioners' court shall approve such account for such amount as they may find to be correct, and order a draft to be issued upon the county treasurer in favor of such judge, for the amount so approved. [Acts 1879, Extra Session, Ch. 44.]

See Willson's Cr. Forms, 937.

§2893—ART. 1077.—**Fee of justice for holding an inquest.**—A justice of the peace shall be entitled for issuing a summons for a jury and all other business connected with an inquest on a dead body, including certifying

and returning the proceeding to the proper court, the sum of five dollars, to be paid by the county; *provided*, that when an inquest is held over the dead body of a state penitentiary convict, the state shall pay the inquest fees allowed by law, of all officers, upon the approval of the account therefor by the county commissioners' court of the county in which the inquest may be held, and the superintendent of penitentiaries; *and, provided further*, that no inquest shall be held on the dead body of a state penitentiary convict if said convict died from disease and was attended by a regular physician, and a certificate by said physician showing said facts, be filed in the office of the county judge of the county in which said convict died, and in the office of the superintendent of penitentiaries. [Act Aug. 23, 1876, p. 291, §12; amended by Act of March 31, 1883, p. 39.]

§2894—ART. 1078.—**Fee for summoning jury of inquest by officer other than justice.**—The officer, other than a justice of the peace, who summons a jury of inquest, shall be paid the sum of two dollars and fifty cents. [Act Aug. 23, 1876, p. 291, §13.]

No jury is allowed now in an inquest upon a dead body. *Ante*, §2805.

§2895—ART. 1079.—**Commissioners' court shall act upon account.**—The officer or officers claiming pay for services mentioned in the two preceding articles shall present to the commissioners' court of the county, at a regular term of such court, an account therefor, verified by the affidavit of such claimant, and if such account be found correct the court shall order a draft to issue upon the county treasurer in favor of such claimant for the amount due him, and such account shall be filed and safely kept in the office of the clerk of the county court. [Added in revising.]

See Willson's Cr. Forms, 938, 939; see, *ante*, §2805. The law providing for a jury in the proceeding of an inquest upon a dead body has been repealed.

§2896—ART. 1080.—**Pay of jury of inquest.**—Each member of a jury of inquest shall be allowed two dollars each day while serving upon such jury, to be paid by the county, and the certificate of the justice of the peace who held the inquest shall be sufficient evidence of such service to authorize the county treasurer to pay the amount thereof. [Added in revising.]

See Willson's Cr. Forms, 940. There is now no jury allowed in an inquest upon a dead body. *Ante*, §2805.

§2897—ART. 1081.—**Pay of petit jurors.**—Each juror who serves in the trial of any criminal case in any court having criminal jurisdiction, or who has been sworn as a juror for the term or week, shall receive two dollars for each day and for each fraction of a day he may serve or attend as such juror; *provided*, that this provision shall not extend to mayors' and recorders' courts taking cognizance of offenses against municipal ordinances; *provided further*, that jurors in justices' courts, who serve in the trial of criminal cases in such courts, shall receive fifty cents in each case they may sit as jurors; *provided*, that no juror in such courts shall receive more than one dollar for each day or fraction of a day he may serve as such juror. [Act Feb. 21, 1879; amended by Act March 15, 1881, p. 32.]

§2898—ART. 1081a.—**Justice shall report jury service, etc.**—Justices of the peace shall report to the county clerk, on the first Monday in each month, the names of the persons who have served as jurors in his court for the preceding month, and the number of days and fractions of days that they have served respectively, and the number of cases in which they have served respectively on each of said days or fractional days, and it shall be the duty of the county clerk to issue his warrant against the county treasurer in favor of each of the persons so serving as jurors. Every justice failing to make and file such report shall be deemed guilty of a misdemeanor and upon con-

viction shall be fined in any sum not less than twenty-five nor more than two hundred and fifty dollars. [Act March 15, 1881, p. 32, §2.]

The preceding article should appear in the Penal Code, but was overlooked by the annotator when preparing that portion of this work.

§2899—ART. 1082.—**If not sworn, not entitled to pay.**—A person who has been summoned and who attends as a juror, but who has not been sworn as such in a case, or for the term or the week, shall not receive pay as a juror. [Added in revising.]

§2900—ART. 1083.—**Pay of grand jurors.**—Grand jurors shall each receive two dollars per day for each day and for each fraction of a day that they may serve as such. [Act February 16, 1883, p. 11, amending revised Code.]

§2901—ART. 1084.—**Pay of bailiffs.**—Bailiffs for the grand jury shall receive such pay for their services as may be determined by the district court of the county where the service is rendered, and the order of the court in relation thereto shall be entered upon the minutes, stating the name of the bailiff, the service rendered by him and the amount of pay allowed therefor; *provided*, the pay shall not exceed two dollars and fifty cents per day for riding bailiffs during the time they ride, and not exceed one dollar and fifty cents per day for other bailiffs; *and provided further*, that the deputy sheriff shall not receive pay as bailiff. [Adopted in revising.]

See Willson's Cr. Forms, 944.

§2902—ART. 1085.—**Certificates for pay of jurors and bailiffs.**—The amount due jurors and bailiffs shall be paid by the county treasurer upon the certificate of the clerk of the court in which such service was rendered, or of the justice of the peace, mayor or recorder in which such service was rendered, which certificate shall state the service, when rendered, by whom rendered, and the amount due therefor. [Added in revising.]

See Willson's Cr. Forms, 941, 942, 943-945.

§2903—ART. 1086.—**Drafts and certificates receivable for county taxes.**—Drafts drawn and certificates issued under the provisions of this chapter shall, without further action or acceptance by any authority except registration by the county treasurer, be receivable at par for all county taxes. The same may be transferred by delivery, and no ordinance, rule or regulation made by the commissioners' court or other officer or officers of a county, shall defeat the right of a holder of any such draft or certificate to pay county taxes therewith. [O. C. 968.]

§2904—**Costs payable by counties—Decisions relating to.**—Counties are not liable for costs due clerks in cases of misdemeanors, or of felonies dismissed. *Colorado County v. Beebe*, 44 Tex. 447. The action of the commissioners' court upon a sheriff's account for board and guards of prisoners is conclusive, in the absence of a showing that such court had abused its discretion, or that the allowance was not sufficient for the support of the prisoners. *Fayette County v. Faires*, 44 Tex. 514. The power of a sheriff to employ guards is expressly limited and defined by Article 4522 of the Revised Statutes, and he can only make such employment with the approval of the commissioners' court, or in cases of emergency, with the approval of the county judge, except in the single instance where there is no jail in the county. A county cannot be sued upon a claim until such claim has first been presented to the commissioners' court for allowance, and such court has neglected or refused to audit and allow the same or any part thereof. *McDade v. Waller County*, 3 App. C. C. p. 139. When a justice of the peace, for the purposes of an inquest, employs an expert to make a *post mortem* examination of the dead body, etc., the county is liable for reasonable compensation for such service. And where it is necessary for the purposes of an inquest to disinter a dead body, the county is liable for the expenses of disinterring, and also of re-interring. *Rutherford v. Harris County*, 3 App. C. C. 143.

## CH. 4.—OF COSTS TO BE PAID BY DEFENDANT.

ART.	SEC.	ART.	SEC.
<b>I. IN THE COURT OF APPEALS.</b>		<b>IV. JURY AND TRIAL FEES.</b>	
1087. Fees of attorney-general.	2905	1108. In case of several defendants, and where defendant pleads guilty.	2916
1088. Fees of clerk of court of appeals.	2906	1099. No fee allowed attorney, etc.	2917
1089. Shall be taxed against defendant.	2907	<b>V. WITNESS FEES.</b>	
<b>II. IN THE DISTRICT AND COUNTY COURTS.</b>		1100. In district and county courts.	2918
1090. Fees of district and county attorneys.	2908	1101. Trial fee in county courts.	2919
1091. In case of joint defendants.	2909	1102. Jury fee in justices', mayors' and recorders' courts.	2920
1092. Attorney appointed entitled to the fee.	2910	1103. Not adopted by legislature.	
1093. Fees of district and county clerks.	2911	1104. Where there are several defendants.	2921
1094. Fees of sheriff or other peace officer.	2912	1105. Jury fees collected as other costs.	2922
<b>III. IN JUSTICES', MAYORS' AND RECORDERS' COURTS.</b>		1106. Fees of witnesses in criminal cases.	2923
1095. Fees of justices, mayors and recorders.	2913	1107. State shall not pay witness fees.	2924
1096. Fees of constables and other peace officers.	2914	1108. Shall be taxed against defendant, upon, etc.	2925
1097. Fees of state's attorney.	2915	1109. No fees allowed, unless, etc.	2926
		1110. Clerks, etc., shall keep books, in which shall be entered, etc.	2927
		1111. Witness liable for costs, when.	2928

## I. IN THE COURT OF APPEALS.

§2905—ART. 1087.—Fees of attorney-general.—The attorney-general shall, in every conviction of offenses against the penal laws in cases of misdemeanor, when the judgment of the court below is affirmed or the appeal is dismissed, receive the sum of ten dollars. [Act Aug. 23, 1876, p. 284, §2.]

§2906—ART. 1088.—Fees of clerk of court of appeals.—The clerk of the court of appeals shall, in every case of misdemeanor when the judgment is affirmed, receive the sum of ten dollars. [Act Aug. 23, 1876, §5.]  
See Bonn v. S. 12 App. 100.

§2907—ART. 1089.—Shall be taxed against defendant.—The fees named in the two preceding articles shall be taxed against the defendant and collected as other costs in the case. [Act Aug. 23, 1876, p. 284, §2.]

## II. IN THE DISTRICT AND COUNTY COURTS.

§2908—ART. 1090.—Fees of district and county attorneys.—District and county attorneys shall be allowed the following fees, to be taxed against the defendant:

1. For every conviction under the laws against gaming when no appeal is taken, or when on appeal the judgment is affirmed, fifteen dollars.

2. For every other conviction in cases of misdemeanor where no appeal is taken, or where on appeal the judgment is affirmed, ten dollars. [Act Aug. 23, 1876, p. 284, §7.]

§2909—ART. 1091.—In case of joint defendants.—Where there are several defendants in a case, and they are tried together, but one fee shall be allowed and taxed in the case for the district or county attorney, but where the defendants sever and are tried separately a fee shall be allowed and taxed for each trial. [Added in revising.]

§2910—ART. 1092.—Attorney appointed entitled to the fee.—When an attorney is appointed by the court to represent the state in the absence of the district or county attorney, the attorney so appointed shall be entitled to the fee allowed by law to the district or county attorney. [Added in revising.]

**§2911—ART. 1093.—Fees of district and county clerks.—**The following fees shall be allowed the clerks of the district and county courts:

1. For issuing each *capias* or other original writ, seventy-five cents.
2. For entering each appearance, fifteen cents.
3. For docketing cause, to be charged but once, twenty-five cents.
4. For swearing and impannelling a jury and receiving and recording the verdict, fifty cents.
5. For swearing each witness, ten cents.
6. For issuing each *subpoena*, twenty-five cents.
7. For each additional name inserted therein, fifteen cents.
8. For issuing each attachment, fifty cents.
9. For entering each order not otherwise provided for, fifty cents.
10. For filing each paper, ten cents.
11. For entering judgment, fifty cents.
12. For entering each continuance, twenty-five cents.
13. For entering each motion or rule, ten cents.
14. For entering each recognizance, fifty cents.
15. For entering each indictment or information, ten cents.
16. For each commitment, one dollar.
17. For each transcript on appeal, for each one hundred words, ten cents.

[Act Aug. 23, 1876, p. 289, §10.]

**§2912—ART. 1094.—Fees of sheriff or other peace officer.—**The following fees shall be allowed the sheriff or other peace officer performing the same services:

1. For executing each warrant of arrest or *capias*, or making arrest without warrant, one dollar.
2. For summoning each witness, fifty cents.
3. For serving any writ not otherwise provided for, one dollar.
4. For taking and approving each bond, and returning the same to the court when necessary, one dollar.
5. For each commitment or release, one dollar.
6. Jury fee in each case tried, fifty cents.
7. For attending prisoner on *habeas corpus*, when such prisoner upon a hearing has been remanded to custody or held to bail, for each day's attendance, two dollars.
8. For conveying a witness attached by him to any court out of his county, his actual necessary expenses by the nearest practicable public conveyance; the amount to be stated by him, under oath, and approved by the judge of court from which the attachment issued. [Act Aug. 23, 1876, p. 289, §11.]

### III. IN JUSTICES', MAYORS' AND RECORDERS' COURTS.

**§2913—ART. 1095.—Fees of justices, mayors and recorders.—**Justices of the peace, mayors and recorders shall receive the following fees in criminal actions tried before them, to be collected of the defendant in case of his conviction:

1. For each warrant, seventy-five cents.
2. For each bond taken, fifty cents.
3. For each *subpoena* for one witness, twenty-five cents.
4. For each additional name inserted therein, ten cents.
5. For docketing each case, ten cents.
6. For each continuance, twenty cents.
7. For swearing each witness in court, ten cents.
8. For administering any other oath or affirmation without a certificate, ten cents.

9. For administering an oath or affirmation with a certificate thereof, twenty-five cents.

10. Jury fee where a case is tried by jury, fifty cents.

11. For each order in a case, twenty-five cents.

12. For each final judgment, fifty cents.

13. For each application for a new trial with the final judgment thereon, fifty cents.

14. For each commitment, one dollar.

15. For each execution, one dollar.

16. For making out and certifying the entries on his docket and filing the same with the original papers of the cause, in each case of appeal, one dollar and fifty cents.

17. For taxing costs, including copy thereof, ten cents.

18. For taking down the testimony of witnesses, swearing them, taking the voluntary statement of the accused, certifying and returning the same to the proper court in examinations for offenses, for each one hundred words, twenty cents. [Act Aug. 23, 1876, p. 291, §12.]

**§2914—ART. 1096.—Fees of constables and other peace officers.**—Constables, marshals or other peace officers who execute process and perform services for justices, mayors and recorders in criminal actions, shall receive the same fees allowed to sheriffs for the same services. [Added in revising.]

**2915—ART. 1097.—Fees of state's attorney.**—The attorney who represents the state in a criminal action in a justice's, mayor's or recorder's court, shall receive for each conviction where no appeal is taken, or where upon appeal the judgment is affirmed, ten dollars, unless otherwise provided by the ordinance of any incorporated city or town. [Added in revising.]

**§2916—ART. 1098.—In case of several defendants, and where defendant pleads guilty.**—Where several defendants are prosecuted jointly and do not sever on trial but one attorney's fee shall be allowed, and where a defendant pleads guilty to a charge before a justice, mayor or recorder, the fee allowed the attorney representing the state shall be five dollars. [Added in revising.]

**§2917—ART. 1099.—No fee allowed attorney, etc.**—No fee shall be allowed a district or county attorney in any case where he is not present and representing the state upon the trial thereof, unless he has taken some action therein for the state, but in case he has taken no action, a fee of five dollars shall be taxed, for the benefit of the county, instead thereof; and in no case shall the county or district attorney, in consideration of a plea of guilty, remit any part of his lawful fee. [Added in revising.]

#### IV. JURY AND TRIAL FEES.

**§2918—ART. 1100.—In district and county courts.**—In each criminal action tried by a jury in the district or county court, when the defendant is convicted, there shall be taxed in the bill of costs against him a jury fee of five dollars. [Added in revising.]

**§2919—ART. 1101.—Trial fee in county courts.**—In each case of conviction in a criminal action tried in the county court, whether tried by a jury or by the judge, there shall be taxed in the bill of costs against the defendant, or against all the defendants where several are tried jointly, a trial fee of five dollars, the same to be collected and paid into the county treasury in the same manner as is provided in the case of a jury fee. [Added in revising.]

§2920—ART. 1102.—**Jury fee in justices', mayors' and recorders' courts.**—In each criminal action tried by a jury in a justice's, mayor's or recorder's court, when the defendant is convicted, there shall be taxed in the bill of costs against him a jury fee of three dollars, unless otherwise provided by the ordinances of any incorporated city or town. [Added in revising.]

ART. 1103, submitted by the revisers, was not adopted by the legislature; it reads as follows:

ART. 1103.—No jury fee shall be taxed against a defendant in any case, in any court, where he waives a trial by jury.

§2921—ART. 1104.—**Where there are several defendants.**—Where there are several defendants tried jointly only one jury fee shall be taxed against them, but where they sever and are tried separately a jury fee shall be taxed in each trial. [Added in revising.]

§2922—ART. 1105.—**Jury fees collected as other costs, etc.**—Jury fees shall be collected as other costs in a case, and the officer collecting the same shall forthwith pay the amount collected to the county treasurer of the county where the conviction was had. [Added in revising.]

#### V. WITNESS FEES.

§2923—ART. 1106.—**Fees of witnesses in criminal cases.**—Witnesses in criminal cases shall be allowed one dollar and fifty cents a day for each day they are in attendance upon the court, and six cents for each mile they may travel in going to or returning from the place of trial. [O. C. 454.]

§2924—ART. 1107.—**State shall not pay witness fees.**—The state shall in no case pay witness fees. [O. C. 455.]

But see, *ante*, §2875.

§2925—ART. 1108.—**Shall be taxed against defendant, upon, etc.**—Upon conviction, in all cases, the costs accruing from the attendance of witnesses shall be taxed against the defendant, upon the affidavit, in writing, of such witness, or of some credible person, stating the number of days that such witness has attended upon the court in the case and the number of miles he has traveled in going to and returning from the place of trial, which affidavit shall be filed among the papers in the case. [O. C. 457.]

§2926—ART. 1109.—**No fees allowed, unless, etc.**—No fees shall be allowed to a person as witness fees unless such person has been *subpoenaed*, attached or recognized as a witness in the case. [Added in revising.]

§2927—ART. 1110.—**Clerk, etc., shall keep book, in which shall be entered, etc.**—Each clerk of the district and county court, and each justice of the peace, mayor and recorder, shall keep a book in which shall be entered the number and style of each criminal action in their respective courts and the name of each witness *subpoenaed*, attached or recognized to testify therein, showing whether on the part of the state or the defendant. [Added in revising.]

§2928—ART. 1111.—**Witness liable for costs, when.**—In all criminal cases where a witness has been *subpoenaed* and fails to attend he shall be liable for the costs of an attachment, unless good cause be shown to the court or magistrate why he failed to obey the *subpoena*. [O. C. 979.]

## TITLE 16.—COMMISSIONS ON MONEY COLLECTED.

ART.	SEC.	ART.	SEC.
1112. Commissions allowed district and county attorneys.	2929	1113. Commissions allowed sheriff or other officer.	2930

§2929—ART. 1112.—**Commissions allowed district and county attorneys.**—The district or county attorney shall be entitled to ten per cent. on all fines, forfeitures or money collected for the state or county, upon judgments recovered by him, and the clerk of the court in which such judgments are rendered shall be entitled to five per cent. of the amount of said judgments, to be paid out of the amount when collected. [Acts 1879, Chap. 126, p. 133.]

§2930—ART. 1113.—**Commissions allowed sheriff or other officer.**—The sheriff, or other officer, who collects money for the state or county under any of the provisions of this Code, except jury fees, shall be entitled to retain five per cent. thereof when collected. [Act Aug. 23, 1876, p. 287, §7.]

A general remission of a forfeiture or fine, by the governor, includes the commissions of the district or county attorney. S. v. Dyches, 28 Tex. 635.



*Sec. 3.—Be it further enacted, etc., That all penal laws and all laws relating to criminal procedure in this state, that are not embraced in this act and that have not been enacted during the present session of this legislature, be, and the same are hereby, repealed.*

*NOTE.—The foregoing act was presented to the governor of Texas for his approval on the twenty-seventh day of February, 1879, at 10 o'clock A. M., and was neither signed by him nor returned to the house in which it originated with his objections thereto, within the time prescribed by the constitution, and thereupon became a law without his signature.*

*JOHN D. TEMPLETON,*

*March 17, 1879.*

*Secretary of State.*

*Took effect July 24, 1879.*

DEPARTMENT OF STATE,  
Austin, Texas.

I, JOHN D. TEMPLETON, Secretary of State of the State of Texas, do hereby certify that the foregoing volume is a true and correct copy of the original bills on file in this department. And I do further certify that the regular session of the sixteenth legislature of the State of Texas convened at Austin on the fourteenth day of January, A. D. 1879, and adjourned on the twenty-fourth day of April, A. D. 1879.

*In Testimony Whereof*, I do hereto sign my name and  
affix the seal of the state, at the city of Austin, on this  
the sixth day of September, A. D. 1879.



JOHN D. TEMPLETON,  
*Secretary of State.*

# APPENDIX No. 4.

## TABLE OF ACTS OF THE 16TH TO 20TH LEGISLATURES, 1879 TO 1887 INCLUSIVE.

Showing Where Each Unrepealed Chapter or Section is Placed in this Compilation.

Also, Initial Letters to Designate Chapters Omitted Because They are Appropriations, or Other Topics that are not Included in this Work.

### EXPLANATION.

The legislature is designated by its number and date of convening and adjourning.

The first and second columns indicate the chapter and page where each act is to be found in the session laws.

The third column indicates the subjects of the laws by the number of the title where they are placed in this work, or by the following abbreviations:

Am.—Amendment.

Ap.—Appropriation.

App.—Appendix placed at end of  
Vol. 2.

C. P.—Code of Criminal Procedure.

C.—Counties and County Boundaries.

J.—Jurisdiction of County Court Diminished or Increased.

J. D.—Judicial District.

L. D.—Land District.

O.—Obsolete.

P. C.—Penal Code.

P. D.—Public Debt.

P. L.—Public Lands.

Q.—Quarantine.

Rw.—Railway.

R.—Repealed.

S. L.—School Lands.

S.—Stockraising.

T.—Taxation.

When the full title of an act is necessary to indicate its purpose or construction, it is given at length at the end of the table and is referred to by the figures 1, 2, etc.

The article where a law now in force is found in this work, is indicated by the number in the fourth column.

The citation of an act in the text by the number of the legislature, and page of the session laws, will give a reference to the title in this table.

NOTE.—Sec. 35, Art. 111, of the Constitution, reads as follows: No bill (except general appropriation bills, which may embrace the various subjects and accounts for and on account of which moneys are appropriated), shall contain more than one subject, which shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed.

This table of titles of the several acts of the legislature embraced in this work has been arranged for the purpose of giving a ready reference thereto, whenever necessary to determine the constitutionality of an act or of any of its provisions, as well as to explain its meaning, which otherwise might not be apparent.

As to the rule of construction, see R. S. Art. 3124 and note, and the following cases: *Giddings v. San Antonio*, 47 T. 548; *Stone v. Brown*, 54 T. 330; *State v. McCracken*, 42 T. 383; *Breen v. T. & P. R. W. Co.*, 44 T. 302; *I. & G. N. R. R. Co. v. Smith County*, 54 T. 1; *State v. Shadle*, 41 T. 404; *Ex parte Mabry*, 5 Ct. App. 93; *Johnson v. State*, 9 Ct. App. 249; *Albrecht v. State*, 8 Ct. App. 216; *Cox v. State*, 8 Ct. App. 254.

TABLE OF ACTS OF 16TH LEGISLATURE, CONVENED JANUARY 14, 1879,  
ADJOURNED APRIL 24, 1879.

SESSION ACTS.		STATUTE.		SESSION ACTS.		STATUTE.		SESSION ACTS.		STATUTE.	
Ch.	Page.	Article.		Ch.	Page.	Article.		Ch.	Page.	Article.	
1	1	1	1092a.	57	63	R.	4876a.	109	117	Am.	4257.
2	2	J. D.	R. 17.	58	65	P.O.	[B]				
3	2	Ap.	O.	59	66	17	4809d.	110	118	T.	R. 4752,
4	3	J. D.	R. 17.	60	67	P.O.	396-398.				4753a.
5	4	J. D.	R. 17.	61	67	C.	768.	111	119	Am.	1333.
6	4	Ap.	O.	62	68	J.	1172c.	112	119	Am.	1694.
7	5	Ap.	O.	63	69	J. D.	R. 17.	113	120	31	3678a.
8	5	R.	1172b.	64	70	C.P.	794.	114	125	32	299a. 1638a.
9	6	O.	.....	65	71	C.P.	436.				16 L. S. S.
10	7	J. D.	R. 17.	66	71	R.	3226a.	115	125	R.	p. 30.
11	7	J. D.	R. 17.	67	76	18	3782.	116	126	33	2218.
				68	77	J.	1172d.	117	127	Am.	2802a.
12	8	2	3179a.	69	79	Am.	2405.	118	127	Am.	1173.
			1198, § 21a.	70	79	T.	4777e.	119	128	Am.	3122a. 3123b.
13	9	3	3968a.	71	81	19	4783a.	120	129	C.P.	680a.
14	11	Ap.	O.	72	82	20	3935a.	121	129	Am.	3955, 3963.
15	12	4	2374a.	73	83	Am.	2931.	122	130	Am.	See 4767.
16	12	J. D.	R. 17.	74	83	J. D.	R. 17.	123	130	34	3289.
17	15	J. D.	R. 17.					124	132	Am.	4759.
18	15	J. D.	R. 17.	75	84	R.	Repealing	125	132	Am.	3193.
19	16	5	4037c.				Ch. 8, R. S.				
20	17	Ap.	O.	76	84	21	696.	126	133	C.P.	1054-1056,
21	20	J. D.	R. 17.	77	86	Q.	4090.	127	134	35	1112.
22	21	J. D.	R. 17.	78	88	J. D.	R. 17.	128	135	O.	3190a.
23	21	J. D.	R. 17.					129	137	C.	3776 (1).
24	22	J. D.	R. 17.	79	89	22	1533a.	130	138	S.	686.
25	22	J. D.	R. 17.				3362 (1).	131	139	C.	4659.
26	23	O.	.....	80	89	J. D.	R. 17.	132	139	R.	3823a.
27	29	T.	4710a.					133	141	T.	3515.
28	29	P.C.	[A]	81	90	Am.	1401. 1420a.	134	143	R.	4728a.
29	30	O.	.....				1420b, 1420c.	135	150	36	4662.
30	33	J. D.	R. 17.	82	94	C.P.	560, 561.	136	150	R.	3703b.
31	33	6	1515a.	83	94	R.	241.	137	151	37	R. 17.
32	34	J. D.	R. 17.	84	95	O.	.....	138	151	J. D.	2823a.
33	34	7	1116a.	85	95	J. D.	R. 17.	139	152	38	R. 17.
34	34	R.	3624 (1).	86	96	J. D.	R. 17.	140	152	J. D.	2309a.
35	35	Am.	4292.	87	97	J. D.	R. 17.	141	153	T.	R. 17.
36	35	J. D.	R. 17.	88	98	J. D.	R. 17.	142	153	P.C.	4676a.
37	37	O.	.....	89	99	Am.	3649.	143	153	Ap.	482a. 482b.
38	38	Am.	1663a.	90	99	Am.	3227.	144	159	Am.	O.
39	39	8	4064.	91	100	R.	.....	145	160	39	2942a.
40	39	T.	R. 4671.	92	101	23	Vol. 2, p. 681	146	160	40	3948a.
41	40	P. L.	3989a.	93	102	J. D.	R. 17.	147	161	40	4732a.
42	41	Am.	3239c.	94	102	Am.	R. 130.	148	164	T.	4777a.
43	41	T.	4745a.	95	103	R.	4258b. (28).	149	164	R.	4761.
44	42	9	986f.	96	103	Am.	1235.	150	165	O.	.....
45	42	10	1128b.	97	104	R.	1289.	151	166	P.C.	97.
46	43	11	986e.	98	105	Am.	75-79.	152	168	O.	.....
47	44	12	1517a.	99	105	24	4235a.	153	169	Am.	R. 3272.
48	45	J. D.	R. 17.	100	106	J. D.	R. 17.	154	169	R.	4039 (1).
49	46	T.	4759a.	101	107	25	4609a.	155	175	Am.	3714.
50	46	T.	4746a.	102	107	Am.	R. 16.	156	175	Rw.	3970a.
51	46	13	3467a.	103	108	26	3367.			R.	3880a.
52	47	R.	3511.	104	108	J. D.	R. 17.	157	177	Am.	Final Title,
53	57	14	65a.	105	109	27	986h.				§ 10.
54	61	15	986g.	106	111	28	3968a § 17(1)	158	178	Ap.	O.
55	61	16	3962a.	107	115	29	3893a.	159	181	41	3702a.
56	62	Ap.	O.	108	116	30	4084.	160	182	42	3702c.

[A] See Willson's Cr. Stat. § 736, p. 146.

[B] See Willson's Cr. Stat. Art. 430a.

**ACTS OF SIXTEENTH TO TWENTIETH LEGISLATURES.**

**TABLE OF ACTS OF THE SPECIAL SESSION OF THE 16TH LEGISLATURE,  
CONVENED JUNE 10, 1879, AND ADJOURNED JULY 9, 1879.**

SESSION ACTS.		STATUTE.		SESSION ACTS.		STATUTE.		SESSION ACTS.		STATUTE.	
Ch.	Page.		Article.	Ch.	Page.		Article.	Ch.	Page.		Article.
1	1	Ap.	O.	20	17	O.	.....	39	36	10	3675. § 1.
2	1	Ap.	O.	21	18	J. D.	R. 17.				
3	2	Am.	3702 <i>d</i> .	22	19	Am.	4652.	40	36	Am.	4759. 4759 <i>a</i> , 4759 <i>b</i> , 4759 <i>c</i> .
4	3	J. D.	R. 17.	23	20	Am.	3888.				
5	3	Ap.	O.	24	20	7	3968 <i>b</i> .	41	37	O.	.....
6	4	Am.	3703.	25	21	J. D.	R. 17.	42	38	Am.	1333.
7	5	J. D.	R. 17.	26	21	J.	1172 <i>f</i> .	43	39	R.	4665.
8	5	1	4769 <i>a</i> .	27	23	Am.	3962.	44	40	C. P.	1075.
9	6	O.	.....	28	23	R.	Vol. 2, p. 681	45	40	O.	.....
10	7	J.	1172 <i>e</i> .	29	27	R.	R. 3515.	46	41	C. P.	1076.
11	8	J. D.	R. 17.	30	28	J. D.	R. 17.	47	42	C.	860.
12	9	2	1520 <i>a</i> , 4098 <i>a</i> .	31	29	T.	4758 <i>a</i> .	48	43	11	4098 <i>f</i> .
13	9	3	2316 <i>a</i> .	32	30	O.	4665.	49	44	O.	.....
14	10	4	2267 <i>a</i> .	33	30	O.	.....	50	46	T.	R. 4752.
15	11	5	3266, 3272.	34	30	R.	1085 <i>a</i> .	51	47	Am.	4278.
16	12	Am.	1136.	35	32	8	2744 <i>a</i> .	52	48	R.	3976 <i>a</i> (1).
17	12	T.	4777 <i>b</i> .	36	32	9	2943 <i>a</i> .	53	49	Am.	3785.
18	16	6	3681 <i>a</i> .	37	34	Q.	4090.				
19	17	C. P.	896.	38	35	R.	3530.				

**TABLE OF ACTS OF 17TH LEGISLATURE. CONVENED JANUARY 11, 1881,  
ADJOURNED APRIL 1, 1881.**

SESSION ACTS.		STATUTE.		SESSION ACTS.		STATUTE.		SESSION ACTS.		STATUTE.	
Ch.	Page.		Article.	Ch.	Page.		Article.	Ch.	Page.		Article.
1	1	O.	.....	38	28	P. C.	423, <i>et seq.</i>	75	79	15	3681 <i>b</i> .
2	1	O.	.....					76	82	Am.	4608.
3	2	C. P.	435.	39	31	Am.	1974, 1802 <i>a</i> , 1822 <i>a</i> .	77	83	Am.	539 <i>a</i> , 539 <i>b</i> .
4	2	T.	4759 <i>a</i> .					78	83	R.	19 Leg. p. 34
5	3	Am.	451.	40	31	C. P.	1081.	79	84	O.	.....
6	3	J.	1172 <i>g</i> .	41	32	O.	.....	80	92	O.	.....
7	4	O.	R. 1085 <i>a</i> (1)	42	33	J.	1172 <i>j</i> .	81	94	Am.	3681 <i>b</i> .
8	5	Am.	1289.	43	34	J. D.	R. 17.	82	94	16	3363, etc.
9	5	1	986 <i>a</i> .	44	34	P. C.	111-112.				
10	6	Am.	3812.	45	35	6	Vol. 2, p. 320	83	97	Am.	1665 <i>a</i> , 1665 <i>b</i> , 1689, 1702.
11	6	O.	.....	46	37	7	3802 <i>a</i> .				
12	7	2	3433 <i>a</i> .	47	37	C. P.	1054.	84	98	O.	.....
13	8	J. D.	R. 17.	48	38	C.	810, 822.	85	98	Am.	3112.
14	9	P. C.	40 <i>a</i> .	49	38	8	R. 3512, etc.	86	99	17	486 <i>a</i> .
15	10	Am.	1547.	50	50	9	3368.	87	99	Am.	2395.
16	10	J. D.	R. 17.	51	51	10	3678 <i>b</i> .	88	100	R.	3994.
17	11	J. D.	R. 17.	52	51	Am.	4752.	89	103	J. D.	R. 17.
18	12	J. D.	R. 17.	53	52	C. P.	1074 <i>a</i> , 1074 <i>b</i> .	90	103	P. C.	690.
19	13	J.	1172 <i>h</i> .	54	53	O.	R. 17.	91	104	18	3906 <i>a</i> .
20	14	3	1173 <i>c</i> .	55	53	R.	4662 (1).	92	105	19	3694 <i>b</i> .
21	15	Ap.	O.	56	59	11	3966 <i>a</i> (1).	93	105	S.	4559.
22	15	J. D.	R. 17.	57	60	C. P.	[A]	94	106	O.	.....
23	16	4	3361 <i>a</i> .	58	63	Am.	340 <i>a</i> , 506.	95	107	T.	4758 <i>b</i> .
24	17	P. C.	364.	59	63	Am.	425 <i>a</i> , 522 <i>a</i> .	96	108	P. C.	220.
25	17	P. C.	365.	60	64	J.	1172 <i>k</i> .	97	108	20	3515.
26	18	Am.	2234.	61	65	12	4037 <i>a</i> .	98	110	S.	4592 <i>a</i> .
27	18	J. D.	375.	62	67	Am.	695.	99	111	J. D.	R. 17.
28	19	R.	4876 <i>a</i> .	63	68	J. D.	R. 17.	100	111	O.	.....
29	19	R.	4876 <i>a</i> .	64	69	O.	.....	101	112	Am.	3226 <i>a</i> .
30	20	J. D.	R. 17.	65	71	O.	.....	102	114	Am.	541 <i>a</i> to 541 <i>f</i> .
31	21	5	3226 <i>a</i> , § 2.	66	71	13	3838 <i>a</i> .				
32	24	Am.	3824, 3825.	67	72	Am.	4333.	103	115	Am.	340. 344. 346, 352, 357.
			3976 <i>a</i> , § 1, § 6.	68	72	14	1126 <i>a</i> .				
33	24	P. L.		69	73	O.	.....	104	117	21	986 <i>i</i> .
				70	74	O.	.....	105	119	P. L.	Vol. 2, p. 687
34	25	O.	.....	71	74	J.	1172 <i>l</i> .	106	122	22	3880 <i>d</i> .
35	27	Am.	3971.	72	75	Am.	3684, <i>et seq.</i>	107	123	J. D.	R. 17.
36	27	Am.	241.	73	76	S. L.	4022 (1).				
37	28	J.	1172 <i>i</i> .	74	77	O.	J. D. 17.				

[A] The court decided this Act to be unconstitutional.

ACTS OF SIXTEENTH TO TWENTIETH LEGISLATURES.

TABLE OF ACTS OF THE SPECIAL SESSION OF THE 17TH LEGISLATURE, CONVENED APRIL 6, 1882, AND ADJOURNED MAY 5, 1882.

SESSION ACTS.		STATUTE.		SESSION ACTS.		STATUTE.		SESSION ACTS.		STATUTE.	
Ch.	Page.		Article.	Ch.	Page.		Article.	Ch.	Page.		Article.
1	1	O.	.....					21	28	O.	.....
2	1	O.	.....	12	7	Am.	1026-1032, 1077-1082.	22	30	O.	.....
3	2	O.	.....					23	30	O.	.....
4	3	Am.	4256.	13	9	4	11, 13.	24	31	O.	.....
5	3	T.	4759a.	14	15	O.	.....	25	34	O.	.....
				15	16	Am.	3602.	26	35	5	4258a.
6	3	1	3879 (1). 2989.	16	16	O.	.....	27	36	R.	Vol. 2, p. 688
								28	36	O.	.....
7	4	O.	.....	17	18	Am.	4662 (1). 4664, 4665.	29	37	O.	.....
8	4	2	1128a.					30	38	6	16.
9	4	O.	.....	18	23	O.	.....	31	39	O.	.....
10	5	J. D.	17.	19	25	O.	.....	32	40	O.	.....
11	5	3	3794a.	20	26	O.	.....				

TABLE OF ACTS OF 18TH LEGISLATURE, CONVENED JANUARY 9, 1883, AND ADJOURNED APRIL 13, 1883.

SESSION ACTS.		STATUTE.		SESSION ACTS.		STATUTE.		SESSION ACTS.		STATUTE.	
Ch.	Page.		Article.	Ch.	Page.		Article.	Ch.	Page.		Article.
1	1	O.	.....	43	33	Am.	3127a.	79	79	Am.	4659.
2	1	O.	.....	44	33	O.	.....	80	80	Am.	4420a.
3	2	1	3976b.	45	35	T.	4724.	81	80	P.C.	722.
4	2	Am.	245-7.	46	35	O.	.....	82	81	P.C.	403a, et seq.
5	3	O.	.....	47	36	6	478.	83	82	17	3967a.
6	3	2	Vol. 2, p. 689	48	36	R.	Vol. 1, p. 227	84	82	Am.	694.
7	4	3	4031a.	49	38	7	3964a.	85	83	C.P.	1056.
8	4	Am.	1285.	50	39	C.P.	1077.	86	83	Am.	4082.
9	5	Am.	4000.	51	39	Am.	1667, 1693.	87	84	J.	1172q.
10	5	P.C.	240.	52	40	L.D.	3833f.	88	85	R.	Vol. 2, p. 689
11	6	J.	1172m.	53	41	S.L.	3776 (1).	89	90	Am.	787.
12	7	T.	4757a.	54	42	8	4876a.	90	90	J. D.	R. 17.
13	7	O.	.....	55	45	9	4037b.	91	91	Am.	1639.
14	8	C.P.	800.	56	46	Am.	65a.	92	91	J.	1172r.
15	8	O.	.....	57	48	10	425d.	93	92	Q.	4090i.
16	8	Am.	1135.	58	49	Am.	4462.	94	93	O.	.....
17	9	C.P.	669-670.	59	49	Am.	2403.	95	98	Am.	575.
18	9	4	66a.	60	50	Am.	1134, 1134a.	96	99	Am.	503a, 503b.
19	10	O.	.....					97	100	P.L.	3800a.
20	11	C.P.	1083.					98	101	Am.	4742.
21	11	O.	.....	61	50	Am.	1699, 1700, 1705, 1707, 1708, 1709.	99	101	T.	4767.
22	12	C.P.	1000.					100	102	P.C.	669.
23	12	P.C.	314, 315.					101	103	Am.	1190.
24	13	Am.	4876.								
25	13	Am.	3880e.	62	52	L.D.	3833a, 3833b, 3833c, 3833d.	102	103	Am.	66-68, 70-74, 79 and 97.
26	14	J.	1172n.								
27	15	P.L.	3703, § 8 (1)	63	53	R.	1006, 1007.	103	105	C.	883a.
28	16	Am.	2430a.	64	54	Am.	3278.	104	106	R.	4065.
29	17	P.C.	180.	65	54	11	2302 (1).				
30	17	Am.	4090.	66	56	J.	1172p.	105	109	Am.	122, 129, 137, 138, 130, 132.
31	22	C.P.	1061a-1061g.	67	56	J. D.	R. 17.				
32	22	Am.	4411.	68	66	P.C.	795.	106	110	Am.	3239b.
33	23	J. D.	R. 17.	69	66	P.C.	186.	107	110	Am.	2266.
34	24	P.C.	789a.	70	67	12	4258b.	108	111	T.	4684.
35	24	J.	1172o.	71	71	P.C.	784.	109	112	18	380a.
36	25	O.	1085a (1).	72	71	13	4023a.	110	113	Am.	1639a, 1639b.
37	27	Am.	838.	73	72	14	2374a.	111	113	P.L.	3966a.
38	27	P.C.	198a.	74	73	15	4848a.	112	114	J. D.	R. 17.
39	28	Am.	4232.	75	73	Q.	4098h.	113	115	P.C.	430.
40	28	5	4033b.	76	75	C.P.	1059.	114	116	R.	3517.
41	29	J. D.	R. 17.	77	76	16	4556a.	115	117	P.C.	.
42	32	Am.	951.	78	79	P.C.	426.	116	118	Ap.	.....

**ACTS OF SIXTEENTH TO TWENTIETH LEGISLATURES.**

**TABLE OF ACTS OF THE SPECIAL SESSION OF THE 18TH LEGISLATURE, CONVENED JANUARY 8, 1884, AND ADJOURNED FEBRUARY 6, 1884.**

SESSION ACTS.		STATUTE.		SESSION ACTS.		STATUTE.		SESSION ACTS.		STATUTE.	
Ch.	Page.		Article.	Ch.	Page.		Article.	Ch.	Page.		Article.
1	9	Ap.	.....	15	26	J.D.	R. 17.				
2	10	Ap.	.....	16	27	Am.	3027, 3029.	28	60	Am.	3672, 3675, 3675a-e.
3	11	J.D.	17.	17	28	Am.	986a. 986c.				
4	11	Ap.	.....	18	29	R.	986b.	29	63	4	4360a.
5	12	1	241.					30	65	5	3952a.
6	13	J.D.	R. 17.	19	31	Am.	4777e, §§ 3, 11, 12.	31	66	P.C.	675a. 675b.
7	13	J.D.	R. 17.								
8	15	J.D.	R. 17.	20	32	J.D.	17.	32	67	Am.	4662, 4666, 4468.
9	17	J.D.	R. 17.	21	34	P.C.	684a.				
10	18	P.C.	413.	22	35	T.	4777c.	33	68	S.L.	4390aa.
11	19	Am.	4360.	23	36	2	1173a.	34	71	S.L.	4077.
12	20	Ap.	.....	24	37	3	2435a.	35	72	S.L.	3703b.
13	20	Am.	4360, 4390.	25	38	Am.	3703, etc.				
		Am.	804.	26	57	S.L.	Vol. 2, p. 694				
14	25	P.C.		27	58	O.	.....				

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TO

## CODE OF CRIMINAL PROCEDURE,

WITH SHORT REFERENCES TO THE PENAL CODE.

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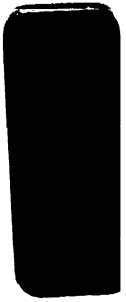
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